



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL REVISION NO. 7 OF 2019

DANIEL KYALO LUA

ESTHER NDUNGE

RUTH NTHENYA.....APPLICANTS

VERSUS

REPUBLIC.....RESPONDENT

RULING ON REVISION

1. The three Applicants herein had earlier approached this court seeking for revision orders. Their request had been presented through their Learned Counsel Mr. Masika. The letter is dated 22/3/2019. The gist of the Applicants request is that this court do revise the orders issued by the trial court on the 7/3/2019 denying the Applicants bond pending the trial.

2. This court considered the submissions of Learned Counsels for the Applicants and the Respondents and delivered a Ruling dated **24/04/2019** in which this court's decision was stayed pending the presentation of pre-bail reports on the Applicants by the County Probation and Aftercare Services Officer.

3. The County Probation Officer Machakos has duly filed the reports in respect of the Applicants. The reports are dated 16/5/2019. The said reports are quite comprehensive and give the genesis of the dispute between the Applicants and their niece one **Lilian Mwelu Nduku** who resides in the United State of America. The dispute relates to a family land within Konza Village. The reports further reveal that the Applicants erstwhile niece has been out to evict them from the said land and that the persons who had been hired to carry out the eviction are now the complainants in the criminal case that has been preferred against the Applicants. Overall the report is quite favourable in that the community members have confirmed that the Applicants are not a threat to the complainants since the complainants hail from elsewhere and are unknown and that there is no possibility of any contact with the applicants once released on bond. The area Assistant Chief one Jonathan Musyoka Kamia has vouched for the Applicants good conduct in the area and had even offered himself as a surety to the applicants. Finally the reports reveal that the Applicants niece who is out to evict them from the family land is the one responsible for the skirmishes as she had been hiring some goons to harass the Applicants and that the community members have had to repulse the said intruders but however the Applicants niece ends up blaming the Applicants for breaches of the peace. The community appears to have taken a stand and have come out in defence of the Applicants and hence the favourable report filed in their favour by the Probation Officer.

4. Learned Counsel for the Applicants has urged this court to consider the pre-bail reports and proceed to grant the Applicants bond with an alternative of cash bail. On the other hand Counsel for the Respondents noted that even though the reports are favourable this court should consider granting bond without alternative cash bail.

5. The investigating officer in the matter before the trial court No. 67156 PC David Kiprono had earlier filed a replying affidavit in which he had opposed the release of the Applicants on bond on the grounds that the Applicants are up to no good as they have sworn to kill anyone who dares to work on their premises and therefore there is a likelihood of interference with the witnesses and even commission of other offences.

6. Under Article 49(1) (h) of the Constitution an arrested person has the right to be released on bond or bail on reasonable conditions pending a charge or trial unless there are compelling reasons not to be released. The duty to furnish these compelling reasons is upon the prosecution. The investigating officer has already given his reasons for opposing the release of the applicants on bond. It is believed that the trial court must have relied on the said reasons when it denied the Applicants bond. It is instructive that had the trial court called for a pre-bail report as herein then it could have reached a different conclusion regarding the issue of release of the Applicants on bond.

7. It is not in doubt that the primary consideration for bail by any court is the question whether or not the accused will attend court for the

trial of his or her case. This is indeed the cardinal factor since if there are circumstances to suggest that the accused person might not turn up for his trial then there would be no point in entertaining an application for bond in the first place. The Complainant as well as witnesses for the Republic are entitled to proceed with a case and therefore any suggestion that an accused might not turn up for the same will greatly hamper the cause of justice. The pre-bail reports filed herein all confirm that there is no likelihood of the Applicants absconding court. In fact the reports confirm that despite the Applicants facing an assault case, they have been dutifully attending court without fail. The area assistant chief who had stood surety for them has vouched for the Applicants. The fact that an administrator in the position of assistant chief could go ahead to stand as surety for the Applicants despite not being a relative leaves no doubt that the Applicants are not likely to abscond if granted bail.

8. The above observations lead me to conclude that there are no compelling reasons which would warrant the applicants being denied bail pending the trial. The pre-bail reports have clearly indicated that the situation on the ground is not at all hostile to the applicants as had been pointed out to the trial court.

9. The Applicants at present are still innocent until proved guilty and as such their constitutional liberty to freedom pending the final determination of the criminal case is sacrosanct. It has transpired from the pre-bail reports that the applicants might have been pushed into the criminal arena due to the unending dispute over the family land with their niece who is based in the United States of America who is using proxies to acquire the land. These proxies unwittingly have turned out to be victims as a result of the community's disapproval at the conduct of the applicants niece. It has transpired that members of the community have in the past repulsed these proxies thereby leading to breaches of the peace. It might be advisable for the applicants and their erstwhile niece to consider instituting their claims over the land before the civil courts so as to avoid more criminal skirmishes.

10. Learned Counsel for the Applicants in their letter dated 22/3/2019 had sought for bond pending trial in addition to an order that this court do refer the case to be tried by a different magistrate as well as seeking for stay of proceedings of the lower court. Other than the quest for bond pending trial, I find the applicants have not furnished sufficient and convincing reasons to warrant this court staying the proceedings and referring the case to be tried by another judicial officer. Indeed I have not been shown any hint of bias by the trial court. I find that the trial court arrived at the decision to deny the Applicants bond based on the reasons given by the investigating officer which by then consisted of compelling reasons. However the circumstances have since changed warranting the need to revise the trial court's orders regarding the issue of bail.

11. In the result it is my finding that the Applicants request for revision of the trial courts order dated 7/3/2019 has merit and must be allowed. The following orders are made:-

a. Each of the Applicant herein is ordered released on bond of Kenya shillings One Hundred thousand (kshs.100,000/=) plus one surety of like sum or an alternative cash bail of thirty thousand shillings (Kshs.30,000/=).

b. Upon release the applicants are ordered not to leave the jurisdiction of the court without permission and to attend court during the hearing and mention dates without fail until the final determination of the case or until further orders.

c. The applicants shall not threaten, harm or interfere with the prosecution witnesses.

d. In default to observe any of the above conditions then the bonds shall stand cancelled and they together with their sureties shall be called to account.

e. The sureties to be approved by the trial court.

f. The applicants to appear before the trial court on the 20/05/2019 for further directions.

It is so ordered.

Dated and Delivered at Machakos this 17th day of May, 2019.

D.K.KEMEI

JUDGE