



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL REVISION NO. 379 OF 2018

REPUBLICAPPLICANT

VERSUS

POLLY KETTY WANJA NYAGA.....RESPONDENT

RULING

1. Through a certificate of urgency filed on 1st October, 2018, the Director of Public Prosecutions through Ms Millicent M. Kigira, Prosecution Counsel, sought orders on revision in Kwale Chief Magistrate's Court Traffic Case No. 389 of 2018. Her application is premised on the provisions of Article 165(6) of the Constitution of Kenya, 2010 and Section 362 of the Criminal Procedure Code.

2. The Ms Marindah, Prosecution Counsel, argued the application on behalf of the Ms Kigira. In her submissions she stated that they sought for review of the orders given on 19th September, 2018 by Hon. Wambugu, Senior Resident Magistrate (now Principal Magistrate). She stated that although the applicant has a right to be granted bond under the provisions of Article 49 of the Constitution of Kenya and Sections 123 and 124A, 125 and 127 of the Criminal Procedure Code, the Hon. Magistrate allowed the approval of the bond in the absence of the surety.

3. The Prosecution Counsel further stated that the Hon. Magistrate further directed approval of the bond without the investigation and verification of the bond instrument. It was contended that the Hon. Magistrate purported to constitute a Trial Court in the absence of the Prosecution Counsel, which was not procedural.

4. It was submitted that the Trial Court failed to consider the Bond/Bail Policy of the Judiciary which provides for interrogation of persons seeking to stand surety, which enables the court to exercise its discretion judiciously. This court was informed that the respondent faces a charge of dangerous driving which carries a maximum sentence of life imprisonment. It was stated that the court treated the processing of the respondent's bond/ bail in a casual manner. Reference was made to a letter dated 17th September, 2018 filed at Chief Magistrate's Court Registry at Kwale, by the surety, stating that he would not be available for approval of the bond. Ms Marindah expressed surprise at the manner in which the court was in a rush to release the respondent instead of asking her to look for another surety.

5. The Prosecution Counsel therefore prayed for the proceedings of the lower court to be set aside and for the respondent to be arrested and taken for trial before another court of competent jurisdiction in Kwale.

6. Mr. Okwaro, Learned Counsel for the respondent submitted that the offence of causing death by dangerous driving attracts a sentence of 10 years imprisonment. He stated that verification of a surety is the work of the court and it was not necessary for the Prosecution Counsel to be present when the surety was being interviewed by the Hon. Magistrate. The respondent's Counsel relied on the provisions of Article 159(2)(d) of the Constitution of Kenya which states that justice shall be administered without undue regard to technicalities. He further stated that no bias had been shown to necessitate the transfer of the lower court case to another Magistrate. Mr. Okwaro stated that the surety is ready and available to be interviewed, if need be.

7. In response to the above, Ms Marindah agreed that the offence of causing death by dangerous driving carries a maximum sentence of 10 years. She asserted that the prosecution is a necessary party in bail proceedings as the Prosecution Counsel has to verify if the documents being relied on are authentic.

ANALYSIS AND DETERMINATION

The issue for determination is if it was unprocedural for a surety and the bond instruments to be approved in his absence and that of the Prosecution Counsel.

8. Article 49(1)(h) of the Constitution of Kenya provides that an accused 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. Section 123 of the Criminal Procedure Code (CPC) provides for the right of accused persons to be released on bond/bail pending trial.

9. With regard to the requirements for the release of an accused person on bail/bond, Section 124 of the Criminal Procedure Code provides as follows:-

“Before a person is released on bail or on his own recognizance, a bond for such sum as the court or police officer thinks sufficient shall be executed by that person, and, when he is released on bail, by one or more sufficient sureties, conditioned that the person shall attend at the time and place mentioned in the bond and shall continue so to attend until otherwise directed by the court or police officer.”

10. The Criminal Procedure Code does not outline the manner in which a surety should be examined. **The Judiciary of Kenya Bail and Bond Policy Guidelines of March, 2015** in paragraph 4.40 lay out the factors that a court should take into account when considering the suitability of a proposed surety. These factors are:-

- (a) Financial resources;
- (b) Character and any previous convictions;
- (c) Relationship to the accused person; and
- (d) Any other relevant factor.

11. The said paragraph further states that the proposed surety should attest to these factors and the Prosecutor should participate in this process of approving sureties.

12. Paragraph 4.41 of the said policy guidelines state as follows:-

“Courts should ensure that sureties understand their obligations and the risks they assume when they undertake to serve as sureties. Once the court accepts a person as a surety, it should explain his or her obligations, and require him or her to sign a notice of undertaking of bail, setting out the accused person’s bail conditions and the consequences for the surety if the accused person breaches those conditions.”

13. The lower court record reveals that the above stated procedure for approval of the surety for the respondent was not followed. On 6th September, 2018 the respondent pleaded not guilty to the offence of causing death by dangerous driving contrary to Section 46 of the Traffic Act, Cap 403 Laws of Kenya. The Hon. Magistrate released her on a bond of Kshs. 200,000/= with 1 surety or to cash bail of Kshs. 100,000/=. On 20th September, 2018, when the matter came up for mention, the Prosecution Counsel took issue with the manner in which the court had dealt with approval of the bond instrument. She applied for the Hon. Magistrate to recuse himself. He directed the Prosecution Counsel to file a formal application. She thereafter filed the application for revision before this court.

14. The lower court record speaks for itself. On 17th September, 2018 a letter was filed in the lower court file. It was written by one Weston Gunyali Katsende. He sought exemption from attending court on 18th September, 2018 and for his approval as a surety for the respondent herein, in the case before the lower court. He further indicated that he would report back to work on 18th September, 2018 and that one Christine Nyaga would attend court on his behalf.

15. The Hon. Magistrate made some writings on the said letter which were to the effect that he had seen the surety and the letter and that he had considered the same. He allowed the request made by the proposed suety in the interest of justice. The lower court file contains a copy of the identity card of the purported surety by the name Westone Gunyali Katsende, a release order for the respondent, Form Criminal 95 for bond and bail, the purported surety’s Mwalimu National Sacco statement of accounts, a letter from Technical University of Mombasa (TUM) confirming that he is one of its lecturers, 3 copies of his pay slips. The lower court file also contains a form that the purported surety allegedly signed, where his particulars are captured.

16. From face value, looking at the documentation in the court file, one would conclude that the entire procedure of processing the surety documents was properly done. The lower court proceedings however do not show that he ever attended court for examination under oath, to ascertain his suitability to stand surety for the respondent. The surety form he allegedly signed to commit himself as a surety does not even show the amount of security that he committed himself to. The signature on the said form cannot be said with certainty to be the purported surety’s as the lower court record does not reflect that he attended court for examination.

17. I do concur with Ms Marindah, that any examination of a surety in court cannot be done in the absence of a Prosecution Counsel, otherwise such a process would be lacking in transparency. A Prosecution Counsel is a necessary party and is obligated to be present during the examination of sureties with a view of verifying, through its investigative agencies, authenticity of the documents submitted to the court. The process of approval of a surety is a judicial process which should form part of the court proceedings and the presence of a Prosecution Counsel is mandatory.

18. Judge R. Nyakundi well elucidated the said position in **Republic vs James Kiarie Mutungi** [2017] eKLR in the following words:-

“A Magistrate when exercising power donated by the Constitution and statute in performance of his/her judicial function must

adhere to the procedure and practice to give legality to the session. A court properly constituted in a criminal trial must be viewed as a tripartite entity comprising the Judicial Officer, the accused/defendant and the Prosecution Counsel or Private Prosecution Counsel, the defence Counsel where appropriate and the Court Assistant to deal with logistics and interpretation.

19. The said court went on to state thus:-

“In the event that an accused person absconds from the jurisdiction of the court it is the same prosecutor who must apply for warrant of arrest, process execution through the police to apprehend both the accused and the surety for defaulting in their obligations in that event the prosecutor must be supplied with particulars of the accused and the surety. The need therefore to participate in verification of the materials which precede the approval is obligatory and not discretionary on the part of the trial court. The finding recorded by the lower court on bond approval was arrived at without material and evidence. The trial Magistrate ignored the participation of the prosecutor which I consider as grossly erroneous and if allowed to stand it is open to abuse and a miscarriage of justice.”

20. In addition to the above case, Judge Emukule in the case of **Republic vs Baktash Akasha Abdalla and 3 Others** [2015] eKLR held thus with regard to approval of a surety:-

“Being such a judicial function, it is mandatory that it be exercised in the presence of both the prosecution and defence Counsel.”

21. Having earlier in this ruling outlined the procedure followed by Trial Court in approval of the surety in the lower court case, the subject of this revision, I am left with no doubt that the process was so grossly flawed that it was null and void *abintio*. It is therefore of no effect at all. As it is, it cannot be said with certainty that the documents in the court file regarding the purported surety are genuine. The said surety remains faceless as he never appeared in court to be examined by the Trial Court and to be cross-examined by the Prosecution Counsel. The authenticity of the documents that were tendered before the said court through a non-documented court process were never verified by either the court or the Prosecution Counsel.

22. The third party who was sent to court by the purported surety had no locus standi to so attend in place of the purported surety, as she could neither be examined by the court nor cross-examined by the Prosecution Counsel.

23. I therefore make the following orders:-

(i) That due to the flawed process followed by the Trial Court in approving the surety in Kwale Chief Magistrate’s Court Traffic Case No. 389 of 2018; I hereby revoke the order for release of the respondent on bail/bond pending trial on the terms approved by Hon. Ndegwa, Principal Magistrate;

(ii) Taking cognizance that no blame has been cast on the respondent in the said process, it would be unjust to order that she be detained in prison custody pending the delivery of the lower court file from this court to Kwale Chief Magistrate’s Court, which might take a few days;

(iii) This court notes that the respondent has dutifully attended all court sessions before this court. I am therefore inclined under the inherent jurisdiction of this court and under the provisions of Article 49(1)(h) of the Constitution of Kenya, to release her on cash bail of Kshs. 50,000/= and a surety of a similar amount, for a limited duration of 14 days pending the processing of her bond terms before the Kwale Chief Magistrate’s Court. For the avoidance of doubt, the order of this court for the release of the respondent on cash bail shall automatically elapse within 14 days from today;

(iv) If the respondent fails to execute a cash bail on the terms set by this court, she shall be remanded at Shimo-la-Tewa Women’s Prison pending her transfer to Kwale Prison;

(v) If she deposits a cash bail in this court, the same shall be reimbursed to her once she has had her bond processed by the Kwale Chief Magistrate’s Court;

(vi) The respondent shall be produced before the Chief Magistrate’s Court Kwale on 13th June, 2019 for allocation of the case file to another Magistrate, save for Hon. Ndegwa, PM, to undertake proceedings for approval of a surety; and

(vii) A copy of this ruling shall be supplied to Hon. Ndegwa, PM.

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 7th day of June, 2019.

NJOKI MWANGI

JUDGE

In the presence of

Ms Ogweno, Prosecution Counsel for the DPP - applicant

Respondent present in person

Mr. Oliver Musundi – Court Assistant