



REPUBLIC OF KENYA

HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL REVISION NO. 9 OF 2018

RAJAB SAID.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Revision from the orders of Hon. Ogweno, Resident Magistrate dated 8th

March, 2018 in Mombasa Chief Magistrate's Court Sexual Offence No. 9 of 2018).

RULING

1. The applicant being the accused person in Mombasa Chief Magistrate's Court Sexual Offence Case No. 9 of 2018 filed an application for revision before the High Court on 9th March, 2018 urging this court to invoke the provisions of Section 362 of the Criminal Procedure Code and Article 165 of the Constitution of Kenya on the inherent powers and supervisory jurisdiction of the High Court. The orders for revision are being sought on the following grounds:-

(a) That the Honourable Subordinate court deeply erred in law by failing to approve the bond/bail granted and refusing to release the accused person in light of the provisions of Article 49 of the Constitution of the Republic of Kenya for the following reasons:-

(i) The Bail/Bond granted by the subordinate court is yet to be challenged and/or opposed by the prosecution which ostensibly implies that the continued stay in custody of the applicant in this forum is illegal and unconstitutional and is

outrightly in contravention of the rights of persons in custody who have been duly charged with criminal offences;

i) The subordinate Court in its actions to continually keep the applicant before this forum in custody is akin to being the judge, executioner and prosecutor all lumped into one which severely impacts on impartiality of the court in matters in the nature of criminal cases;

ii) There are no cogent reasons advanced by the Honourable Court for continued stay in custody by the accused person in subordinate Court Criminal Case Number 9 of 2018 (sic) which would oust the jurisdiction of the unfettered rights as guaranteed by the Constitution of the Republic of Kenya; and

iii) The applicant stands to suffer immense prejudice as will be demonstrated by his counsel at the prosecution of this revision which includes but not limited to loss of employment.

(b) That the Honourable Subordinate Court has deeply erred in law in calling for additional evidence outside the realm of the investigations already carried out in the process of charging the applicant (accused person in the subordinate court) from the Children's Home which:-

(i) Has not recorded any statements with the Police of its involvement in the case before Court;

(ii) It is uncertain whether the said Children's Home is registered with Children's Department and its Counselors are yet to record statements with the police;

(iii) The divulgence of any report of the information given in confidence with the purported Counselors at the Children's Home is contrary to patient-counselor confidentiality and also seeking to assist the prosecution advance its case against the

applicant outside the realm and provisions of the Evidence Act, Cap 80, Laws of Kenya and Sexual Offences Act.

(c) That the Honourable subordinate court has deeply erred in piecemeal proceedings in such grave allegations against the applicant and failing to afford due process to him and proceeding to issue orders not applied for by the Prosecution hence denying the applicant due process, legitimate expectation and protection of the law as envisaged by the law.

Submissions

3. The applicant filed his written submissions on 6th March, 2019. The respondent sought to respond orally to the application herein. The applicant's Counsel submitted that the Jurisdiction of this court is conferred by dint of Section 362 of the Criminal Procedure Code which empowers the High Court to call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate court.

4. The applicant further submitted that the court was notified of the anomalies by the respondent and in particular the trampling of the applicants rights by virtue of Article 50(2) of the Constitution of Kenya. He was thus aggrieved by the actions of the respondent in that:-

(i) The Prosecution allowed documents that were knowingly not part of the investigations to be used against the applicant in the trial before the subordinate court;

(ii) The documents obtained were not subjected to interrogation and neither were the authors present in court to substantiate the claims tendered;

(iii) The court allowed additional evidence thus shifting the burden of proof to the applicant to prove his innocence prior to the trial; and

(iv) The respondent failed to supply documents to the defence to give it an opportunity to prepare appropriately.

5. The applicant also submitted that the subordinate court had already precluded an inference of guilt without proof which severely damaged the applicant's character and mode of defence hence he was not treated fairly. He thus sought for the entire proceedings in the lower court to be quashed.

6. The respondent's Counsel, Miss Ogweni, Principal Prosecution Counsel, submitted that the applicant's rights were not violated and that under Article 49(1)(h) of the Constitution, Judicial officers and Judges are given guidelines on the release of an accused person on bail/bond pending trial. That the report from the Children's Officer was not admitted by the court so as to touch on the guilt of the applicant as the same was not to be relied upon by the Prosecution as evidence. Further, that the application herein is a delaying tactic to ensure that the minor does not testify.

7. Counsel further submitted that it is the Director of Public Prosecutions who instructs the Police to investigate cases and prayed for the application to be dismissed.

ANALYSIS AND DETERMINATION

8. The first issue for determination is whether this court has the jurisdiction to entertain this matter. The powers of the High Court in superintending over the subordinate courts and quasi-judicial tribunals has been considered widely by the courts. Article 165(6) of the Constitution of Kenya provides that the High Court shall have supervisory jurisdiction over subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function.

9. In the case of **John Kipngeno Koech & 2 Others vs Nakuru County Assembly & Others** [2013] eKLR the Court held as follows:-

“Jurisdiction is the practical authority granted to a formally constituted body to deal with and make pronouncements on legal matters and by implication to administer justice within a defined area of responsibility. It is a scope, validity, legitimacy or authority to preside or adjudicate upon a matter.”

10. It is therefore clear from these principles that the High Court has jurisdiction to determine the application occasioned by an impugned order. The provisions of Section 362 as read with Section 364 of the Criminal Procedure Code (CPC) actualize the provisions of Article 165(6) and (7) of the Constitution of Kenya.

11. The High Court can be moved to exercise its powers on revision, by an aggrieved party or by the lower court or by the High Court itself, *suo moto*. The High Court then calls for record relating to the order passed or proceedings in order to satisfy itself as to the legality, propriety or correctness of the order in question. The scope of revision therefore is more restrictive in comparison with the appellate jurisdiction which requires the High Court to re-hear the case by re-evaluating and analyzing the evidence adduced before the lower court in totality, in order to arrive at a decision based on merits.

12. The second issue for this court to determine is whether the denial of bond terms and or confinement in custody awaiting the Children Officer's Report was a violation of the applicant's rights. On the merit of this application, I am minded that the release of an accused person on bail/bond is a constitutional right granted to arrested or accused persons pending being formally charged in court or awaiting trial. Article 49(1)(h) of the Constitution provides that:-

"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."

13. As the applicant is entitled to this right, the only qualifying factor is whether compelling reasons have been demonstrated to justify denial of bail/bond. The question in this instance is simply whether the condition imposed by the Trial Court to keep the applicant in custody for 15 days pending receipt of the report by the Children's Officer was reasonable in the circumstances. Section 123(2) of the Criminal Procedure Code requires that in determining bail terms, the circumstances of the case should be given due regard and the terms ought not to be excessive.

14. In determining what is reasonable, the court is guided by the circumstances surrounding the case. The court's paramount consideration is whether the accused will attend court when so required. The grant of bail/bond should therefore be aligned to this purpose, bearing in mind that a person accused of an offence enjoys the presumption of innocence guaranteed under Article 50(2)(a) of the Constitution. In setting out the bail/bond terms, courts are enjoined to ensure that they remain true to the purpose of securing attendance to court by accused persons and not to curtail their liberty which they are entitled to.

15. In reaching a determination on this main issue, the court is guided by several factors. Section 123A (1) of the Criminal Procedure Code gives some guidance on factors to be considered in this respect as follows:

"(a) the nature or seriousness of the offence;

(b) the character, antecedents, associations and community ties of the accused person;

(c) the defendant's record in respect of the fulfillment of obligations under previous grants of bail; and;

(d) the strength of the evidence of his having committed the offence."

16. In addition, courts have been guided by other factors to take into consideration when dealing with an application for bail/bond pending trial, which include, public interest, victim protection, gravity of the offence, gravity of the punishment in the event of a conviction, the security of the accused person upon his release, that is to say, the detention of the accused for his protection, personal reasons such as health of an accused and interference with witnesses.

17. The Bail and Bond Policy Guidelines were developed to give guidance to courts and the Police in making decisions on bail/bond in line with the constitutional provisions. The Guidelines recognize the need for a balanced approach in preserving the public interest and the right of an accused person to fair trial. On guiding courts in determining reasonable bail terms, the said guidelines provide as follows:-

"..bail or bond amounts should not be excessive, that is, they should not be far greater than is necessary to guarantee that the accused person will appear for his or her trial...amounts should not be so low that the accused person would be enticed into forfeiting the bail or bond amount and fleeing. Secondly, bail or bond conditions should be appropriate to the offence committed and take into account the personal circumstances of the accused person. In the circumstances, what is reasonable will be determined by reference to the facts and circumstances prevailing in each case."

18. In this instant application, the Trial Court directed the applicant to be detained for 15 days awaiting the Children Officer's Report, I do note the relationship between the minor (complainant) and the applicant to be that of a niece and an uncle and the court saw it best to have the minor testify before the applicant was released on bond. I agree with the directions of the subordinate court as the reason advanced would fall under the purview of Section 123A(1)(b) of the Criminal Procedure Code.

19. The third issue for determination is on the admissibility of the Children Officer's Report as directed by the court on 8th March, 2018. On this, I do not find any violation in obtaining the report as the victim of the alleged sexual offence was in need of care and protection of the court which was duty bound to make a follow up on the wellbeing of the victim of the alleged offence. The Trial Court under the provisions of Section 150 of the Criminal Procedure Code has the powers to call any witness whom the Court thinks that his/her evidence is essential to the just determination of the case. Bearing the foregoing in mind, prejudice against the applicant herein cannot be pleaded at this stage.

20. In the circumstances, I am not persuaded that the refusal to release the applicant herein on bond/bail pending the receipt of the Children Officer's report was unreasonable or unlawful. The said confinement of the applicant therefore cannot be said to be a violation of his rights.

21. The final orders are that:-

(i) I find no merit in the application for revision dated 9th March, 2018 and the same is hereby dismissed;

(ii) The Deputy Registrar shall remit the lower court file back to the Trial Court for hearing of the Sexual Offence case against the applicant;

(iii) The lower court case will be mentioned on 25th June, 2019 before Hon. Ogweni, Resident Magistrate.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 14TH DAY JUNE, 2019.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Egunza for the applicant

Ms Ogweno for Principal Prosecution Counsel, for the respondent

Mr. Oliver Musundi - Court Assistant