REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL REVISION NO. 37 OF 2019

REPUBLIC.....APPLICANT

VERSUS

ABUBAKAR MOHAMED SWALEH.....RESPONDENT

RULING

1. By an Application for Revision brought by way of a letter dated 23.8.19 under Article 165(6) & (7) of the Constitution 2010 and Sections 362 of the Criminal Procedure Code, the Director of Public Prosecutions (the Applicant) seeks the revision of the Ruling by the Malindi Chief Magistrate's Court, in Cr. Case No. 820 of 2019 delivered on 23.8.19. In that case, Abubakar Mohamed Swaleh, (the Respondent) is facing charged with the following 3 offences under the Penal Code:

Count I: Conspiracy to commit a felony contrary to Section 393.

Count II: Store breaking and committing a felony contrary to Section 306.

Count III: Arson contrary to Section 332(a).

2. In the Ruling, the Court granted to the Respondent bond of Ksh. 1 million with 1 surety. The Respondent was also directed to deposit his passport in Court within 7 days. The Applicant claims that in granting the Respondent bond, the trial Court disregarded the compelling reasons placed before it in the Affidavit of the investigating officer, Cpl David Odero sworn on 20.8.19. The Applicant now seeks revision of the said decision of the trial Court. The trial Court also disregarded the Bail/Bond Policy guidelines.

3. Mr. Muthomi for the Applicant submitted that the grant of bond terms was irregular and unjustified on 2 grounds.

4. The first ground is that the Respondent is a flight risk. He and 4 others had been charged in Lamu Criminal Case No. 308 of 2015 with the 3 offences. The Respondent however reportedly fled to Tanzania and his co-accused were tried, convicted and jailed. This forced the Applicant to withdraw the charges against the Respondent and charge him afresh in Criminal Case No. 272 of 2017. The Respondent resurfaced and filed Mombasa Constitutional Petition No. 8 of 2019 but the Court directed him to present himself at the Malindi Court to take plea. According to the Applicant, the Respondent having disappeared for 5 years is a flight risk and not entitled to bond. The Applicant thus faults the trial Court for granting bond to the Respondent in total disregard of the foregoing compelling reasons.

5. On the Respondent being a flight risk, it was submitted by Mr. Abubakar for the Respondent that when he learned of the charges, he did not flee but filed petition before the High Court. When the Court directed him to take plea in Malindi he did just that, in spite of saying that the charges were illegal.

6. The second ground is that the Respondent is likely to interfere with prosecution witnesses in particular one Dennis Ndegwa (Ndegwa), an accomplice who had recorded a confession implicating the Respondent. It is said that Ndegwa has been threatened against testifying against the Respondent by both the Respondent and his emissaries including one Caroline Wangui. On this allegation, the Respondent submitted that the Respondent has no knowledge of Dennis and has not been to Lamu this year. Further, all evidence was given in Criminal Case 233 of 2014 and there is therefore no further evidence to be adduced.

7. The Court was asked to exercise its powers under Section 364 and reverse the order granting bond to the Respondent. In the event the Court was inclined to grant bond then the Applicant urged that this be done after Ndegwa has testified. The Court was also urged to consider that the damage caused was of Kshs. 8 million. The Respondent opposed this line of submissions and argued that even persons who are accused of heinous offences such as murder and defilement are granted bond as there is no offence that is not bailable. The bond granted to the Respondent accords to the bail and bond policy and the parameters of the law. It is not illegal, incorrect or improper.

8. It was further submitted for the Respondent, that the application is bad in law as the power of the Court is confined to considering whether the decision of the trial Court was correct. The issue herein however is bail and compelling reasons and the discretion exercised by the trial Court. It was contended that this Court ought not to interfere with the discretionary powers of the trial Court unless the ruling is illegal, which it was not. The issues raised by the Applicant were canvassed before the trial Court and the Court made a correct finding. The Court found that the Respondent was never summoned by the police. The Applicant is trying to canvass an appeal before this Court. It was further argued that revision jurisdiction can only be exercised upon the conclusion of the entire proceedings.

9. I have considered the submissions by counsel as well as the authority cited. It is necessary to determine at the outset whether the application is bad in law as argued by the Respondent; that this Court has no powers to interfere with the discretion of the trial Court to grant bail; that an application for revision may only be made after conclusion of the entire matter in the lower Court. The Constitution of Kenya, 2010 confers upon this Court supervisory jurisdiction over subordinate Courts, tribunals or any person, body or authority exercising a judicial or quasi-judicial function. Article 165 provides:

> **(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.**
>
> **(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.**

10. The High Court in exercise of its supervisory jurisdiction has the powers to call for the record of any proceedings before *inter alia* a subordinate Court and make any order or give any direction including upholding, altering or reversing any order it considers appropriate to ensure the fair administration of justice.

11. In criminal matters, the powers of this Court on revision are set out in Section 364 of the Criminal Procedure Code which provides:

> **1. In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—**
>
> > **a. in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;**
> >
> > **b. in the case of any other order other than an order of acquittal, alter or reverse the order.**
> >
> > **c. …**

12. Whereas Section 364(1)(a) relates to the power of revision after conviction, subsection (1)(b) grants to this Court power of revision in respect of any other order other than an acquittal. The argument by the Respondent that the power of revision can only be exercised by this Court after conclusion of a matter therefore holds no water. The key consideration for this Court in making any orders in exercise its supervisory powers including the powers of revision, is that the orders made shall ensure the fair administration of justice.

13. The next question this Court will determine is whether the decision of the trial Court to grant bond to the Respondent was irregular and unjustified in view of the compelling reasons placed before the Court. It is now trite that the right of every accused person to bail or bond is now guaranteed by the Constitution of Kenya, 2010 and may only be denied where there are compelling reasons. Article 49 (1) (h) provides:

> **1. An arrested person has the right—**
>
> **(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.**

14. In Republic v Joktan Mayende & 3 others [2012] eKLR, Gikonyo, J had this to say about compelling reasons:

> **And accordingly, the phrase *compelling reasons* would denote reasons that are forceful and convincing as to make the court feel very strongly that the accused should not be released on bond. Bail should not therefore be denied on flimsy grounds but on real and cogent grounds that meet the high standard set by the Constitution.**

15. The Bail and Bond Policy Guidelines set out the general principles to be considered in an application for bond. These include the right of the accused person to liberty, to be presumed innocent until proven guilty, to be granted reasonable bail and bond terms. The obligation of the accused to attend Court is also a key consideration as is balancing the rights of the accused persons and the interest of justice and considerations of the rights of the victims.

16. In the present case, the Applicant contends that the Respondent is a flight risk having fled to Tanzania in 2014 when he was first charged and only returned this year. This to the Applicant is a compelling reason. I have looked at the exhibited copy of the Respondent's passport which is the Applicant's evidence that the Respondent was in Tanzania the whole time since 2014 and only resurfaced this year. The passport shows that the Respondent entered Kenya at Lunga Lunga border in July this year. No evidence was however exhibited showing when he left Kenya. Indeed the passport exhibited was issued to the Respondent in January 2019. It therefore does little by way of evidence to support the Applicant's allegations.

17. Further, I note that in the Judgment in the petition filed at the High Court in Mombasa the Respondent was directed to present himself

before the Chief Magistrate in Malindi and take plea. This he did, and did not abscond, notwithstanding that he had opportunity to do so. I am therefore not persuaded, from the material placed before me, that the Respondent is a flight risk and even if he were, denial of bail is not always the cure. The Respondent has deposited his passport in Court as one of the conditions of bond. In the case of Republic v Dwight Sagaray & 4 Others [2013] eKLR, Lagat – Korir, J stated and I concur:

> **The prosecution's apprehension is therefore a consideration not to be taken lightly. I have treated it with the seriousness it deserves and come to the considered view that the panacea for possible flight is not to automatically deny bail but to impose stringent conditions that would attract attendance at trial.**

18. On the ground of interfering with witnesses the Applicant exhibited an affidavit sworn by Ndegwa on 21.7.19 in which he says that the Respondent was the mastermind of the arson that took place in 2014. In Dwight Sagaray (supra) Lagat – Korir, J addressed the issue of interference with witnesses and stated thus:

> **As I have held before, interference with prosecution witnesses is in my view a compelling reason not to admit an accused person to bail as such interference goes to the root of the trial and is an affront to the administration of justice. For the prosecution to succeed in persuading the court on this criteria however, it must place material before the court which demonstrate actual or perceived interference. It must show the court for example the existence of a threat or threats to witnesses; direct or indirect incriminating communication between the accused and witnesses; close familial relationship between the accused and witnesses among others.**

19. For the Applicant to succeed in persuading the Court on this criteria, sufficient material must be availed to demonstrate actual or perceived interference. Ndegwa avers that following his arrest in 2014, he disclosed to police officers what transpired in the pre-planned arson by his co-accused and the Respondent who was the mastermind. He has since been threatened by Abdulswamad Mohamed Swaleh, a brother to the Respondent. During the trial and while in remand and during the period of incarceration at Hindi prison, the Respondent's emissaries, Abdulswamad, one Mohamed Salim and one Caroline Wangui warned and threatened him against testifying against the Respondent. As a result of the threats, he fears for his life and in fact reported the matter at the Lamu Police Station.

20. Interference with witnesses is a compelling reason not to admit an accused person to bail. Interference goes to the root of the trial and undermines the work of the prosecution in its key role in the administration of criminal justice. In the instant case, I am persuaded that a threat does in fact exist and is tantamount to interference with Ndegwa as a prosecution witness.

21. I have considered the case of Republic v James Kiarie Mutungei [2017] eKLR relied on by the Applicant. My view is that the same is distinguished as the prosecution therein was not involved in the bond approval process. The learned Judge found that the trial Court failed in its duty to involve the prosecution in verification and approval of the information supplied by the accused and his surety.

22. In the end and having considered all the facts herein, I do not find that the learned Magistrate exercised his discretion improperly or incorrectly by granting bond to the Respondent. I am also satisfied that he properly directed his mind to the facts and found correctly, in my view, that there were no compelling reasons that would necessitate the absolute denial of bond to the Respondent. However, given that there exists the real threat of interference with Dennis Ndegwa, a prosecution witness, my finding is that the interests of justice will be best served if I suspend, which I hereby do, the release of the Respondent until after Dennis Ndegwa has testified. In this regard, I direct the trial Court to proceed expeditiously to take the evidence of the said Dennis Ndegwa. Thereafter the Respondent shall be released on the terms set by the trial Court.

DATED, SIGNED and DELIVERED in MALINDI this 3rd day of September 2019

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M. THANDE

JUDGE

In the presence of: -

……..…… for the Applicant

……..… for the Respondent

……..…….. Court Assistant