



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

MURDER NO. 16 OF 2016

SAMSON GUCHU WAIHAKA.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

1. The application pending before Court is dated 7th November, 2017 where the 2nd accused **Samson Guchu Waithaka** is seeking for the Court to review and set aside the order made on 2nd November, 2017 cancelling his bond and ordering his arrest. His application is based on the ground that he was not afforded an opportunity to be heard before the orders were made. That he has been attending Court as and when required. That he has never threatened any witness in this case and in all the witness statements there is no witness who has implicated him in the murder of the deceased. That one Paul Nyaga Maina had alleged that he was threatened but his statements did not disclose any threats made to him and he is not a witness to the case.

2. Issues arising:

(1) Constitutional right to be heard

Kiai Mbaki & 2 others V Gichuhi Macharia & another [2005] eKLR the Court of Appeal held:

“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”

In this case, the 1st accused applied for bail pending trial and in the course of hearing the application, the prosecution during submission informed Court that the 2nd accused who had been released was interfering with witnesses and threatening them. No application was filed by the prosecution and the 2nd accused was not given a chance to respond therefore his constitutional right to be heard was violated.

(2) Review of bail

In the case of **Republic V Diana Suleiman Said & another [2014] eKLR** the Court reviewed the bail order holding that the accused will be held in custody and stated:

“Relying on Supreme Court of India decision in Gulabrao Baburao Deokar V State of Maharashtra and Ors. Criminal Appeal 2113 of 2013, the prosecution urged the grounds for cancellation of bail broadly as interference or attempt to interfere with due course of administration of justice or evasion of abuse of concession granted to an accused; where there is a clear possibility of the accused intimidating witnesses; and where the interest of the society in general outweighs the right of the accused. Counsel for the accused urged the Court not to follow the decision of the Supreme Court of India based on Constitution of India which was promulgated in the 1940s. I however, find the principles enunciated in the case to accord to our own position having regard to the Article 24 limitation of rights in the interests of others.....”

I consider that the principles generally of the accused’s ability or propensity to interfere with the due administration of justice having regard to the circumstances of the case and the considerations of the society or public interest are matters to be considered in considering a review of bail.”

In the case above, the prosecution filed a formal application and the accused was given a chance to respond to the said application. However, in this case, the 2nd accused’s bail was cancelled without giving him a chance of being heard. This offends his constitutional right to fair hearing. The order adversely affected the applicant and there was therefore a need to give the applicant unconditional right to be heard. The right to be heard in a criminal case is a principle of fair hearing as enshrined under **Article 50 (2) (k)** of the **Constitution** which provides:

“Every accused person has the right to a fair trial which includes the right- to adduce and challenge evidence.”

The right to fair trial is one of the rights which shall not be limited. **Article 25** of the **Constitution** provides:

“Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited:

(a)

(b)

(c) the right to a fair trial;

(d)

In the circumstances I find that the application has merits. I order that the order made on 2nd November, 2017 be reviewed and set aside. The bail is reinstated and the applicant will be out on bail pending the hearing and determination of this case.

Dated and delivered at Kerugoya this 1st day of March 2018.

L. W. GITARI

JUDGE

Ruling read out.

Mr. Abubakar for Applicant

Mr. Ombiri for the State.

Accused present.

Court Assistant Naomi Murage this 1st day of March, 2018.

L. W. GITARI

JUDGE

1.3.2018