

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL REVISION NO. 5 OF 2018

REPUBLIC.....APPLICANT

VERSUS

PAUL MBWIKA SAMUEL.....RESPONDENT

RULING

1. Hon. Lorot (SPM) approved surety in Machakos Chief Magistrate’s Traffic Case No. 105 of 2018, Republic v. Pius Mutuku Kithuku on 12th February, 2018. The prosecutor Mr. Machogu subsequently filed a complaint letter dated 14th February, 2018 under Articles 165 (6) and (7), Article 157 (6) (c), (9), (11), Article 159 (1) and Article 50 (1) of the Constitution. He sought that this court invokes its supervisory jurisdiction over the said court and revise, review and set aside the said proceedings of the bond approval orders on grounds that; the prosecution was not involved in the bond approval process; the prosecution did not have a chance to investigate and confirm the authenticity of the bond documents before and during bond approval; the prosecution did not have the opportunity to examine the sureties and their suitability; the entire process offended the right of the State and the complainant to a fair hearing as provided by the Constitution and that the bond approval is a judicial and not administrative process, therefore failure to involve the Director of Public Prosecution or his representative renders the whole process an irregularity of law and procedure. Cited in reliance were **Roy Richard Elirema & Another v. Republic [2013] eKLR**, **Republic v. James Kiarie Mutungei [2017] eKLR** and **Republic v. Baktash Akasha Abdalla Revision No. 75 of 2015**.

2. The courts in **James Kiarie** and **Baktash Akasha** (supra) both relied in the Court of Appeal decision in **Roy Richard** (supra). The courts in all the three cases and which position I too hold, is that in a criminal trial, there must be a prosecutor who must play the role of deciding what witnesses to call, the orders in which to call the said witnesses and whether to continue or discontinue the prosecution and further that the approval of surety is a full judicial process and is incomplete without the participation of the public or private prosecutor.

3. It must be noted that the court in Roy Richard referred to a criminal trial and in my view the approval of surety is not a trial process but rather a preliminary procedure to it. Despite my foregoing disposition, I acknowledge that the approval of surety ought not to be merely administrative but is a judicial process and the presence of a prosecutor is of great importance as was stated in **Baktash Akasha**. This is for the reason that the courts have no machinery with which they can authenticate documents tendered for surety. While I so acknowledge, it must be noted that the discretion on whether or not to approve a surety remains with the court. What then should a court do in the event a prosecutor is not in attendance? It is at this point that I depart from my brothers’ findings in **James Kiarie** and **Baktash Akasha** cases. While it is important for the prosecutor to participate in the process, the Court of Appeal in the case cited in reliance refers to a criminal trial in which in my view, the approval of surety does not fall within. Further, the Constitution at Article 159 (2) (d) requires of the courts to render substantial justice without undue regard to technicalities. The Court’s are obligated to ensure that litigants and in this particular case the proposed sureties are allowed to access justice without undue delay. If the prosecutor attached to a court is not available the surety in a matter such as a traffic case should not be turned away but must be attended to for the simple reason that at the end of the day the buck still stops with the court as regards its duty to ensure that all persons who have come to the court for services are attended to. It is not uncommon to find that prosecutors attached to courts often are not available so as to participate in the approval of sureties. In such situations it would not be prudent to turn away persons who have come to

court seeking its services. The court would proceed to interview the proposed surety and if it satisfied that the surety is suitable shall proceed to approve him or her. If the court desires to have any documents verified then it could forward them to the relevant Government department for the necessary verifications. In the present case the record of the lower court shows that the trial court interviewed the surety and was satisfied with the surety's suitability as well as the documents presented. The record further shows that the accused persons duly attended court on the 20/02/2018 and 5/3/2018 in obedience to the bond terms and conditions. I find that the accused stands to be prejudiced if the approval of his surety is set aside for the only reasons that the Court Prosecutor was absent yet the court duly found the surety suitable and documents authentic. I find the trial prosecutor has not suffered any prejudice with the approval of surety conducted in his absence as the accused who is the subject of the proceedings has faithfully attended court in obedience to the bond terms and conditions. The trial prosecutor should now proceed with the trial of the case.

4. In the result it is the finding of this court that there was no error or impropriety in the approval of surety by the trial court warranting a revision. The request of revision is rejected and that the trial court is directed to proceed with the trial.

It is so ordered.

Dated and delivered at Machakos this 3rd day of May, 2018.

D.K.KEMEI

JUDGE

In the presence of:-

Mogoi - for the state

Paul Mbwika Samuel - the Accused

Kituva - Court Assistant