

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

REVISION NO. 4 OF 2018

REPUBLICAPPLICANT

VERSUS

PIUS MUTUKU KITHUKU.....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. My point of departure from the said authorities is however that each case is to be decided on basis of its circumstances and in particular that in the cases cited in reliance, there were no prosecutors during the approval of surety unlike in this case. I note from my perusal of the record that in attendance on 12th February, 2018 when the surety was approved was a prosecutor who goes by the name Adera and it has not been demonstrated and or established that the said prosecutor was barred from participating in the scrutiny of the documents or that he objected to the approval of the surety.

5. Secondly, I note that **James Kiarie** case (supra) is further distinguishable. In that case, the trial magistrate made an order for the accused to be released on bail of KShs. 3,000,000/= with a surety of identical amount but during the processing of the security documents and release order, the surety signed cognizance of KShs. 50,000/= and not KShs. 3,000,000/=. It was not on the other hand shown that there were deviation from the implementation of the bond terms as ordered and thus the bond approval was ordered to be reviewed. The circumstances in the present case are different.

5. As the lower court proceedings for the 12th February, 2018 indicates the presence of a court Prosecutor, I find that the lower court's coram was complete. The lower court record for the 20/2/2018 and 5/3/2018 reveals that the accused was present in court in obedience to the bond conditions. In the premises I find there was no error of impropriety warranting a revision.

6. In the result it is the finding of this court that the Application for revision by the prosecution is found to lack merit. The same is rejected. The lower 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 Applicant

Pius Mutuku Kithuku - for the Respondent

Kituva - Court Assistant