



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL REVISION CASE NO. 1 OF 2017

SOSPETER MUTINDA KITAVI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

ORDER ON REVISION

1. By way of a letter dated **15th November, 2016**, the firm of **Mulu & Co. Advocates** seek revision of the order of a subordinate court presided over by **E. Boke, Senior Principal Magistrate** where she cancelled the Applicant's bail owing to allegations stated in the Children Officer's Report that the victim and her mother were threatened.
2. The Applicant, an Accused in the Subordinate Court, **Sexual Offence Case No. 35 of 2016**, is charged with the offence of **Defilement** contrary to **Section 8(1)(4)** of the **Sexual Offences Act No. 3 of 2006**. When the Applicant was arraigned before court on **29th August, 2016**, and having denied the charge he was granted bond of **Kshs. 200,000/=** with a surety of the same amount. A further order was made requiring the Children's Department to avail a report on the welfare of the victim.
3. When the matter came up for mention on the **26th September, 2010**, the Prosecuting Officer applied for cancellation of bond based on information contained in the report filed by the Children Officer, Kitui. The Children Officer's Report was a narrative of what transpired, an allegation that the family of the Accused tried requesting the parents of the Complainant to withdraw the case in vain. As a result they threatened and assaulted the Complainant's mother and vowed to use money to secure freedom of the Accused.
4. On the **24th October, 2016** **Mr. Mulu Advocate** having been retained by the Accused applied for review of the order cancelling the bond terms on the grounds that the Accused is in custody therefore had not pressurized the victim's mother or relatives as alleged; and he did not breach the terms of bond as he had not been released from custody.
5. Further, he submitted that if any relatives of the Accused who are not named in the report were interfering with the victim's relatives they should be identified and prosecuted.
6. In response, Counsel **Mutegi** for the State emphasized that the report prepared by the Children Officer confirmed the information the Prosecution received from the Investigating Officer. He argued that if released the Accused would interfere with witnesses.
7. This is a matter where the Accused was released on bail by the court on its own motion because the offence he faces is bailable. **Article 49(1)(h)** of the **Constitution of Kenya** provides thus:

“(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.”

Bail having been granted, to cancel it, the Prosecution was expected to file an affidavit deponed by the Investigating Officer stating reasons that called for cancellation of bail. The Accused would then be given the opportunity of interrogating the affidavit, subjecting the Investigating Officer to cross examination and responding thereto if necessary.

8. It is important to determine under what circumstances the report was filed. The learned Magistrate made the order *suo moto*. She was not specific as to what prompted her to make the order. According to **Section 119(1)(h) of the Children Act**, a child who has been sexually abused or is likely to be exposed to sexual abuse and exploitation is a child in need of protection. If such a case is filed such a report will be vital.

Looking at the content of the report, it contains allegations touching on facts of the case as envisaged by the Children’s Officer. The source of the information is not divulged. The allegations imply commission of a Criminal Offence by unnamed persons. These should have been subjected to investigation.

9. From the foregoing it is apparent that the order made by the trial Magistrate was improper. I therefore set aside court orders dated **29th August, 2016, 26th September, 2016** and **24th October, 2016** and direct that the file be placed before another Court of competent jurisdiction for hearing of the bail application.

10. It is so ordered.

Dated, Signed and Delivered at Kitui this 9th day of February, 2017.

L. N. MUTENDE

JUDGE