**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAJIADO**

**CRIMINAL REVISION NO. 1 OF 2017**

**REPUBLIC…….....……..…...….....APPLICANT**

**Versus**

**JAMES KIARIE MUTUNGEI…...…….……RESPONDENT**

**(Pursuant to an order issued by the Chief Magistrate Court at Ngong in Criminal Case No. 160 of 2016 – Republic v James Kiarie Mutungei)**

**Mr. Onserio Advocate for the Applicant**

**Mr. Akula Senior Prosecution Counsel for the State**

**RULING**

Mr. Akula, the Senior Prosecution Counsel through a letter filed in court dated 30/1/2017 made an application under Article 165 (6) and (7), 157 (6) (c), (9), (11) and Article 159 (1), Article 50 (1) of the Constitution of Kenya 2010 and section 362 of the Criminal Procedure Code under supervisory jurisdiction seeking from this court the following orders:

**That this honourable court do call for and examine the record in Chief Magistrate Court Criminal Case No. 160 of 2016 and revise, review and set aside the proceedings of the bond approval and subsequent orders conducted on 6/12/2016.**

On the letter the senior prosecution counsel stated 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 sureties were never examined on oath as to their suitability. The entire process offended the right of the state and the compliance to a fair hearing as provided by the constitution of Kenya 2010.

The respondent James Kiarie Mutungei through Onserio Okemwa advocate filed a counter response dated 20/2/2017 to the effect that the application by the applicant counsel to have the bond granted to the respondent cancelled is discriminatory and a violation of his constitutional rights based on the following grounds:

**(1) That the respondent has a right to bond.**

**(2) That the respondent hasn't violated his bail terms/bond terms.**

**(3) That the application was made in bad faith and is vindictive.**

**(4) That the process of verifying security documents and approving sureties is a judicial and administrative function and the respondent should not be penalized if the said process is not done uniformity in all criminal matters before the Ngong Chief Magistrate Court.**

**(5) That a fresh surety hearing and vetting of the security documents can be done without infringing on the respondent's rights.**

**(6) That the fact that the prosecution was not involved in the bond process does not invalidate the respondent's bail.**

**(7) That this application is meant to intimidate the respondent and infringe on his right to appeal, revise and review any matter arising from his pending trial.**

**BACKGROUND:**

Before proceeding further I think it is appropriate to highlight the factual matrix of and history of the case subject matter of this application. The respondent James Kiarie Mutungei was indicted and faces the charge of robbery with violence contrary to section 296 (2) of the Penal Code Cao 63 of the Laws of Kenya. The particulars of the charge being that James Kiarie Mutungei on the 2nd day of October 2016 at Ngong area within Kajiado North Sub-County in Kajiado County while armed with a dangerous weapon namely kitchen knife robbed A W O Ksh.22,000 and at or immediately before the time of such robbery used actual violence to the said A W O. The second charge of rape contrary to section 3 (1) as read with section 3 (3) of the Sexual Offences Act Cap 62A (Revised 2014) Laws of Kenya. The brief facts are that on the 2nd day of October 2016 at Ngong Township in Kajiado County the respondent James Kiarie Mutungei unlawfully caused his penis to penetrate the vagina of A W O.

The respondent pleaded not guilty to the two counts necessitating an interlocutory application on bail under Article 49 (1) (f) of the Constitution to be considered by the trial magistrate. On 6/12/2016 under those proceedings the record reveals that the learned trial magistrate ordered the bond in favour of the respondent to be reduced to Ksh.3,000,000 from an initial of Ksh.5,000,000 with a surety of identical amount. The trial court processed the necessary documentation on bail to have the respondent be released from prison custody with a release order which has no date save for the stamp of the court and signature of the magistrate. The present application by the state through the senior prosecution counsel arises out of the order passed on 6/12/2016 and subsequent execution of the documents to give effect to the order by the learned trial magistrate in favour of the respondent.

**SUBMISSIONS BY THE APPLICANT COUNSEL:**

Mr. Akula, the learned prosecution counsel at the very outset submitted that under Article 50, 157 and 159 of the Constitution and section 362 of the Criminal Procedure Code. the state is not contesting the right to bail to the respondent provided for under Article 49 (1) (f) of the Constitution. The bone of contention according to Mr. Akula, learned counsel for the applicant deals with the legal parameters that are required to be taken into consideration for the exercise provided under Article 49 (1) (8) of the Constitution and 124 of the Criminal Procedure Code. Mr. Akula learned counsel for the applicant further submitted these legal parameters entail that the prosecution counsel ought to participate in the bond approval and verification of documents. Mr. Akula further contended that the trial learned magistrate failed to examine the surety under oath as to her suitability to stand surety for the respondent. The respondent faces serious charges of robbery with violence contrary to section 296 (2) of the Penal Code and a second count of rape contrary to section 3 (a) of the Sexual offences Act. According to Mr. Akula the sureties as approved by the court were not sufficient in the circumstances of this particular case which contends that a likelihood of the respondent taking flight from the jurisdiction of this court. The learned counsel for the state further contended that the process of granting bond in favour of the respondent under Article 49 (1) (f) of the Constitution violated also the very constitution which provides for the rights, protection and welfare of the victims of offences under the Victim Protection Act No. 17 of 2014. The learned counsel further argued that the learned trial magistrate failed to notify the victim nor take into account her rights and protection during the bail proceedings conducted on 6/12/2016. Mr. Akula learned

prosecution counsel further contends that every person is equal before the law and has the right to equal protection and equal benefit of the law as conferred under Article 27 of our constitution. Mr. Akula, the learned counsel further placed reliance upon the case of *Republic v Barklesi Abdalla & Others [2015] eKLR* which laid down the legal principle that the prosecutor ought to be present and participate in bond approval proceedings. Mr. Aula, the learned prosecution counsel urged this court to review the order as being irregular with a view to make good by issuing orders of compliance to the trial court to abide with the law.

Mr. Onserio, learned counsel appearing for the respondent submitted that the arguments by the learned counsel for the applicant are in contravention to Article 27 of the Constitution on discrimination. It was contended by the learned counsel that the application challenging the bond approval is a violation of Article 49 (1) (h) of the Constitution which provides instances, pursuant to section 123A of the Criminal Procedure Code as regards to exceptions on restrictions to the right to bail. The learned counsel further submitted that Article 27 read together with Article 49 (1) (f) of the Constitution with section 123A of the Criminal Procedure Code does not contemplate restriction of the right to bail on the basis of an omission to surety approval. The learned counsel contention was that the judiciary does not have a Bond or Bail Act to guide the courts. Secondly this Bond and Bail Policy of the Judiciary has not been codified. Thirdly, the revocation of the bond already granted to an accused person is not provided for under the law. Fourth, the requirement of attendance and participation by a prosecutor is not mandatory but obligatory. On the basis of the aforesaid submissions the learned counsel submitted to this court that a revocation of the bond duly executed by the respondent will be a violation of his rights under the constitution.

I have considered the application and both arguments as advanced by learned counsel for the applicant and the respondent. The issue before this court therefore is whether the applicant is entitled to the order sought pursuant to Article 165 (6) (7) of the Constitution as read together with section 362 and 364 of the Criminal Procedure Code (Cap 75 of the Laws of Kenya). In a revision preferred challenging an order of the Senior Resident Magistrate in respect of bond approval under section 123 of the Criminal Procedure Code in favour of the respondent on 6/12/2016.

In order to appreciate the application, the rival submissions made by both counsels it is important to first set out the law applicable to the application of this nature on revision.

(a) I start with the constitutional provisions on jurisdiction of the High Court. I refer to specifically to Article 165 (6) of the Constitution 2010. The Article reads as follows:

> **"(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising 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 the subordinate court or person, body authority referred in clause (6) and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."**

The provisions under the criminal procedure code read as hereunder:

Section 362:

> **"The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate court"**

Section 364 (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 his knowledge**

**(b) In the case of any other order other than an order of acquittal alter or reverse the order.**

**(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence."**

(b) The law on provisions as to bail.

Section 123 as read with section 123A:

Section 123 – ***"when a person is accused of any offence under the penal code or any other statute and the person has been arrested or detained without a warrant by an officer in charge of a police station or appears or is brought before a court and is prepared at any time while in the custody of that officer or at any stage of the proceedings before that court to give bail, that person may be admitted to bail provided that the officer or court may instead of taking bail from the person released him on his executing a bond without sureties for his appearance as provided in this code……"***

Section 123A – ***"subject to Article 49 (1) (h) of the Constitution and notwithstanding section 123 in making a decision on bail and bond the court shall have regard to all the relevant circumstances in particular nature and seriousness of the offence, the character, antecedents, association and community ties of the accused person the defendants record in respect of the fulfillment of obligations under previous grants of bail the strength of the chance of his having committed the offence."***

Section 124 – ***"before a person is released on bail or on his own recognizance a bond for such sum as the court or police officer thinks sufficient shall be executed by that person, and, when he is released on bail, by one or more sufficient sureties, conditioned that the person shall attend at the time and place mentioned in the bond and shall continue so to attend until otherwise directed by the court or police officer."***

Case law commentaries on Article 165 (6) and (7) and on powers of revision by the High Court:

The question of jurisdiction of the High Court superintending the subordinate/tribunals has been considered widely by the courts since the promulgation of the Constitution 2010. In the case of ***Andrew Kibet Cheruiyot & Another v Medical Practitioners and Dentist Board & 2 Others Petition No. 260 of 2013*** the court held interalia:

**"Article 165 (6) gives the High Court jurisdiction over bodies such as the 1st respondent by providing that the High Court shall have supervisory jurisdiction over subordinate courts and over any person, body or authority exercising a judicial or quasi – judicial function."**

In the case of ***John Kipngeno Koech & 2 Others v Nakuru County Assembly & Others [2013] eKLR*** where the court held:

**"Jurisdiction is the practical authority granted to a formally constituted body to deal with and make pronouncements on legal matters and by implication to administer justice within a defined are of responsibility. It is a scope, validity, legitimacy or authority to preside or adjudicate upon a matter."**

It is therefore clear from these principles that the High Court has jurisdiction to determine the application occasioned by the impugned order of the learned trial magistrate at Ngong Law Courts in Criminal Case No. 160 of 2016. The enactment of section 362 as read with section 364 of the code is substantially part of the provisions of the statute to actualize the provisions of Article 165 (6) and (7) of the Constitution.

The rationale of the High Court as a revisionary authority can be initiated by an aggrieved party, or suo-moto made by the court itself, call for the record relating to the order passed or proceedings in order to satisfy itself as to the legality, or propriety, correctness of the order in question. The scope of revision therefore is more restrictive in comparison with the appellate jurisdiction which requires the high court to rehear the case and evaluate the evidence in totality by the lower court to come with a decision on the merits. The provisions of section 362 and 364 of the code do not provide for a time limit which a party may seek the court to invoke its jurisdiction under the powers of revision and grant the relief sought. The power of revision conferred by the provisions of section 362 as read with section 364 was left open for an applicant or any aggrieved party to be considered and taken before the final order in reference to the ongoing proceedings.

In considering similar provisions under the Indian Criminal Procedure Code and applicable statute on revisional powers. The Supreme Court in the case of ***Sriraja Lakshmi Dyeing Works v Pangaswamy Chettair [1980] 4SCC 259*** said as follows:

> **"The conference of revisional jurisdiction is generally for the purpose of keeping tribunal subordinate to the revising tribunal within the bounds of their authority to make them act according to law, according to the procedure established by law and according to well defined principles of justice. Revisional jurisdiction as ordinarily understood with reference to our statues is always included in appellate jurisdiction but not vice versa. The question of the extent of appellant or revisional jurisdiction has to be considered in each case with reference to the language employed by the statute. The dominal ideal conveyed by the incorporation of the words to satisfy itself under section 25 *read as which has similar provisions with our section 362 of the Criminal Procedure Code (Cap 75 of the Laws of Kenya) emphasis mine* is essential a power of superintendence. The scope of the revisional powers of the high court where the high court is required to be satisfied that the decision is according to law as to the legality and propriety of the order under revision, which is quite obviously as much wider jurisdiction. That jurisdiction enables the court of revision, in appropriate cases, to examine the correctness of the findings of facts also, though the revisional court is not a second court of appeal (emphasis supplied)."**

I reiterate that the provisions being considered by the Supreme Court of India in this case are substantially and materially identical with our provisions under section 362 of the Criminal Procedure Code. The legal principles enunciated by the apex court in deciding the matter are therefore relevant in this case. Similarly ***in Slaw Wallace & Co. Ltd v Govindas Paru Slothamdas & Another [2001] 3SCC 445*** the court observed that, *"in the High Court satisfying itself as to the regularity of the proceedings of the correctness, legality or propriety of any decision or order passed therein and if, on examination, it appears to the High Court that any such decision or order should be modified, annulled, reversed, or remitted for consideration it may pass such order accordingly."*

It is to be appreciated that the ambit created by the provisions of section 362 of the code empowers this court to exercise discretion as to the correctness, legality and propriety of the order or proceedings. There is no dispute that the trial court which held the sessions complained of by the applicant is inferior to this court as outlined in our Constitution of the Republic. The subordinate court is therefore a subject of supervisory and superintendent by this court in both judicial and administrative function. The court can therefore annul, review, vary or issue further directions on the matter complained of by an aggrieved party or which came into the attention of the court suo-moto. The only rider in the circumstances of this jurisdiction is to ensure the accused has an opportunity to be heard or his legal counsel before any decision is reached.

I have looked at the above authority and I am of the conceded view that the definition of terms under section 362 of the Criminal Procedure Code be elaborated. The principle of legality is the ideal that requires all law to be clear, ascertainable and non retrospective. It requires decision makers to resolve disputes by applying the legal rules that have been declared before hand, and not to alter the legal situation retrospectively by discretionary departures from established law. (See ***Robinson Paul H [2005] Fair Notice & Fair Adjudication*** two kinds of legality propriety is about appropriateness, justness, right.

(See Legal Dictionary on Definition Correctness – the substantive and procedural requirements are provided by statutes and rules as well court decisions. Correctness within the legal context concerns accuracy, extent procedures are used to determine the facts to influence the determination. It also refers to the right answer. See ***Michael Glanzbery, Truth in Stanford Encyclopedia of Philosophy***. The phrase within the legal context by ***Roscoe Pound on some Principles of Procedural Reform KJL Review 338, 402*** has defined as:

> **"A resolution on the merits which occurs when a law suit is decided according to procedural rules that are designed interpreted and implemented to give parties a full opportunity to participate in presenting the proofs and reasoned arguments on which a court can decide a case."**

The ***Oxford English Dictionary Vol. VIII*** defines the word propriety to mean fitness, appropriateness suitability, conformity with requirements, rule of principle rightness, accuracy, correctness, justness.

As can be seen from this analysis the function of the court under section 362 of the Criminal Procedure Code as read with section 364 is to enable the court to scrutinize and examine the correctness of facts of a subordinate court or tribunal so as to make a finding on legality or propriety. Legality means lawfulness, strict adherence to law, correctness and propriety ordinarily having the same meaning. It can be deduced from this evaluation that the jurisdiction on revision will be invoked where there is a decision by a subordinate court, the decision is not subject of appeal, the grounds of revision must exist against the decision being challenged from the subordinate court. The interference under section 362 by this court on revision can only be justified if the impugned decision is grossly erroneous, to justness appropriateness and suitability to trial. The trial magistrate has not complied with the provisions of the law, the findings made and the decision reached failed to take into account the evidence that there was a misdirection of facts on the face of the record, the parties in the case were not heard or given an opportunity to present the case before the decision or the decision being contested by the aggrieved party was arbitrary amounting to abuse of the court process.

The question for this court therefore is whether in exercising discretion by the trial magistrate in Chief Magistrate Criminal Case No. 160 of 2016 there is prima facie evidence requiring invocation of revisional powers to annul or set aside the order.

An application to be admitted to bail by an accused person is governed by Article 49 (1) (f) of the Constitution and section 123, 123A, 124, 125 and 127 of the Criminal Procedure Code (Cap 75 of the Laws of Kenya). Under the provisions of the code the accused person on being indicted before a court of law for a cognizable offence has a right to be released on bail save where the prosecution has demonstrated that compelling reasons exist not to release him on bail. See the case of ***Job Kenyanya Masoni v Republic Cr. Application No. 399 of 2012 eKLR*** the Judiciary in the year 2015 also developed bail and policy guidelines to augment the Criminal Procedure Code and Practice and other relevant instruments to guide police and judicial officers in application of the law on bail. In so doing the exercise of discretion to grant bail is to be in conformity with the constitution and statutory provisions.

Bail in our criminal justice system is the security given for the release of an accused person detained in custody pending trial or appeal furnished by signing a personal bond or a surety signing a guarantee of ensuring his attendance before any court as required and specified. As indicated under the code, section 124, 125 and 127 the phrase sufficient surety or cognizance runs through the provisions and the trial court is therefore mandated to consider. What are the parameters does the court expect the judicial process to entail; the financial ability of the surety or the accused to deposit the bond and meet the terms of bail. The character, age and health of the accused or surety probability of the accused attending court when and as required whether the surety understands the note of a surety as a guarantee before court to commit in court to avail the accused for all court attendances, whether the surety is a resident of the local jurisdiction where the case is to be heard and determined, whether the security property may it be a logbook or certificate of title to land is worth the amount of the terms of bond granted by the court and the obligations of the surety in the overall administration of justice during the pendency of the case.

It is in this state of examination that the judicial officer determines the suitability of surety before exercising discretion in his favour to deposit the securities as provided for under the law. The risk factors as clearly reiterated in the Bond and Bail Policy of the Judiciary 2015 answers to the question that the accused and surety seeking bond must be interrogated and answers provided before a decision is reached to release an accused person to bail. Both the accused and the surety must place before the trial court the necessary facts that would allow proper exercise of discretion judiciously. The seriousness of the offence, the strength of the case, interference of witnesses, failure of the accused to have absconded or charged with another case, the need to protect the victim, the security and safety of the accused, the likelihood of absconding from the jurisdiction of the court and other factors must be weighed by the court in the interest of justice.

All these matters in terms of law and procedure of the courts has to be undertaken by examining the accused and the surety upon oath. The need to examine the accused on oath besides the surety is to ensure the dual covenant entered between the two with the court to avail themselves in all court attendance as scheduled. This inquiry requires more focus by the courts because the prospect whether the accused person poses a flight risk starts in the quality processing of bail applications/approvals.

I have read the record I found no evidence of such inquiry having been conducted by the learned trial magistrate.

The other considerations ignored by the trial court in this application for bond revolves around the protection, rights and welfare of the victims of the offence. Under Article 50 (a) of the Constitution, parliament enacted the Victim Protection Act NO. 17 of 2014 in compliance with Article 50 (a) of the Constitution. Under section 4 (1) (b) of the Act it provides:

> **"Every victim is as far as possible, given an opportunity to be heard and to respond before any decision affecting him or her is taken.**
>
> **(c) The victim's dignity is preserved at all stages of a case involving the victim from the pretrial to the post trial phrase.**
>
> **(d) The victim is not to be discriminated."**

Section 9 (1) (a) the Victim has a right to be present at their trials either in person or through a representative of their choice. Section 10 (b) a victim has a right to have their safety and that of their family considered in determining the conditions of bail and release of the offender. Under the Victim Protection Act (Supra) – a victim has a right to due process, right to notice, right to be heard or his legal representative, right to reasonable protection, right to information etc.

I have the synopsis of the record and submissions by the defence counsel shows that the victim was not informed of the pending ongoing proceedings in respect of bail in favour of the accused. The alleged offences against the accused as per the information by the prosecution was that the accused committed robbery with violence contrary to section 296 (2) of the Penal Code and at the same time committed the offence of rape contrary to section 3 (3) of the Sexual Offences Act. These are serious offences which on conviction will attract a death penalty and length custodial sentence for the offence of rape. From the record and submissions by both counsels and applying the provisions of the Constitution and the Victim Protections Act it is clear that the victim of the offence was not notified or heard by the trial court involving the accused release on bond in proceedings conducted on 6/12/2016. It is not in dispute that the victim has a right which flows from the constitution to be informed in a timely manner of any court proceedings involving the crime where he or she is a victim. The rights prescribed under the Act are to be actualized by the court before making a determination on any matter involving the victim.

In the instant case the victim has filed an affidavit where she had deposed that she was not informed of the pretrial hearing on release of the accused person. The accused person nor the defence has not controverted that disposition in the affidavit of the victim. The rights described in the subsection outlined were to be asserted in the trial court in which the accused is being prosecuted for the crime of robbery and

rape. If the court denies the victim rights in any motion like in this case before me I have no doubt in my mind that a petition for a court of mandamus may issue against the trial magistrate. The failure of the victim not to be notified nor participate in the bail proceedings was an error, omission and an irregularity which occasioned a failure of justice on the part of the trial magistrate. By ignoring the weight and role of the victim of crime in the decision to admit the accused on bail, the trial magistrate proceeded on a wrong premise of law and arriving at a conclusion which betrayed the provisions of Article 10 of the Constitution on national values and principles which are to be factored in decision making process. That therefore rendered the finding by the trial court not according to law calling for an interference under section 362 of the Criminal Procedure Code.

This application by the senior prosecution counsel drew my attention to the record of the trial court. From the record the trial magistrate made an order for the accused to be released on bail of Ksh.3,000,000 with a surety of identical amount. It is no doubt that the processing of security documents and release order was to cover the terms of the order as stipulated above. In examining the propriety of the proceedings the surety Margret Wanjiru Mutungei signed cognizance of 50,000 and not Ksh.3,000,000. There was no evidence of security deposited as a guarantee for the release of the accused. The records does not bear any resemblance of evidence when the bond terms were revised from Ksh.3,000,000 to a lesser amount of Ksh.50,000. The template containing the particulars of the accused and the surety dated 22/12/2016 are at variance with court order dated 6/12/2016 reducing the bond terms from Ksh.3,000,000 to Ksh.50,000 with a surety of identical amount. The accused person instead of signing a bond of Ksh.3,000,000 with a corresponding surety of the same amount as per the court order apparently signed a cognizance of Ksh.50,000 and a surety of the same amount without any supporting court order to that effect. The trial magistrate in endorsing the bond terms and signing the release order in favour of the accused violated the law. The accused supposedly bond terms of Ksh.50,000 can best be described as a fraud. The court proceeded to decide the entire question of releasing the accused with a surety of Ksh.50,000 on a non-existent order.

Similarly there was a question mark about the template forms on particulars of accused and surety cannot be a substitute for the detailed reference required of the accused or surety on oath by the judicial officer during bond approval, the casual nature, the registry officials undertakes the exercise of recording particulars of the accused and the surety without any verification has occasioned a miscarriage of justice to the parties. It is not surprising to find a case where an offender has taken flight from the jurisdiction of the court and a warrant ensues to track him down. Many a times the particulars of data given by both accused and surety have been unreliable to track down the surety or the accused person. This arises due to the fact that the accused and sureties have realized that the information required of them is never verified.

Who is better placed to verify whether the mobile number provided by the parties is registered in the names of the accused or the surety other than the prosecutor working in conjunction with the police?

The court has no machinery to undertake verification of mobile phone registration. The trial court failed in its duty not to involve the prosecution in verification and approval of information supplied by the accused and surety. The proceedings and bond approvals documents demonstrates a court in hurry to accomplish the task without caring about the qualitative content of the data collected from the parties. The template forms in this case have not been countersigned by the prosecutor who is a critical member of a proper constituted court. There is nowhere in the code the role of an executive officer is given prominence to oust the constitutional mandate donated to the Director of Public Prosecutions in our criminal justice system. The trial court therefore by purporting to constitute a criminal court without a prosecutor is an irregularity of law and procedure.

On this point I am satisfied that there was an illegality on the purported bond which released the accused person. The impugned order by the trial court is unsustainable in law. The same under section 362 of the Criminal Procedure Code should be set aside abinitio.

The other ground raised in this application was in respect of the constitution of a criminal court during the proceeding under the Criminal Procedure Code. What constitutes a court is not defined. A magistrate sitting or presiding matters of a judicial nature is not equivalent or synonymous to a court. A magistrate

when exercising power donated by the constitution and statute in performance of his/her judicial function must adhere to the procedure and practice to give legality to the session. A court properly constituted in a criminal trial must be viewed as a tripartite entity comprising of the judicial officer, the accused/defendant, the prosecution counsel or private prosecution counsel, the defence counsel where appropriate, and the court assistant to deal with logistics and interpretation.

As regards the above, I take cognizance of the role of the Director of Public Prosecution under Article 157 (6) of the Constitution which provides interalia:

> **"The power to institute and undertake criminal proceedings against any person before any court other than a court a martial in respect of any offence alleged to have been committed. The moment an accused person has been indicted the operation of Article 157 on the role of the prosecutor comes into effect. That role includes plea taking, pretrial conferences, mentions, the main trial, in the event of conviction participation, in sentencing hearings until the final order of the court."**

The role of a prosecutor cannot therefore be ignored at any one time by the court stated to be properly constituted. The Court of Appeal revisited this issue in the case of Roy Richard **Elirema & Another v Republic Cr. Appeal No. 67 of 2002** in which the court stated interalia:

> **"In Kenya, we think and we must hold, that for a criminal trial to be validly conducted within the provision of the constitution and the code, there must be a prosecutor either public or private who must play the role of deciding what witnesses to call, the order in which those witnesses are to be called and whether to continue or discontinue with the prosecution. These roles cannot be played by the trial court for if it does so there would be a serious risk of the court losing its impartiality and that would violate the provisions of section 77 (1) of the Constitution now read as Article 50 of the Constitution 2010."**

This legal proposition was adopted by **Emukule J** in the case of ***Republic v Baktash Akasha Abdalla & 3 Others Cr. Revision No. 75 of 2015 at Mombasa eKLR***. The circumstances of the Baktash Akasha (Supra) are in close similarity with the present case. In brief facts presented before the judge, there was bond approval to release the applicant without the participation of the public prosecutor. The court held interalia that:

> ***"The function of approval of bond is a judicial function which is mandatory that it be exercised in the presence of both the prosecution and defence counsel. In the case of the defence counsel where applicable emphasis mine."***

The observations of this court with reference to the lower court record as supported by the submissions by the applicant counsel in the presence of the defence counsel reveals the following. - The learned trial magistrate exercised discretion without the participation of the public prosecutor – There is no record to support the revised terms of bond in favour of the accused/respondent from Ksh.3,000,000 to Ksh.50,000 in the presence of the public prosecutor or the accused person – The security was not sworn to attest as to his fitness to stand surety for the accused – The template forms to capture the particulars of the accused or surety have no provision for verification by the prosecutor. The trial magistrate endorsed approved with no reasons to support the decision.

In the event an accused person absconds from the jurisdiction of the court it is the same prosecutor who must apply for warrant of arrest, process execution through the police to apprehend both the accused and the surety for defaulting in their obligations. In that event the prosecutor must be supplied with all the particulars of the accused and the surety. The need therefore to participate in verification of the materials which precede the approval is obligatory and not discretionary on the part of the trial court. The finding recorded by the lower court on bond approval was arrived at without considering relevant material and evidence. The trial magistrate ignored the participation of the prosecutor which I consider as grossly erroneous and if allowed to stand it is open to abuse and a miscarriage of justice.

I am satisfied that there are sufficient grounds to support the illegality, the incorrectness and impropriety of the order releasing the accused person on bond. Under the circumstances I review the lower court record and quash the decision to release the accused on bond on an order tainted with illegality and impropriety under section 362 of the Criminal Procedure Code. I find guidance interalia in the legal proposition from the persuasive authorities cited and also the holding in the case of ***Elirema Case by the Court of Appeal (Supra).***

The following therefore shall abide my decision:

(1) It is manifest that the impugned order by the learned trial magistrate failed to meet the threshold of the constitution and the statute law.

(2) The bond approval and verification of surety was done without the participation of the prosecutor.

(3) The proceedings on bond did not comply with law on the requirement for the surety to take oath and swear as to correctness of the statement of facts as sufficiency of the security to be deposited in favour of the accused bail.

(4) There is no correct information or data accused/surety gave to satisfy the court that they understood the conditions of being released on bail under Article 49 (1) (h) of the Constitution as read with section 123, 124, 125 and 127 of the Criminal Procedure Code.

(5) The documents releasing the accused on bond of Ksh.50,000 with a surety of identical amount was prima facie fraudulent in absence of a court order.

(6) The victim of the offence given the peculiarity of the charges was never notified nor heard during the bond application considerations, or approval so as to attend the pretrial hearings or send a legal representative of choice to the court. By the trial court proceedings in absentia of the victim the court acted in contravention of the constitution and the victim rights as stipulated under the Victim Protection Act No. 17 of 2014.

As a consequence the accused person right to bail was an illegality. The order is hereby quashed forthwith and all subsequent approvals set aside. The accused is to be arrested and remanded in custody. The proceedings on bail to commence denovo. The criminal case no. 160 of 2016 is hereby remitted back to the Chief Magistrate Ngong to reconsider the application and reach a decision in accordance and compliance with the law.

It is so ordered.

**Dated, delivered and signed in open court at Kajiado on 15th day of March, 2017.**

**……..**

**R. NYAKUNDI**

**JUDGE**

**Representation:**

Mr. Onserio advocate for the accused present

Mr. Akula for Director of Public Prosecutions present

Mr. Mateli Court Assistant