



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

MISCELLANEOUS CRIMINAL APPLICATION NO. 30 OF 2017

JOSPHAT WAMBUA KITONGA

JAPHET MULINGE KIKOVA.....APPLICANTS

PATRICK KIVINDYO KIKOVE

VERSUS

THE STATE.....RESPONDENT

RULING OF THE COURT

1. The three Applicants herein have filed a Notice of Motion dated 28/02/2017 seeking for the following reliefs:-

- 1. THAT this court be pleased to review the orders of Honourable Gilbert Shikwe, Resident Magistrate in Kithimani Criminal Case Numbers 298 of 2016, 112 of 2017, 130 of 2017 and 259 of 2017 made on the 23rd February, 2017.***
- 2. THAT the court be pleased to order reinstatement of the accused's persons bail/bond terms and release the accused from Industrial Area G K prison.***

The Application is supported by an annexed affidavit of **Josphat Wambua Kitonga** who is one of the accused persons in the cases at Kithimani Law Courts sworn on even date and further by the following grounds namely:-

- a. That the accused persons are law abiding citizens and great environmental champions who found themselves in these Criminal cases as a result of standing up against an environmental degradation cartel composed of a few powerful and wealthy individuals.***
- b. That the accused persons were apprehended on different dates and taken to court where they were given bonds by Hon. Martha Opanga who was the Principal Magistrate.***
- c. That the cash bails were opposed by the Prosecution based on an affidavit by the D.C.I.O. Yatta and Masinga Police Division Mr. Angelo Kinyanjui Nguruna dated 13/12/2016 and which was dismissed by Hon. Martha Opanga as lacking merit.***
- d. That the accused persons have been out on bond and attending court as directed and have not***

skipped any court appearance.

e. That the Prosecution sought for the cancellation of accuseds bonds pursuant to the contents of the D.C.I.O's Affidavit dated 13/12/2016 that had earlier been rejected by Hon. Opanga.

f. That Hon. Gilbert Shikwe disregarded the finding of Hon. Opanga and accepted the contents of the bail D.C.I.O's Affidavit.

g. That the accused have never obstructed police from arresting suspects since if that had been so then they would have been charged with an offence of obstructing a police officer from carrying lawful duties.

h. That it is a worry that the Resident Magistrate could usurp powers of his superior.

i. That the order of the Resident Magistrate is akin to heralding judicial anarchy.

j. That it is only in the interest of justice that the High Court exercises its supervisory jurisdiction in setting aside the order of Hon Gilbert Shikwe Resident Magistrate made on the 23rd February, 2017.

2. The Application is opposed by the Respondent. A C. I. D officer based at Yatta one Angelo Kinyanjui Nguruna swore a Replying Affidavit dated 22/03/2017 which raised the following grounds of opposition.

a. That the accused persons while out on bond had assaulted the complainant leading to the filing of new assault charges in addition to the previous ones of robbery with violence and arson and hence the need for cancellation of bonds.

b. That the accused persons while being out on bond have been frustrating the police from apprehending other suspects who are still at large.

c. That Hon. Shikwe had the benefit of receiving oral evidence and was thus convinced by the averments of the police and thereafter ordered for the cancellation of the accused's bonds.

d. That the lower court properly exercised its mind in cancelling the accused's bonds after they abused and violated the terms of the bonds.

e. That the complainant's safety can only be guaranteed when accused are in custody and further the police would easily manage to apprehend the suspects at large without interference from the accused persons.

f. That the High Court do uphold the orders of the lower court.

Parties presented oral submissions. Mr. Mutunga for the Applicants submitted that the lower court whimsically suspended the Applicants bonds in total disregard to the orders that had been granted by a fellow Magistrate thereby creating judicial anarchy. He further submitted that the lower court was expected to exercise discretion judiciously. He cited the case of REPUBLIC =Vs = PATRICK MURITHI MUTHEI & OTHERS HCCR. REVISION NO. 119 OF 2016 at NYERI. Counsel submitted that the action of Hon. Shikwe in overturning an order of his superior amounted to sitting in an appeal. Further he submitted that despite the accused being placed in custody, the police have not made any arrests of those suspects at large yet the police had alleged that the accused were involved in preventing the said arrests and that the police seem to shift blame on the innocent Applicants. Applicant's Counsel submitted that Hon Shikwe has since reviewed the orders on cancellation of bond and released the first Accused/Applicant **Josphat Wambua Kitonga** on a bond of Kshs.100,000/= plus one surety and that the other accused persons are still in remand custody.

Mr. Machogu for the Respondent submitted that the state has a right to present reasons for cancellation of bond if there are compelling reasons. He submitted that the Hon. Shikwe had received viva voce evidence of the investigating officer in which there was interference and intimidation of prosecution witnesses by the accused persons and therefore it was necessary to cancel the accused's bonds. The Respondent's Counsel urged this court to dismiss the Applicant's Application.

I have considered the Applicant's Application as well as the grounds and affidavit in support. I have also considered the Replying Affidavit by the Investigating officer on behalf of the Respondent. I have considered the oral submissions of learned counsels for the parties herein. I have also perused the record of the lower court at Kithimani Law Courts which contains the ruling of Hon. Gilbert Shikwe made on the 23/02/2017. It is not in dispute that the accused persons had been charged with several offences ranging from robbery with violence contrary to Section 296 (2) of the Penal Code, Arson contrary to Section 332 of the Penal Code. It is also not in dispute that the accused persons had been granted bond but which were later cancelled and or suspended following an application by the Prosecution in which it had been claimed that the accused had threatened and harmed the complainant and further hampered the police from arresting other suspects at large. The suspension of the said bonds is aptly captured in the ruling of Hon. Shikwe made on the 23/02/2017 and which this court is now called upon to review.

The power of Revision is given to the High Court vide Section 362 and 364 of the Criminal Procedure Code as well as Article 165 (6) and (7) of the Constitution of Kenya 2010.

Section 362(2) of the Criminal Procedure Code provides thus:-

“ The High court may call and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any subordinate court.”

Section 364 of the Criminal procedure code confers power to the High Court to review or revise lower court's decisions.

Under **Article 165 (6) and (7)** – The High Court has supervisory jurisdiction over subordinate courts and has power to call for the record of any proceedings before subordinate courts and to make orders or give directions as appropriate in order to ensure the fair administration of justice.

After carefully analyzing the ruling of the court made on the 23/02/2017 and hearing the oral submissions, I find the following two issues necessary for determination namely:-

- 1. Whether Hon. Shikwe sat an appeal over an order made by his fellow colleague Hon Opanga and thereby created judicial anarchy at Kithimani law courts.***
- 2. Whether the applicants have made out a case for review of the orders made by Hon. Shikwe on 23/02/2017.***

c. As regards the first issue it is not in dispute that Hon. Opanga had initially been requested by the Prosecution vide an affidavit dated 13/12/2016 to cancel bonds for the accused persons and upon consideration she had rejected the request. The file was later handed over to Hon. Shikwe and a similar request was made by the Prosecution and that the said Hon. Shikwe received viva voce evidence from the investigating officer and the defence counsel allowed to cross-examine him. Thereafter Hon. Shikwe was persuaded by the Prosecution that there were compelling reasons to warrant the cancellation of the accused's bonds. The Applicant's counsel submits that it was irregular for Hon. Shikwe to overturn a ruling of his superior and that as a result there has been judicial anarchy. I am not persuaded by the Applicant's Counsels contention because both Hon. Shikwe and Hon. Opanga are Magistrates working at the subordinate court at Kithimani and both exercise concurrent jurisdiction. The matter had been handled previously by Hon. Opanga before she was transferred and the file was handed over to Hon. Shikwe to handle it. It was therefore open and legitimate for any party to approach the said court for

review of any orders that had been issued by the court on transfer. Besides the new Magistrate Hon. Shikwe had become seized of the matter and was in charge of the court matters. Hence there was no judicial anarchy perpetrated at all as alluded to by Counsel for the Applicants.

6. As regards the second issue, it is without doubt that under the Provisions of Article 49 of the Constitution, an accused person has a right to be released on bail pending charge or trial unless there are compelling reasons for refusing bail are shown or demonstrated. Hence if compelling reasons arise or are demonstrated after the arrested person has been released or granted bail, the court may review the matter on the basis of the compelling reasons shown. In the matter at hand the trial court received an Affidavit from the investigating officer one Angelo Kinyanjui Nguruna and who presented viva voce evidence and was cross-examined. The issue was about the conduct of the accused persons who had been out on bond and were alleged to have intimidated the complainant and further thwarted attempts by police to apprehend other suspects at large. The Learned Magistrate thereafter ruled that the prosecution had raised compelling reasons warranting for cancellation of bond. It is noted that the main reasons advanced by the prosecution was that the accused persons had interfered with witnesses and more particularly the complainant and further that their conduct while out on bond was inimical to the success by police to arrest other suspects at large. As was noted by the High court in the case of **REPUBLIC =VS= DANSON NGUNYA & ANOTHER – MOMBASA HCCR NO. 26 OF 2008** the right to be released on bail or bond is tied with the presence of compelling reasons and as such the prosecution is entitled to oppose or challenge the release of accused persons on bond if they have justifiable reasons. Hence the trial Magistrate at Kithimani was properly presented with those compelling reasons by the prosecution and as a result made his findings on the 23/2/2017 in which he ordered for the cancellation of bond. It is without doubt that the learned trial magistrate had exercised his discretion and arrived at the decision he did. The High Court would not usually interfere with exercise of discretion by the subordinate courts unless the same had not been done judiciously. As to whether or not the said decision warrants a review by this court, certain silent issues in the lower court proceedings are worthy of note. Firstly the prosecution presented the initial affidavit by the investigating officer and which was dismissed by Hon Opanga forcing the prosecution to file a fresh one before Hon. Shikwe which was deliberated upon and the deponent cross-examined by defence counsel. Secondly it is noted that no Application had been formally lodged by the prosecution indicating to the defence that they intended to seek for the cancellation of bond so as for the accused to file their reply if any. Thirdly the oral Application was presented during a mention date and that none of the accused persons had an opportunity to respond to the averments in the affidavit of the investigating officer thereby leaving only the defence counsel to tackle the deponent without the benefit of a replying affidavit from any of the accused persons. Fourthly, there appears to exist some disputes between the accused persons and complainant and others within Masinga area over the control of sand harvesting, Environmental Management as well as natural resources management in the area. Fifthly, none of the other suspects still at large have been apprehended to date despite the fact the accused persons being in remand custody. Sixthly none of the accused persons has been charged with an offence of obstructing the police officers from executing their lawful duties yet one of the compelling reasons for cancellation of band was that the accused had prevented the police from effecting arrests on those still at large. Lastly it has been confirmed that the trial court has since reinstated bond to one of the accused persons herein and left out the rest thereby violating the rights of those in remand custody as guaranteed under Article 27 (1) and (2) of the Constitution.

Looking at the above issues and more particularly the fact that the accused persons had not been given an opportunity to respond in like manner to the affidavit of the investigating officers, I find that their constitutional rights had been infringed. Even if there had been some compelling reasons by the prosecution, the trial court would have noted the fact that the accused persons had been attending court as directed and therefore were to benefit from even some warning by the court to the effect that if they fail to adhere to the terms of the bond then they would be liable to have the bonds cancelled. It is further noted that the accused had been released on cash bails which ordinarily are different from those with a surety since the latter entails a surety being taken through a rigorous exercise and surety compelled to make certain undertakings before the court whereas those released on cash bails rarely make any undertakings since most times the payment is made elsewhere while the suspects are in custody or remand and only report to court during the next date required. In the circumstances I find that even though the Respondent presented some compelling reasons to the trial court, the said court did not exercise its discretion

judiciously thereby warranting this court to have the orders amenable for revision. Accordingly, I order and decree as follows:-

1. That the orders of the learned Magistrate made on the 23/02/2017 in Criminal case numbers 298 of 2016, 112 of 2017, 130 of 2017 and 259 of 2017 at Kithimani law courts and all the consequential orders are hereby set aside.

2. That each accused person in the aforementioned cases are granted a bond of Kshs.100,000/= plus one surety in like sum and further any cash bail earlier paid be refunded back to the depositors forthwith.

3. THAT upon release on bond, each accused is ordered not to interfere with prosecution witnesses and to attend court as and when required.

It is so ordered.

Dated, signed and delivered at Machakos this 10th day of April .2017.

D. K. KEMEI

JUDGE

In the presence of:-

Kyalo for Kago for Applicants.....

Machogu for Respondent.....

.C/A: Kituva.....