



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL REVISION NO.276 OF 2015**

**REPUBLIC.....APPLICANT**

**VERSUS**

**MOSES KURIA.....RESPONDENT**

**RULING**

The Respondent, Moses Kuria was charged before the trial magistrate's court with two (2) counts of **incitement to violence and disobedience of the law** contrary to **Section 96(a)** of the **Penal Code**. The Respondent pleaded not guilty to the charges. Although the prosecution objected to the Respondent's release on bail pending trial, the trial court, after considering the arguments made, released the Respondent on bail. The prosecution was aggrieved by the decision. They have moved to this court under **Section 362** of the **Criminal Procedure Code** seeking to have the decision revised. It is the contention of the prosecution that the trial court ought not to have released the Respondent on bail pending trial in view of the fact that the Respondent has another pending case over the same type of offence. The prosecution argued that since the Respondent appears to have a propensity for committing similar offences, it is in the public interest that the bond granted to the Respondent be cancelled and the Respondent be remanded in custody pending the hearing and determination of the criminal charges facing him. The prosecution was of the view that the utterances made by the Respondent were a threat to national security and public safety taking into consideration that campaigning for the forthcoming elections were about to commence. In essence, the prosecution was saying that, taking into consideration our recent past history where politicians made utterances that resulted in violence, the courts should take all necessary steps to protect the public from politicians who have such propensity of making such inciting utterances. It was in that regard that the prosecution is of the opinion that the trial court erred in releasing the Respondent on bail pending trial. It is the prosecution's case that the Respondent's past conduct constitutes compelling reason to deny him bail pending trial.

On his part, the Respondent filed a replying affidavit in opposition to the application. The Respondent further filed notice of preliminary objection to the application. In the notice, the Respondent contends that this court has no jurisdiction to hear the application on revision because the prosecution ought instead to have filed an appeal to this court. During the hearing of the application, the Respondent further argued that the prosecution had improperly approached this court by filing a notice of motion instead of moving the court by a letter. In response, the prosecution submitted that the court had jurisdiction to issue the orders sought in the application under **Section 362** of the **Criminal Procedure Code**. Having carefully considered the rival submission and argument made in that regard, this court is of the opinion that the issue as to whether this court has jurisdiction can be disposed with thus:

**Section 362** of the **Criminal Procedure Code** grants this court jurisdiction to “*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.*” The High Court has pronounced itself in regard to its jurisdiction under **Section 362** of the **Criminal Procedure Code**. This court may not refer specifically to the decisions in question but suffice for this court to state that the High Court has powers to examine any record of any criminal proceedings in a subordinate court with a view to rectifying any illegality or with a view to according justice to the parties. It will not matter how the High Court comes into knowledge of proceedings in question. The issue may be brought to the attention of the court by letter, by an application or even through the media. The High Court has jurisdiction to act appropriately even when such irregularity or illegality in the criminal proceedings of the subordinate court is brought to its attention orally, though this latter procedure is discouraged as the High Court is a court of record. The objection raised by the Respondent therefore lacks merit.

As regard the substance of the application, in his replying affidavit, the Respondent deponed that the prosecution had failed to raise compelling reasons to have the bond that was granted to him cancelled. The Respondent contends that the application was full of malicious falsehoods and material non-disclosure. It was the Respondent’s case that the prosecution was determined to have his bond cancelled yet he had never missed any court session nor has he breached the terms of his release on bail pending trial. For added measure, he stated that he was a Member of Parliament and was never a flight risk. He stated that the charges brought against him were based on mere allegations which he was ready to disapprove during his trial. He urged the court to dismiss the application.

During the hearing of the application, this court heard oral rival submission made by Mr. Maingi for the Prosecution and by Mr. Mungatana for the Respondent. It was clear from submission, that the issue for determination for this court is whether the trial court erred in releasing the Respondent on bail pending trial. The prosecution contended that the Respondent, while facing a similar charge to the one that he was subsequently charged with, went ahead and committed another similar offence. The prosecution argued that the likelihood that the Respondent will commit another similar offence while on bail was high and therefore, in the interest of public security, the Respondent should stay in custody pending the hearing and determination of the criminal charges facing him. On his part, the Respondent is of the view that there were no compelling reasons for this court to cancel the bond that was granted to him by the trial court.

This court has carefully evaluated the facts of this case. There are certain facts that are not disputed. It is not disputed that the Respondent is facing two (2) charges that are more or less of similar nature. The two cases, one brought against the Appellant in 2014 and the other in 2015 are yet to be heard. The Respondent is therefore presumed innocent until proven guilty by a court of law (see **Article 50(2)(a)** of the **Constitution**). **Article 49(1)(h)** of the **Constitution** grants the Respondent the right to be released on bond or bail, on reasonable conditions pending trial “*unless there are compelling reasons not to be released.*” From decided cases, courts have defined what constitutes compelling reasons. It is not important for this court to recite the said reasons. Suffice for this court to state that one of the reasons is where the court determines that the Accused is likely to commit another offence if he is released on bail pending trial.

It is the contention of the prosecution in this case that the Respondent is likely to commit a similar offence if he is released on bail pending trial. The prosecution urged this court to take cognizance of the fact that the nature of the charges facing the Respondent are such that if the court does not act decisively, there shall be a threat to the security of the people of Kenya. The prosecution is of the view that the Respondent’s utterances are a threat to peace and tranquility. In this court’s view, the argument put forward by the prosecution has merit to the extent that where it appears that an accused person has utter disregard to the law, then, it behooves the court to take appropriate action to protect members of the public from any threatened criminal activity. In the circumstances of this case, it is clear that the Respondent, being a public figure has the extra responsibility to choose the words that he utters in public. He has to be careful so that his utterances do not plant seeds of discord between members of the various communities that make this country.

This does not mean that the Respondent's right to freedom of expression as guaranteed by **Section 33** of the **Constitution** is being circumscribed. Far from it. As a public figure and a person of influence, the Respondent must weigh his words because whatever he says is bound or is likely to have an effect on the members of society. This is unlike similar words uttered by an ordinary citizen. This court agrees with the prosecution that the courts cannot ignore our recent history when considering the effect utterances of inciting nature are made by members of the political class. The sooner that members of the said class are made to realize that there will be consequences to whatever inciting utterances they make, the better. Members of that class should refrain from inciting members of public to violence or to disobedient of the law at the pain of severe sanction by the court. That does not imply that this court has already prejudged the Respondent. On the contrary, in considering whether or not to grant the Respondent bail pending trial, the court must take cognizance of the fact that the Respondent will not commit another offence while he is enjoying freedom pursuant to a bond granted by this court pending trial.

In the present application, the prosecution established that there were compelling reasons for the trial court to give the Respondent tougher bond terms in view of the fact that he was facing a similar charge to the other charge which was pending in court. In the premises therefore, this court upholds the bond terms granted to the Respondent by the trial court on 30<sup>th</sup> November 2015 save that the bond terms shall be varied as follows:

- I. The Respondent shall be released on bond of Kshs.10 million with one surety of the same amount or in the alternative cash bail of Kshs.3 million.
- II. The Respondent is granted seven (7) days to abide by the terms of the bond or in the alternative he shall be remanded in custody pending the hearing and determination of his case.
- III. Should the Respondent be charged with any other criminal offence of a similar nature, his bond shall be automatically cancelled. The right to be released on bond shall not be available to him.

It is so ordered.

**DATED AT NAIROBI THIS 9<sup>TH</sup> DAY OF FEBRUARY 2016**

**L. KIMARU**

**JUDGE**