



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL DIVISION
CRIMINAL REVISION NO. 232 OF 2016

REPUBLIC.....APPLICANT

VERSUS

NUSEIBA MOHAMMED HAJI OSMAN

alias UMMU FIDAA alias UMMULXARBRESPONDENT

RULING

Background

The prosecution approached this court by way of a Notice of Motion filed under a Certificate of Urgency on 17th June, 2016. The application was brought under **Articles 49(h)** and **24** of the Constitution and **Section 362** of the Criminal Procedure Code. The Applicant seeks revision of the decision by the **Chief Magistrate's Court, Milimani**, in **Cr. Case No. 835 of 2016** delivered on 17th June, 2016, when the Appellant was granted bond of Ksh. 5 million with two sureties. The application is supported by the Affidavit of Stella Kanyiri, prosecution counsel, sworn on 17th June, 2016. The prosecution also relies on the Affidavit sworn in Objection to Bail sworn by No. 85620 PC Peter Mugi on 6th June, 2016 and 9th June, 2016 in support of the application for denial of bail in the lower court's proceedings.

In the lower court proceedings, the Respondent is facing three offences under the Prevention of Terrorism Act, 2012 as follows: Count I: membership to a terrorist group, contrary to Section 24; count II: possession of articles connected with the commission of a terrorist act, contrary to Section 30 and count III: soliciting for the commission of a terrorist act contrary to Section 9(1).

The prosecution's application for the Respondent's denial of bail was dismissed by the trial court. The Respondent was released on bond in the following terms: 2 Kenyan sureties of KShs. 5 million each; deposit of her passport in court and reporting at the ATPU offices fortnightly.

Applicant's submissions

Mr. Okello, for the Applicant, submitted that the grant of bond terms was irregular and incorrect, for failing to consider the compelling reasons demonstrated by the prosecution through the Affidavit of Peter Mugi sworn on 16th June, 2016. He submitted that the accused faced serious charges that attract a maximum penalty of 30 years imprisonment, which was an incentive to abscond. Furthermore, there was

evidence to show that the Respondent was a flight risk, as shown by the fact that she had been arrested on 1st May, 2016 at Entebbe Airport as she was about to board a flight with Kenya Airways to Nairobi having bought a ticket for Entebbe – Nairobi and Nairobi – Kigali.

The court was urged to consider that investigations were incomplete, and that more charges were likely to be brought against the Respondent. Counsel urged the court to observe that with regard to Count III, there was evidence to show that the Respondent was in a social media group where terrorist attacks were being planned and that a member of that group had been arrested and she, the respondent, had been urging others to leave the group due to the arrest. This evidence, the prosecution submitted, could only be shared with the court in confidence so as not to compromise the investigations. **Section 3(8)** of the Prevention of Terrorism Act was cited in support.

The prosecution also cited the likelihood of interference with witnesses, since there were arrest warrants for two more persons who were at large. It further submitted that the prosecution had a good case, but could not submit on the strength of the case which was a matter for the trial court. Mr. Okello submitted that the police had in their possession equipment (smart phones and computer) which contained information touching on terrorism, connected with both ISIS and terrorists in Somalia. The prosecution maintained that there are serious security concerns involved, and that had the applicant not been arrested, something ominous would have occurred.

The trial court was faulted for failing to consider the need to balance individual rights vis-à-vis public rights. Counsel submitted that while bail is intended to secure the attendance to court of an accused person, in this case, high bond terms would not serve the purpose since the accused was well-resourced and could afford any terms that could be given. Furthermore, the case only had 7 witnesses and could thus be heard expeditiously. Several cases were cited: **Republic v Ahmad Abolafathi Mohammed & Another Cr. Revision No. 373 of 2012 (2013) eKLR**, **Republic v Joktan Mayende & Others Cr. Case No. 55 of 2009 (2012) eKLR**, **Republic v Paul Wainaina Boiyo & 6 Others Criminal Case No. 8 of 2014 (2014) eKLR**, **Phillip Kamau Wachira v Republic Cr. Case No. 46 of 2012 (2013) eKLR**.

Respondent's submissions

The application was opposed. The Respondent relied on her Replying Affidavit sworn on 6th June, 2016. On her behalf learned counsel, Mr. Kilukumi made oral submissions. He argued that **Section 362** of the Criminal Procedure Code, under which the court exercises revisionary jurisdiction, could not be invoked after an application had been dismissed. He added that in this case, an appeal ought to have been filed, since the provision was for purposes of supervising subordinate courts. He submitted that all the compelling reasons cited had been heard by the trial magistrate thus, the court cannot change the decision of the lower court, as decided in the case of **Republic v Baktash Akasha Abdalla alias Baktash Akasha & 3 Others Cr. Appeal No. 178 of 2014 (2015) eKLR**.

Mr Kilukumi in addition argued that, stiff conditions were imposed by the trial magistrate, including, an obligation to report to the ATPU officers, as well as very high bond terms; thus there was no irregularity in the orders of the learned magistrate. Counsel added that bail was given even in very serious offences attracting harsher penalties since an accused enjoyed the presumption of innocence. On the issue of the Respondent being a flight risk, the court was urged to observe that the ticket was in respect of the Respondent's travel from Entebbe to Nairobi and not from Entebbe to Nairobi and onwards to Kigali, thus, the ATPU officers had misrepresented facts before the courts. Referring to correspondence with KQ, it had been shown that the booking of Nairobi to Kigali was cancelled since the Respondent had never booked the flight. Mr. Kilukumi further submitted that the allegation concerning other associates ought not to be taken against the Appellant as a justification to deny the right to bail. The decision in the case of **Qwabe v Rex (NUL) [2004] SZHC 57** was cited in support. Furthermore, this argument was contrary to **Article 49** of the Constitution. The court was also directed to an **article by Kumar Rajendran** found at <https://www.academia.edu>. The Respondent urged the court to dismiss the application.

Mr. Okello, in rejoinder, maintained that the Applicant had properly cited **Section 362** of the Criminal Procedure Code, which the court could invoke on its own motion. He also submitted that the Respondent

was referring to the communication from Kenya Airways selectively, observing that the letter showed that the Respondent had a stop-over in Nairobi and that the ticket to Kigali was only voided due to arrest of the Respondent. Furthermore, the history of the booking showed that the final destination was Kigali. He urged the court to cancel the bail.

Determination.

The first issue raised regards the applicability of **Section 362** of the Criminal Procedure Code to this application. This section gives the High Court power 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.’***

This provision is buttressed by **Article 165(6)** and **(7)** of the Constitution, which provides:

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

Article 165 crystallizes the purpose of the revisionary jurisdiction of the High Court as in furtherance of its supervisory jurisdiction over the subordinate courts.

Section 362 restricts the application of the revisionary jurisdiction of the High Court. Further, **Section 364(5)** prohibits invocation of Section 362 in the following terms:

‘When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.’

It was argued on behalf of the Respondent that the Applicant ought to have moved the court by way of an appeal as opposed to a revision. It is clear that by virtue of Section 365, a revision is not available to a party who failed to exercise its right of appeal from a finding, sentence or order of the court, when that right is available. Taking this into consideration, should the Applicant in this case have filed an appeal against the order of the trial court granting bail and is as such locked out by Section 364(5)?

The scope of application under this provision was widely discussed in the case of **Abraham Wafula v Republic [2013] eKLR (Bungoma, HC Cr. Rev. No. 21 of 2013)** in the following words:

‘The Court in the case of BGM HCCR REVISION NO 27 OF 2013 MARTIN MARUTI KITUYI v REPUBLIC rendered itself accordingly on the Revision jurisdiction of the High Court in the following manner:

“[11] Under Article 50(2) (q) of the Constitution, Appeal and Revision are part of the right to fair trial in a criminal proceeding. Both are constitutional processes for enforcement of legal relief. Except, the court must consider an Appeal as a matter of right whilst Revision under Article 165 (6) and (7) of the Constitution is a matter for the discretion of the court. In the new constitutional structure, Revision is a constitutional relief only that sections 362 to 367 of the CPC are merely the statutory expression of, and the procedural prescriptions attending the remedy of Revision. Therefore, the very nature of Revision as a discretionary remedy explains the policy underpinnings of section 364 (5) of the CPC; that Revision should not be a substitute for an Appeal whatsoever or insisted upon by a party who has not filed an Appeal where one was provided for. Revision primarily serves to put right instances where a finding, sentence, order or

proceedings of a lower court are tainted by incorrectness, impropriety, illegality or irregularity. Those words are key pillars that define the Revision jurisdiction. Broadly put, whenever the integrity of any proceeding is put to question, the Revision jurisdiction of the High Court comes into play and may disturb the decision of the lower court purely in the best interest of justice.

[12] Having said that, section 364(5) of the CPC is not intended to preclude the High Court from considering the correctness of a finding, sentence or order merely because the facts of the matter have been brought to its notice by a party who has or had a right of Appeal which he did not utilize, and is not intended at all to derogate from the wide powers conferred by Article 165 (6) and (7) of the Constitution, and section 362 and section 364 of the CPC. This should explain what the word “insistence” in section 364 (5) entails. It should be understood that the Revision jurisdiction of the court can be set in motion by the court suo moto, even on information provided by the aggrieved party who had the right of Appeal but did not Appeal. On this explication of those sections see the cases of R v Ajit Singh [1957] E.A 822 and Walome v R [1981] KLR 497.

[13] The exercise or not of the discretion of the court should, therefore, depend on the circumstances of each case, and the nature of the things the court is being asked to probe and put right. Those which are clearly illegal as to constitute a breach of fundamental rights or freedoms guaranteed by the Constitution should ordinarily attract the exercise of Revision jurisdiction of the court unless they are matters which the court feels should be left for a claim for damages. But where the aggrieved party is proposing an Appeal from his pleadings, then the court should hesitate to exercise the discretion under Revision jurisdiction. In making this proposition, I am well aware of section 364 (1) (a) of the CPC which allows the High Court in a Revision cause to exercise the powers conferred on it as an Appellate Court in sections 354, 357 and 358 of the CPC. Except, it must be understood that those powers will only come to bear after the court is satisfied that the case is fit for the exercise of discretion under Revision jurisdiction. On that basis, there should be no room to read a contradiction in what I have said.”

In *R. v. Ajit Singh s/o Vir Singh* [1957] E.A. 822 it was observed as follows:-

‘In that case the Court clarified the situation in which the revision jurisdiction might be exercised even when the matter arising was one in which appeal lay (p.824 – Rudd, Ag. C.J.):

“We are of opinion that sub-s.(5) is not intended to preclude the Supreme Court from considering the correctness of a finding, sentence or order merely because the facts of the matter have been brought to its notice by a party who has or had a right of appeal. We do not think this sub-section is intended to derogate from the wide powers conferred by s.361 and s.363 (1). To hold that sub-s. (5) has that effect would mean that this court is powerless to disturb a finding, sentence or order which is manifestly incorrect...merely because the aggrieved party, who might well be an ignorant person, has not exercised a right of appeal but has asked for revision and thus brought the matter to the notice of the court. In our judgment the court can in its discretion, act suo motu (sic) even where the matter has been brought to its notice by an aggrieved party who had a right of appeal.’

This court has examined the proceedings of the lower court, and finds that the most appropriate avenue the Applicant should have taken was by way of appeal. That said, it is not in the interest of justice that the Applicant’s case be locked out due to this technicality. **Article 159(2)(d)** enjoins this court to exercise its judicial authority guided by among other principles that *justice shall be administered without undue regard to procedural technicalities.*

The next substantive question for determination is whether the trial court erred in releasing the Respondent upon executing the bond terms set out by the court. **Article 49(h)** gives every arrested person the right *‘to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.’* The onus lies with the prosecution to show that there are compelling reasons to deny the grant of bail.

It was argued that owing to the seriousness of the offences faced by the Respondent, she may abscond attending court; further, that she was a flight risk, as shown by the fact that she was arrested from Entebbe Airport, as she was about to board for Nairobi, then proceed to Kigali. The Applicant also relied on the incomplete investigations as a compelling reason to deny bail. It was also submitted that the Respondent was arrested with electronic devices, analysis of which had shown information concerning terrorism related activities. The prosecution also cited that there was evidence linking the Respondent to a social media group that was promoting terrorist activities. It was further cited that there was likely interference with witnesses since other accomplices of the Respondent were yet to be arrested.

The underlying consideration for the grant of bail is to secure the attendance of the accused in court when required. As stated in the case of ***Republic v Danson Mgunya & Another Cr. Case No. 26 of 2008 [2010] eKLR***

‘The main function of bail is to ensure the presence of the accused at the trial...Accordingly, this criteria is regarded as not only the omnibus one but also the most important. As a matter of law and fact, it is the mother of all the criteria enumerated above.’

Denial of bail is a limitation on a fundamental human right and freedom as per the guiding constitutional principles under **Article 24(1)** which provides that:

A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

It is not in question that the Respondent faces very serious offences. However, that alone is not compelling to justify denial of bail. The Constitution does not make an exception as to who may be granted bail. The Respondent currently enjoys a presumption of innocence until proved guilty or she admits to the charges against her.

It was challenged that the Respondent is a flight risk owing to the circumstances surrounding her arrest. From the Affidavit of the prosecution counsel and the investigating officer, it is clear that the Respondent was arrested in Uganda, at Entebbe International Airport, upon which she was handed over to the ATPU officers of Kenya. The Respondent, in her Replying Affidavit maintains that she was travelling to Nairobi after she learnt of her husband’s arrest. The Respondent relied on a copy of a letter from Kenya Airways dated 30th May, 2016, and addressed to one Bwire of ATPU which states that the ticket issued to her was a one-way ticket from Entebbe to Nairobi, issued on 1st May 2016. A copy of the ticket was also provided.

The Applicant submitted that the Respondent intended to travel to Kigali, with a stopover at Nairobi, a fact which she denied and on whose behalf it was submitted that no booking had been made to travel to Kigali. In a letter dated 8th June, 2016, in response to a request from the ATPU, Kenya Airways indicated that the ticket showed that the Respondent was booked to travel from Nairobi to Kigali with a stopover in Nairobi but that the Nairobi to Kigali sector was cancelled. The ticket was then validated and issued for

travel from Entebbe to Nairobi only. The ticket from Entebbe to Nairobi was voided by another agent after the Respondent was offloaded. At the time of her arrest, the Respondent was in possession of a ticket for Entebbe to Nairobi, and the Kigali route had already been cancelled. She could not therefore, have been *enroute* to Kigali through Nairobi as submitted by the Applicant.

The Applicant urged the court to consider the fact that investigations against the Respondent were incomplete and that there was a likelihood of interference were the Respondent to be released. Furthermore, it was urged to observe that the Respondent had been arrested with electronic devices which contained information on terrorism related activities being planned. The Respondent was also alleged to be a member of a social media group that promoted such activities and that her associates were still at large. The Applicant underlined that public security would be undermined if the Respondent is released. Mr. Okello submitted that the available evidence could be shared with the court in confidence so as not to jeopardize investigations, pursuant to **Section 3(8)** of the Prevention of Terrorism Act. This provision allows the court to among others receive and examine information in chambers but applies in an application challenging the decision of the Inspector General recommending the classification of an entity as a specified entity under the Act. This provision is therefore, not applicable in an application for denial of bail.

Section 123A of the Criminal Procedure Code gives further guidance on considerations to be made in determining whether or not bail should be granted, in the following terms:

‘(1) 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 and in particular—

(a) the nature or seriousness of the offence;

(b) the character, antecedents, associations and community ties of the accused person;

(c) the defendant's record in respect of the fulfillment of obligations under previous grants of bail; and;

(d) the strength of the evidence of his having committed the offence;

(2) A person who is arrested or charged with any offence shall be granted bail unless the court is satisfied that the person—

(a) has previously been granted bail and has failed to surrender to custody and that if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody;

(b) should be kept in custody for his own protection.’

A balancing act is required between the rights of the individual and public interest. The **Bail and Bond Policy Guidelines** recognize this principle under **para. 3(e)** at pp. 9-10, acknowledging that in certain instances: ***‘The interests of justice therefore demand the protection of the investigation and prosecution process against probable hindrance by accused persons. It is therefore important for police officers and judicial officers to appreciate that the public have an interest in the effective prosecution of offences.’*** The Guidelines proceed to provide that: ***‘it must therefore be demonstrated with convincing evidence that his or her release will present risks, and that such risks cannot be managed, even with the attachment of appropriate conditions’*** (Emphasis added).

Does the apprehension expressed by the Applicant meet this threshold? The Applicant is apprehensive that no amount of bail terms will secure the Respondent’s attendance in court. It has not been demonstrated that the Respondent is a flight risk. She holds a Kenyan passport. In the Affidavit of Stella Kanyiri, it was deponed that the Respondent was in the process of planning attacks with other associates.

The court was therefore, urged to look at the public interest risks associated with the Respondent release. Reaching such a balance as in this case, raises practical difficulties, since the court is, on the one hand being invited to consider the evidence in private to inform its decision on whether or not to grant bail. Conversely, the court must provide reasons for its decisions, in line with the right of an accused person to a fair trial. **Article 24(1)** cited above requires that a limitation of a right should meet certain demands, and thus, the need to have a decision supported by cogent reasons. This dilemma was echoed by the court in the case of ***Aboud Rogo Mohammed & Another v Republic (2011) eKLR***, where the court noted that if given an opportunity to examine evidence in private, the result could be the court withholding some of the reasons behind its decision, owing to the need to preserve confidentiality. It is in this respect that the court in this case proposed the need for the legislature to empower the court in such instances.

While consideration of the strength of the case is a factor to be considered, the court also has to be cautious against stepping into the realm of evidence when it has not been tabled before the trial court. This court is alive to the sacrosanct nature of the right to a fair trial, which is non-derogable. The law as it is does not provide instances for the court to consider the evidence while the accused person does not have the opportunity to challenge that evidence. Furthermore, at this stage, the Respondent enjoys the presumption of innocence. As expressed by the court in ***Republic vs Danson Mgunya & Another (Msa.) HC Cr. Case No. 26 of 2008***:

‘... the strength of the evidence which supports the charge ought not to apply in Kenya except where perhaps the application for bail is being made or renewed after the court has placed the accused on his defence. This is inconsistent with the principle that an accused is presumed innocent. Such criteria should be applied with great caution and only in exceptional circumstances like where there is statements that show that the accused was caught red-handed or where there is a lawfully admitted confession.’

In consideration of the above, it is my view that the Applicant has not demonstrated the need to revise the ruling of the learned magistrate. The said learned magistrate properly directed her mind that there were no compelling reasons that would necessitate the denial of bail/bond to the Respondent. Before me, no new matters have arisen that would warrant the denial of bail to the Respondent. I therefore, decline to allow the application. The Respondent shall be released on bond upon fulfilling the following terms as modified:

- a) 2 Kenyan sureties of Kshs. 5 million each who must be carefully examined by the trial court.
- b) The Respondent shall immediately deposit her passport with the trial court and shall not leave the country except with express permission of the trial court.
- c) The Respondent shall report to the ATPU and in particular to the investigating officer in this case twice a week, that is on Mondays and Fridays or as per the investigating officer’s directions. The details of this compliance shall be filed in the trial court on a monthly basis.

Should the appellant contravene any of these conditions, the bond shall be cancelled forthwith. It is so ordered.

DATED AND DELIVERED THIS 11TH DAY OF JULY, 2016.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. Miss Akuja for Okello for the Applicant.
2. Ibrahim holding brief for Kilukumi for the Respondent.

