



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

REVISION NO. 75 OF 2015

(From the original Conviction and Sentence in the Criminal Misc. No. 334/2014 (Consolidated with Misc. 337/2014) of the Chief Magistrate's Court at Mombasa: M. N. Gicheru - CM)

REPUBLIC.....APPELLANT

VERSUS

1. BAKTASH AKASHA ABDALLA
2. VIJAYGIRI ANANDGIRI GOSWAMI
3. GULLAM HUSSEIN
4. IBRAHIM AKASHA ABDALLA.....RESPONDENTS

REVISION RULING

1. The respondents herein were granted bail under section 123 of the Criminal Procedure Code, (Cap 75, Laws of Kenya) by this court pursuant to public hearing. The release of suspects or the respondents is however subject to approval of sureties under section 124 of the said code.
2. In his letter dated 11th January, 2015, the Assistant Director of Public Prosecutions, expressed shock and dismay that the process of release of the respondents was being undertaken as an administrative function whereas the process of approval of sureties is a judicial function which should be undertaken in the presence of counsel for the prosecution, the respondents and the judicial official. As such he called upon this court to exercise its supervisory jurisdiction pursuant to Article 165(6) of the Constitution of Kenya 2010, and section 362 of the Criminal Procedure Code, 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.
3. As earlier stated, the contention of the learned Assistant Director of Public Prosecutions is that approval of sureties for persons released on bail, is a judicial and not an administrative function. As an administrative function it may be done by the judicial officer alone. However as a judicial function it must be done, in the presence of counsel for the prosecution that is Director of Public Prosecutions or his representatives, counsel for the respondents or accused. In other words the proceedings must be those of the court. In this regard counsel relied on two similar decisions of the Court of Appeal but I will cite one only – **ROY RICHARD ELIREMA & ANOTHER VS. REPUBLIC (Criminal Appeal No. 67 of 2002)**, (the Elirema case), in which the court said *inter alia*:-

“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 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 Article 50 of the Constitution, 2010)

4. The approval of sureties is likewise a full judicial process, and it is incomplete without the participation of the public or private prosecutor. Counsel therefore urged the court to set aside and quash the decision of the subordinate court to approve a surety in the absence of prosecution counsel.
5. Mr. Ndungi, learned counsel for the respondents in a short response, conceded that it was desirable to let prosecution counsel be present or represented in the proceedings at which sureties for the accused are examined.
6. The basic tenet upon which approval of sureties by the court is premised is that **“the accused person will attend court at the time and place mentioned in the bond and shall continue to attend until otherwise directed by the court or police officer.** That is the essence of section 124 of the Criminal Procedure Code which says:-

“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 sureties, conditioned that the person shall attend court at the time and place mentioned in the bond and shall continue to attend until otherwise directed by the court or police officer.”

7. In light of the clear language of statute as to the sufficiency of the amount of bond, and the person or persons who execute the bond, the process is clearly a judicial and not an administrative function. Being such a judicial function, it is mandatory that it is exercised in the presence of both the prosecution and defence counsel.
8. In the circumstances, I hold the process of approving a surety for, and releasing one of the accused or suspect was irregular, and I set it aside.
9. I direct that the process of approval of sureties for the accused or suspects shall be carried out in open court before another senior judicial officer and in the presence of the prosecution and defence counsel.
10. These shall be orders accordingly.

Dated and Delivered at Mombasa this 12th day of February, 2015.

M. J. ANYARA EMUKULE

JUDGE

In the presence of:

Mr. Muteti, Ms. Gichuhi, Ms. Kahoro & Mr. Kiprop for State

Mr. Wadugi & Mr. Ndegwa for Accused

Mutisya Court Assistant