



**REPUBLIC OF KENYA**

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

**CRIMINAL (REVISION) CASE NO. 16 OF 2015**

REPUBLIC..... APPLICANT

*VERSUS*

JOSEPH MAINGI ISIKA..... RESPONDENT

**RULING**

This is the application dated 16/6/2015 seeking revision based on six grounds. The applicant argues that the court reviewed its orders denying the respondent bond terms based on mere allegations. On 12/5/15 the court heard an application for bail by the respondent which was denied on grounds that the prosecution had shown compelling reasons. In the application dated 16/6/2015 the respondent applied for bail which application was not opposed by the applicant. The court allowed the application which orders gave rise to this application.

The applicant argued that it was an afterthought on the part of the defence to seek review of the initial bond terms which had initially been set out by the court. Further that the magistrate failed to take into consideration the compelling reasons relied on by the prosecution in the earlier application. The magistrate was faulted for not following up on the orders regarding protection of the victim who still remain vulnerable with the presence of the respondent who is a habitual offender and may continue defiling young children.

It was argued that court should take note that under Article 53(1)(d) of the constitution children have a right to be protected from abuse and other forms of violence.

The counsel for the respondent Mr. Mogusu opposed the application by way of oral submissions. He argued the magistrate released the applicant on bail which was in the interest of justice. It was not an error on the part of the court to grant orders for bail. It was not relevant that the respondent faced more than one count of defilement. The prosecution had argued in the earlier application that the respondent had been charged with three different cases of defilement and that he would interfere with witnesses.

Mr. Mogusu further submitted that an application for revision under section 362 and 364 of the Criminal Procedure Code is for purposes of correcting an error or illegality on the court record. The applicant has not pointed to any error. The respondent has a constitutional right to bond. The court considered the objection raised by the prosecutor and upheld it in the application dated 12/5/2015.

The respondent applied for review later on grounds that the respondent was very sick in prison. The prosecutor did not object to the application. On interference with witnesses the magistrate ordered that the complainants be taken to a children's facility where they would stay pending hearing of the case. This direction was complied with and the children are now safe. This application was filed four months ago and the respondent has not done anything intended to harm or interfere with any of the witnesses.

The law applicable in matters of revision is Section 362 of the Criminal Procedure Code which provides:-

*“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”.*

The respondent argued that bail is a constitutional right for any arrested or accused person and that the magistrate was right in reviewing the bail application.

Section 49(1)(h) of the Constitution provides that the accused shall be released on bail, on reasonable conditions pending a charge in the trial, unless there are compelling reasons not to be released.

The magistrate in the application dated 12/5/2015, found that the prosecution had demonstrated compelling reasons for not releasing the respondent on bond. However, on 28/5/2015 the counsel for the respondent made an application for review of the orders made on 12/5/2015 on grounds that the respondent was seriously ill and requires specialized treatment which was not available at Embu Provincial Hospital. It was stated that he suffered from asthma and ulcers and was undergoing treatment at Embu PGH but his condition was not improving.

The prosecution CIP Lydia said she had no objection but asked the court to give her 10 minutes to consult with her colleagues. The matter was placed aside and mentioned a short while later when the prosecutor said that she had no objection considering that it was a medical issue.

The magistrate considered that there was no objection to the application and granted the orders sought. He ordered that the respondent be released on a bond of KShs.200,000/- with one surety of similar amount. In the same breath the magistrate considered that the victims who are minors were in need of care and protection. He therefore ordered that the Mbeere South District Children’s officer secures vacancies in a children’s facility within 7 days where the minors would be kept pending the hearing of the case.

During the hearing of this application the court was informed by the defence counsel that the minors have now been accorded protection. The applicant did not comment on this issue.

The application in issue in this case is the one argued in court on the 28/5/2015. This application was not opposed by the applicant even after consultation by the prosecutor with her seniors. The respondent had raised new issues concerning his health. Although the court should have inquired as to the treatment allegedly not available at Embu PGH, the prosecution did not oppose the application. The applicant had a duty to demand that medical records and other documents to support the application be produced in court to confirm the allegations raised, this chance was lost when the prosecution conceded to the application. It is therefore unexpected that the applicant having conceded to the application for bail has now filed a revision.

The magistrate acted within his discretion when he granted the orders on 28/5/2015. He went a step further to make an order for protection of the minors even though the prosecution did not apply for the orders. It was the duty of the prosecution to oppose the application if they still maintained the earlier position that they had compelling reasons which they failed to do.

Section 362 serves the purpose of correcting any illegality, impropriety of any finding, sentence or order as to the regularity of any proceedings of a subordinate court. In the application before me, the magistrate did not make any irregular, illegality or impropriety that calls for review.

I find no merit in this application and it is hereby dismissed.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 14TH DAY OF OCTOBER, 2015.**

**F. N. MUCHEMI**

**J U D G E**

**In the presence of:-**

**Ms. Matere for Applicant**

**Mr. Mugusu for Respondent**