REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL MISC. APPLI0CATION NO.2 OF 2014

FELITY SICHANGI NYONGESA…..APPLICANT

VRS

REPUBLIC ….RESPONDENT

RULING

1. Felity Sichangi Nyongesa, the Applicant herein is facing two criminal charges before the Principal Magistrate's Court, Sirisia. In the first Case, Cr. Case. No.445 of 2013, the Applicant was on 18/07/2013 charged with defilement of a girl contrary to Section 8 (1) as read with Section 8 (4) of the Sexual Offences Act No.3 of 2006. It was alleged that on the 8th July, 2013 at around 17.00 hrs within Bungoma County he intentionally and unlawfully defiled A M a girl aged 13 years. He was released on a bond of Kshs.100,000/=.
2. On 18th December, 2013, the Applicant was again charged in the same Court in Cr. Case No.869 of 2013 with a similar offence. It was alleged that on 3rd November, 2013 within Bungoma County, he once again defiled the very same A M a girl aged 14 years. At the time of taking the plea on 18/12/13, the prosecution objected to him being granted bond on the ground that the Applicant had previously been charged with a similar offence of allegedly defiling the same girl. That Court denied the Applicant bond on the ground that the reasons given by the prosecution was compelling. The Court however, reserved for the Applicant a right to apply for the review of the order denying him bond.
3. On 2nd January, 2014, when the matter came up for mention before the trial court, M/s Wakoli, Learned Counsel for the Applicant applied for the review of the order of 18/12/13 that had denied the Applicant bond. She pointed out to the Court the fact that the prosecution had misled the Court on 18/12/2013 that the Applicant was a habitual offender. The prosecution objected to the application and noted that its objection of the 18/12/2013 was supported by an Affidavit of P. C. Onyando.
4. By a short ruling delivered on 09/01/14, the trial court held that it did not have jurisdiction to review the order of the Court that had taken the plea and declined to make any finding on the application by Ms. Wakoli. The Court directed the Applicant to seek redress before this Court.
5. On 20/01/14, the Applicant took out a Motion on Notice under Section 123 (3) of the Criminal Procedure Code ("the C.P.C") and Articles 49 (1) (h), 50 (2) (a) and 159 (2) (a) and (d) of the Constitution of Kenya seeking that the order of 18/12/2013 be reviewed and set aside and that the Applicant be admitted to bond pending the hearing of Cr. Case No.869 of 2013. The grounds for the application were set out in the body of the motion and the Supporting and Further Affidavits of Daisy Nabalayo Wakoli sworn on 15/01/14 and 05/02/14, respectively. These grounds were that

the Applicant had in both cases pleaded not guilty, whilst he had been granted bond in Cr. Case No.445/2013, he was however denied bond in Cr. Case No.869/2013 on the grounds that he was a habitual offender, that the trial Court had declined to make a finding on his application for review made on 02/01/2014 and referred the issue to this Court and that the Respondent would not suffer any prejudice if the Applicant was released on bond. Ms Wakoli rehearsed these grounds in her submissions and cited the Case of **Job Kenyanya Musoni -vs- R. [2012] KLR** in support of those submissions. The urged the Court to allow the application.

6. The State opposed the application vide a Replying Affidavit of No.72208 P. C. Walter Onyando sworn on 04/02/14. Mr. Onyando swore that he was the Investigations Officer in both Sirisia Cr. Case Nos.445 and 869 of 2013, respectively, that he had taken statements of witnesses in both cases, that on 13/09/2013 when the Complainant testified in Cr. Case No.445/2013, she recanted her statement and denied having been defiled by the Applicant, that on investigation, the complainant confirmed that she had been promised money by the complainant to recant her said statement, that it is on the strength of that confirmation that he swore the Affidavit opposing bond on 18/12/2014.
7. Mr. Kibellion, Learned Counsel for the State submitted that the Application was bad in law and an abuse of the Court process as the Court had not been properly moved, that there can not be review if the redress for the order sought to be reviewed was an appeal, that Article 159 of the Constitution was not applicable as this was not a technical but a matter of substance. Counsel further submitted that the right to bond under Article 49 was not absolute, that if the Court finds compelling reasons it can deny bond, that there were compelling reasons in this case since the Applicant had interfered with the prosecution witnesses. That the interference was by way of money and a promise to marry. He cited the Case of **R -vs- Jackton Mayende & 3 Others Bungoma H C Cr. No.55 of 2009. (UR)** in support of that proposition Counsel therefore urged that the application be declined.
8. In a rejoinder, MS Wakoli submitted that the issue of witness interference was an afterthought. That on both the 18/12/13 and 02/01/14, when the issue of bond was agitated in the Court, that issue was never raised. That the statement of the complainant made on 29/01/14 and relied on by the State before the Court was made after the filing of the current application and was tailor made to fit the objection to the application. Counsel distinguished the Case of **R -vs- Mayende (Supra)** on the ground that in that case, there were testimonies to establish the compelling reasons, whilst in the current case, the State was relying on witness statements that had not been tested. Counsel further submitted that since there was an error on the face of the record, the Court had been properly moved. She noted that in the Case of **Job Kenyanya Musoni -vs- R (Supra),** the Court was moved the same way.
9. I have considered the affidavits on record, the submissions of Learned Counsel and the authorities relied on. In the Case of **Republic -vs- Danson Mgunya & Anor [2010] eKLR,** Ibrahim J (as he then was) was emphatic that:-

> ***"Liberty is precious and no one's liberty should be denied without lawful reasons and in accordance with the law. Liberty should not be taken for granted …..... " (Emphasis added).***

It is for this reason that Article 49 (h) of the Constitution is very categorical that the right to bond can only be denied for compelling reasons. In this regard, I agree with the holding in **R -vs- Jackton Mayende** that interference of prosecution witnesses is a compelling reason under Article 49 (h) to warrant denial of bond. In that case, the Court delivered itself thus:-

> ***"Where there is evidence that a person is accosted, physically or otherwise, by an accused person in the Case where a person is a witness, it suffices to prove that the accused did act(s) tending or intended to interfere with a witness. The Court is then entitled, if not bound to infer that the intention of the accused in accosting the witness had been to dissuasive the witness from giving evidence."***

I will add that interference with witnesses is not only where there is threat of physical injury, any other improper approaches that are meant to dissuade the witness from giving his testimony or

make him give skewed testimony in the subject trial is interference. Indeed such interference is a criminal offence under Section 117 of the Penal Code. It is a gross interference with the cause of justice and should be reason enough to deny an accused bail.

10. I propose to first deal with the issue of jurisdiction raised by Mr. Kibellion. Learned Counsel submitted that the Court's jurisdiction had been wrongly invoked. That a review cannot lie where a right of appeal exists as the orders sought cannot be granted in a miscellaneous application but in a substantive appeal. Ms Wakoli was of the contrary view. She submitted that there was an error apparent on the record and that in any event, the Court in **the Job Kenyanya Musoni -vs- Republic (Supra)** had been moved in the same way.

11. I have looked at the **Job Kenyanya's Case.** Whilst it would seem that the Court in that Case was moved in the same manner as the Applicant has done in this Case, that issue was never raised and the Court made no finding on it. That Case is therefore of no relevance. The proviso to Section 357 (1) of the CPC bars the making of any application for bail to the High Court once a Subordinate Court has declined one. It only allows for an appeal. The proviso reads:-

> ***"Provided that, where an application for bail is made to the subordinate Court and is refused by that court, no further application shall lie to the High Court, but the person so refused bail by a Subordinate Court may appeal to the High Court..... "***

Then Section 364 (5) of the C.P.C provides:-

> ***"(5) 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." (Emphasis supplied).***

12. In my view, the rationale behind these provisions are to bar the High Court from substituting the discretion of the Subordinate Court with its own. The party must convince the High Court in a proper appeal that the Subordinate Court was wrong in declining to grant bail or in making the finding complained of. In this regard, I agree with the submission of Mr. Kibellion that the jurisdiction of this Court on revision is very limited . This is not a technical matter but it goes to substance.

13. It is not disputed that on 18/12/13, the Subordinate Court refused the Applicant bail. It is also not disputed that the application before me is expressed to be for review of the order of 18/12/2013 that refused the Applicant bail. If that was all, the application would have been for dismissal without considering its merit. I think that it was a grave misconception for the Applicant to seek the review the order of 18/12/2013.

14. Be that as it may, the question that arises is whether once a grave error has been pointed out that on 02/01/14 the trial Court entertained the Applicant's application for review of the order of 18/12/2013, but declined to make a decision on it but, yet that right had been expressly reserved by the plea court on 18/12/13. The record shows that, on 18/12/13, the Court that took the plea observed that:-

> ***"I am of the view that the reasons given by the prosecution are compelling enough and as such the accused is denied bond. ..... However, the accused may make an application for reviewing the order denying him bond. Hearing on 29/1/2014 in court 2."***

To my mind, this meant that the Court granted the Applicant the opportunity of revisiting the issue of bond still in the Surbordinate Court by way of review. This is what the Applicant sought to do on 2/1/2014 before the trial Court.

15. In this regard, the Court having conclusively barred the Applicant from revisiting the issue of bond, it was a serious error for the trial Court to decline to rule on the issue of bond when the

Applicant seized the opportunity on 02/01/2014. If the trial court felt that it could not review the order of 18/12/13, it should have referred the same to the Court that had made the order of 18/12/2013 instead of entertaining the application, decline to make a decision thereon and refer the Applicant to the High Court. It is for this reason that I hold that, the strict application of the proviso to Section 357 (1) and Section 364 (5) that revision does not lie would cause a great injustice to the Applicant. Accordingly, I will invoke the supervisory powers of this Court under Article 165 (6) of the Constitution and re-consider the Applicant's application for bond.

16. In the lower court, the Applicant was denied bond on the basis that he was a habitual offender. I have no doubt that, where it is proved to the satisfaction of the Court that an accused is a habitual offender, that may be a compelling reason to deny him bond. In the instant case, what the accused was facing were two cases, in which he had pleaded not guilty. Cr. Case No.445 of 2013 which was the basis of the objection was still pending. To my mind, that was not sufficient compelling reason to deny the Applicant bond. The accused, is presumed innocent until proved guilty. Until the case is proved against him, the matter remains to be mere allegations.

17. However, before me, the state opposed the application on the ground that the accused would interfere with its witnesses. The State relied on the statements recorded by the complainant on 16/07/13 and 29/01/14, respectively. In the statement of 16/07/13, the complainant informed the police that the Applicant had defiled her. P. C. Onyando swore that in her testimony of 23rd September, 2013 she recanted that statement. In paragraph 9 of his Replying Affidavit, he stated that on investigation, the complainant had confirmed that she had been promised money by the complainant to recant her statement in Cr. Case No.445 of 2013. Mr.Kibellion submitted that there was interference of the witness by way of promise of money and marriage. To Ms. Wakoli however, the issue of interference with witnesses was an afterthought as it had not been raised in the lower Court.

18. It may be true that the issue of interference of witnesses was an afterthought by the state because, the record shows that on 18/12/13 the prosecutor neither raised it nor referred to the Affidavit of P. C. Onyando of 18/12/13 . However, since the matter has been raised, it is incumbent upon this Court to consider it.

19. As already stated, interference with witnesses is a compelling reason to deny an accused bond under Article 49 (h) of the Constitution. In this Case, is there prove of interference of witnesses by the Applicant? In paragraph 9 of the Replying Affidavit, P. C. Onyando swore that:-

> ***"9. THAT On investigation, the complainant confirmed that she was promised money by the accused to recant her statement in Case No.445 of 2013 (Annexed and marked "Wo4" is a copy of the complainant statement outlining the position).***

He then produced the complainant's statement dated 29/01/14.

20. At paragraphs 3 and 4 of that statement, the complainant stated:-

> ***"On the month of August, 2013 I was approached by one Rodgers Sichangi while I was from school during lunch break. The said Rodgers Sichangi had then persuaded me not to testify against his brother. He told me that I should deny having known my boy friend FELITY NYONGESA and he would give me money. Later I met mama Maurice Pepela who also told me to deny ever knowing my boy friend Felity Nyongesa and that he did not defile me.***
>
> ***On the 23rd September, 2013 as I had been told by Rodgers Sichangi and mama Maurice Pepela, I did deny ever knowing the accused who was my boyfriend. I also did deny that the accused had played/had sex with me. This did not please my parents however I did so because Rodgers Sichangi had promised to give me***

money. ***However, today I have not been given the money." (Underlining mine)***

21. It is very clear from the foregoing that, the people whom the complainant accused of interference are one Rodgers Sichangi and mama Maurice Pepela. The complainant did not accuse the Applicant of interference nor suggest that the two were acting at his behest. Neither did P. C. Onyando clarify that upon receiving the allegation of interference he carried any investigations to confirm the same and that such investigations had implicated the Applicant. That being the case, the statement in paragraph 9 of Onyando's Replying Affidavit is factually incorrect. Nowhere in her statement of 29/01/2014, did the complainant state that she had been promised money by the complainant. My view is, where liberty of a person is at stake, there can be no room for speculation or negative inferences without proper and adequate basis. In this case, the fact that the alleged acts of one Rodgers and mama Maurice were for the benefit of the accused, it can not be inferred that those persons were doing so at the behest, consent or even knowledge of the accused. I see no evidence of interference of witnesses by promise of money.

22. Mr. Kibellion referred the Court to the statement of the complainant recorded on 4th November, 2013 which was produced in the Further Affidavit of Ms.Wakoli and submitted that there was evidence of interference by promise of marriage. I will refrain from making any comment on that statement as the trial in the lower court is yet to take place. But suffice it to state that in the Affidavit of P. C. Onyando of 04/02/14, the allegation of interference was that of money and that he had made a decision to rely on and produce the statement of 29/01/14 only and not the one of 04/11/2013.

23. To my mind therefore, I see no sufficient evidence of interference of witnesses or threat of such interference by the accused. There is no compelling reason to deny the Applicant bond.

24. Accordingly, I will allow the application, the order of 18/12/13 in Cr. Case No.869/2013 is hereby reviewed and set aside. The Applicant is admitted to bond of Kshs.200,000/= with a surety of a similar amount.

Dated and Delivered at Bungoma this 10th day of March, 2014.

A. MABEYA

JUDGE