Miriti v Republic (Criminal Revision E006 of 2023)
[2024] KEHC 3381 (KLR) (22 March 2024) (Ruling)

Neutral citation: [2024] KEHC 3381 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL REVISION E006 OF 2023

JRA WANANDA, J

MARCH 22, 2024

BETWEEN

PIUS MUGENDI MIRITI ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The Applicant was charged in Eldoret Chief Magistrate's' Criminal Case No. 222 of 2019 with the offence of defilement of a 16 years old minor. The Prosecution called 3 witnesses and upon close of the Prosecution case, the Court found that the Applicant had a case to answer and put him on his defence.

2. Before the defence hearing could take off, the Applicant moved to this Court requesting it to invoke its supervisory powers of Revision under Article 165(6) and (7) of *the Constitution* and Section 362 of the Criminal Procedure Code and direct that the trial begins de novo and that all the witnesses be recalled to testify.

3. The Applicant has approached this Court vide the undated Notice of Motion filed on 3/02/2023. He claims that his rights to a fair trial as enshrined under Article 50 of *the Constitution* have been violated because the trial Court denied his request for recall of the witnesses. He claims that the purpose of recalling of the witnesses was to conduct further cross-examination because of new "unsworn" evidence brought by the witnesses.

4. The Application first came before me on 12/07/2023. To enable me appreciate the Applicant's complaints, I called for the trial Court file and stayed the trial before the lower Court. The file was duly forwarded vide the letter dated 23/10/2023 and I have now scrutinized it. On 24/01/2024 when the matter came up in Court, I granted the Prosecution 7 days to file its response and also gave the parties liberty to file written Submissions.

5. The Applicant's Submissions filed on 15/01/2024 is on record. In the Submissions, he submitted that he was supplied with the statements of the witnesses but he misplaced them, that when he requested to be supplied with another set, he was not so supplied in good time and that the same were only given to him during the hearing, that when he requested for an adjournment, the request was denied and he was forced to proceed with the trial, that he was also unwell and as a result, he was unable to prepare and cross-examine the witnesses on critical and important questions, and that he was a pro se litigant but now has representation.

6. The Applicant, in his Submissions, also pleaded with this Court to grant him bail of Kshs. 20,000/- as he is from an impoverished background and he had been in custody for the last 18 months with no visits from his relatives from Meru, that he also needs to continue with his studies in college, that he had been given bail by the trial Court but the same was later withdrawn, that his absence from Court was due to the lockdown and movement restrictions that were imposed during the Covidpandemic when he was in Meru, that he availed himself before Court in January 2021 when the restrictions were eased up and he was given a hearing date, that however on his way from Court, he was arrested in Nairobi for allegedly breaching the Covidcurfew restrictions on one night and was quarantined for a fortnight, that it is because of these reasons that he was unable to attend Court, and that he has raised the issue of cash bail before the trial Court on several occasions but he has not received any help. He denied that he was arrested and brought to Court for absconding.

7. On 14/02/2024 when the matter again came up before me, in opposing the Application, Learned State Counsel appearing for the State, Ms. Limo, opted to respond orally. She then submitted that the Applicant's allegations were untrue as he was given sufficient time to prepare, that plea was taken on 20/09/2019, hearing set for 30/09/2019 and the Applicant given bond. Counsel submitted further that on the hearing date, the witnesses were absent and the matter was stood over to 30/12/2019, that the 1st witness testified on that date and was cross-examined by the Applicant, that the Applicant confirmed that he had been supplied with the witness statements but is now claiming that he had misplaced the same, that this alleged misplacement was not any time brought to the attention of the trial Court. Counsel urged further that subsequently, the Applicant's bond was cancelled when he failed to attend Court and Warrants were issued for his arrest, that the Surety also failed to attend Court until the Court threatened to forfeit the security, and that the Applicant was later arrested and brought to Court with the assistance of the Surety after he disappeared for 2 years. In conclusion, Counsel reiterated that 3 witnesses testified and the Applicant was granted an opportunity to cross examine all of them. She submitted that the Application was brought in bad faith and urged the Court to dismiss it.

8. When given the opportunity to respond, the Applicant opted to rely on his written Submissions.

Determination

9. The jurisdiction of the High Court with regard to the powers of Revision is supervisory and is provided under *the Constitution* in Article 165 (6) and (7) in the following terms:

> "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."

10. Section 362 of the Criminal Procedure Code, then provides as follows:

> " Revision
>
> 362. Power of High Court to call for records
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> 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."

11. The operative phrase in considering Applications for revision is therefore "correctness, legality or propriety" of any finding, sentence or order made by the lower Court.

12. The purpose and nature of the revisionary jurisdiction of the High Court was examined by Odunga J (as he then was) in the case of Joseph Nduvi Mbuvi vs Republic [2019] eKLR in which he observed as follows:

> " In my considered view, the object of the revisional jurisdiction of the High Court is to enable the high Court in appropriate cases, whether during the pendency of the proceedings in the subordinate court or at the conclusion of the proceedings to correct manifest irregularities or illegalities and give appropriate directions on the manner in which the trial, if still ongoing, should be proceeded with. In other words, the High Court's revisionary jurisdiction includes ensuring that where the proceeding in the lower court has been legally derailed, necessary directions are given to bring the same back on track so that the trial proceeds towards its intended destination without hitches. Not only is the jurisdiction exercisable where the subordinate court has made a finding, sentence or order but goes on to state that it is also exercisable to determine the regularity of any proceedings of any such subordinate court as well."

13. The issue that arises for determination in this matter is therefore "whether this Court should exercise its revisionary jurisdiction and direct the trial Court to recall witnesses for cross-examination, and also reinstate the bail/bond cancelled by the trial Court".

i. Whether the Prosecution case should be re-opened

14. The Applicant concedes that he did cross-examine all the 3 Prosecution witnesses but now seeks to cross-examine them afresh on the alleged ground that he was not given sufficient time to prepare the cross-examination. However, from my scrutiny of the proceedings, I cannot find any evidence that he was not given sufficient opportunity to cross-examine. The Applicant also concedes that he was supplied with the Prosecution's witnesses' statements but claims that he misplaced the same. He claims that he requested to be supplied with a replacement set and that even though the replacement was made, the same was done very late and only on the same date of the trial thus denying him sufficient time to prepare. He claims that his request for an adjournment to enable him prepare was denied. Contrary to the allegations however, nowhere does the record reflect that at any no point during the trial did the Applicant raise any complaint that he misplaced the witness statements or that he was denied an adjournment. This is despite the fact that, due to the Applicant's absconding from Court, the trial spanned a period of about 4 years - 2019 to 2023.

15. n respect to instances where accused persons are given the opportunity to cross-examine but fail to take advantage thereof, the Court of Appeal, in the case of Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998, held that:

> " Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilized, then the only point on which the party not utilizing the opportunity can be heard is why he did not utilize it."

16. In view of the foregoing, it is my considered view that this ground of insufficient time to cross-examine is an afterthought and an attempt to delay the trial. For this reason, I decline to grant any orders to re-open the prosecution case or direct for recall of the witnesses.

ii. Whether the Court should re-instate bail/bond

17. It is not in contention that bail is a constitutional right. However, it is also not in dispute that bail can be denied where there are compelling reasons for such denial.

18. My scrutiny of the trial Court file reveals that upon taking plea on 20/09/2019 and pleading not guilty, the Applicant was granted bond of Kshs 100,000/- with 1 surety of a similar amount. After the 1st witness testified on 30/12/2019, the matter was then fixed for further hearing for 29/04/2020. However, on that date, the Applicant did not turn up in Court and did not also turn up on 29/09/2020, 30/10/2020 and 12/12/2020. Warrants of Arrest against him was issued. The Applicant eventually showed up in Court on 27/01/2021. He claimed to have been unwell and the Warrant was lifted. The resumption of the hearing was then fixed for 24/03/2021. However, on 24/03/2021, the Applicant again failed to attend Court and a second Warrant of Arrest was issued. He also did not attend Court on 28/04/2021, 1/09/2021, 6/12/2021, 17/12/2021 and on 15/02/2022. He was eventually availed in Court on 14/07/2022 with the assistance of his Surety. The Surety then successfully applied to withdraw as such. In the circumstances, the Court cancelled the bond and the Applicant was taken back to custody.

19. On the issue of reinstatement of bond/bail in respect to an accused person who has previously absconded Court, I am in full agreement with the decision of Musyoka J in the case of Republic v Violet Khanali [2021] eKLR where he found as follows:

> " 6. I have reviewed various decisions, where the High Court has had to consider reinstatement of cancelled bond. That is to say Japhet Ochieng vs. Republic [2015] eKLR (Mwita J), Josphat Wambua Kitonga & 2 others vs. State [2017] eKLR (D. Kemei J), Elizabeth Achieng Abongo vs. Republic [2021] eKLR (Aburili J), Samuel Muthaura vs. Republic [2020] eKLR (Gikonyo J), Republic vs. Maureen Wanjiru Gakuro [2018] eKLR (Lesiit J) and Jonathan Batita & another vs. Republic [2017] eKLR (Kimaru J). With respect to reinstatement of bond for absconding, the courts are uncompromising and unforgiving.

7. The factors to consider when reinstating bond terms for absconding, include, the nature of the offence, the number of times the accused person has absconded, the reasons given for absconding, the character of the accused, and the stage of the trial.

8. In Samuel Muthaura vs. Republic [2020] eKLR (Gikonyo J), the accused absconded for 2 months and attended court only after he was apprehended by the police. The court held that denying his bond, by way of not reinstating it, was justifiable as absconding was a compelling reason, as his attendance of court in future was not guaranteed. In Jonathan Batita & another vs. Republic [2017] eKLR (Kimaru J), the accused persons absconded court for an undisclosed period of time. When they were apprehended, on warrants of arrest, they argued that they had been unwell, and suffered from ailments which could not be treated while in prison. The court was not persuaded, as the accused persons were not able to explain why they did not attend court once their health improved. The court was also not convinced that the ailments could not be treated in prison. The plea for reinstatement was rejected, on grounds that there was no guarantee that the accused would not abscond in future, and their past conduct precluded the court from exercising discretion in their favour.

9. It was stated in Republic vs. Danson Mgunya & Another [2010] eKLR (Ibrahim J), that the primary criterion for grant of bond/bail is the availability of the accused to stand trial. All the other reasons or grounds flow from it. The nature and gravity of the offence is one of them, the more serious the offence the greater the incentive to jump bail. I agree totally with Republic vs. Danson Mgunya & Another [2010] eKLR (Ibrahim J), bond/bail is given on the undertaking that the accused person would attend court. That is the principal condition upon which the bond/bail is granted. It is at the core of the matter. Once that undertaking is broken or breached, then the foundation for bail/bond is destroyed. Bond/bail is founded on trust, that the accused will keep his word, and attend court as and when required, in accordance with the bond terms. Once that trust is broken or lost, there cannot be a basis for reinstatement of the bond.

10. In the instant case, the accused person faces a murder charge. She absconded for 5 years, the last court appearance having been in 2015. Four witnesses had testified as at that date. Her explanation is that she has been attending court, but her file was never called out on all the occasions she was in court. The record reflects that the matter came up 50 times, and all those occasions the warrant for her arrest was renewed. It would be inconceivable that on those 50 occasions the matter was never called out in open court. Furthermore, in some instances her advocates attended court, and they never saw her. If she attended court as alleged, it behoved her to approach the court registry and explain her predicament. That explanation flies in the face when looked at as against the reasons given in her application, that she had no reason for absconding, and that she was merely misguided. She cannot be trusted to attend court in future, should her bond be reinstated. To borrow the words in Samuel Muthaura vs.

Republic [2020] eKLR (Gikonyo J), her absconding for 5 years is a compelling reason to deny her reinstatement of bond."

20. Clearly therefore, the Applicant's act of absconding was a serious display of disobedience and disregard to Court orders. In the absence of convincing explanation for his prolonged absence, the trial Court was within its rights to cancel the bond and remand the Applicant back to custody.

21. It should also be always recalled that the reversionary power of the High Court is not meant to be invoked to micro-manage the subordinate Courts. In respect to this caution, in the same case of Joseph Nduvi Mbuvi vs Republic (supra), Odunga J stated further as follows:

> " 14. It is, however my view that the jurisdiction should not be invoked so as to micro-manage the Lower Courts in the conduct and management of their proceedings for the simple reason that if every ruling of the Lower Court and which went against a party were to be subjected to the revisionary jurisdiction of the Court, floodgates would be opened and the Court would be inundated with such applications thus making it practically impossible for the Lower Courts to proceed with any case to its logical conclusion. ....."

22. For the said reasons, I decline to interfere with the trial Court's decision in cancelling bond.

Final Orders

23. In the premises, the Application fails and is dismissed. The lower Court file is hereby directed to forthwith be returned to the lower Court for resumption of the trial.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 22ND DAY OF MARCH 2024

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WANANDA J.R. ANURO

JUDGE