



**Ngatia v Republic; Ngatia & another (Interested Parties) (Miscellaneous Criminal Application E414 of 2023) [2024] KEHC 3004 (KLR) (Crim) (19 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3004 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
MISCELLANEOUS CRIMINAL APPLICATION E414 OF 2023  
LN MUTENDE, J  
MARCH 19, 2024**

**BETWEEN**

**DAVID IRURA NGATIA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**AND**

**KARUGA NGATIA ..... INTERESTED PARTY**

**JIMMY MUIRURI NGARUA ..... INTERESTED PARTY**

**RULING**

1. David Irura Ngatia, the Applicant, is charged in Makadara Chief Magistrates Court Criminal Case No. E 6424 of 2023 with the offence of Malicious Damage to Property contrary to section 339(1) and Assault causing actual bodily harm contrary to Section 251 of the *Penal Code*.
2. The Interested Parties (IP) herein are the complainants in Count 1 and 3 in the stated matter. The applicant allegedly damaged a car registration number KBX 288B Subaru and CCTV camera belonging to the 1<sup>st</sup> IP and allegedly assaulted the 2<sup>nd</sup> IP at Queen of Apostle Kasarani on 27<sup>th</sup> July, 2023 and 3<sup>rd</sup> September, 2023, respectively.
3. The applicant has moved this court in its revisional jurisdiction through an application dated 31<sup>st</sup> October, 2023 seeking review, variation or setting aside the conditions of bail granted by the lower court. The application is premised on grounds that: An arrested person has the right to be released on bail and reasonable conditions pending trial; bail should be reasonable and not punitive; and, that bail terms were altered in his absence and without affording him a chance to be heard. That he had



- complied with initial terms including impugned conditions requiring him to find other premises other than his permanent abode within seven (7) days.
4. The application is supported by an affidavit deposed by the applicant where he deposes that the complainants who are his brother, neighbor and tenant of his late father's estate opposed his release on bond but the court pronounced itself that he was not a flight risk. The court also found that he has a fixed abode with a stable family. That he paid cash bail of Ksh 50,000/= and has been released.
  5. That the court was reconvened and, in his absence, directed that he finds an alternative premises to reside in, other than his fixed family abode.
  6. That the requirement that he finds an alternative premises is punitive and causes unbearable psychological and physical stress to him and his family. That he has a child who is sitting for National examination on 30<sup>th</sup> October, 2023 and disruption will negatively impact him.
  7. That: he is a retired army officer and he cannot afford a secondary abode; has lived in the place for 25 years and moving house is unaffordable and a threat to the wellbeing of his family; His residence is independent from complainants' and his presence has no impact on the safety of complainants; and, that the complainants intend to influence an ongoing succession dispute between him and his brothers.
  8. The application is opposed by the respondent through a replying affidavit sworn by the Investigating Officer, No. 48251 Corporal Paul Kivuva, who deposes that he is aware of the court order restricting the applicant from interfering with witnesses. Regarding the question of review of orders granted, he avers that he should have been consulted on any decision relating to the applicant's whereabouts, and, that the court must exercise discretion following the pre-bail report.
  9. The 1<sup>st</sup> IP filed a replying affidavit where he deposes that the applicant, his neighbour at Kasarani and a retired military officer of Kenya Defence Forces is a holder of a firearm. That he is frequently seen to be careless and gives the fire arm to his minor son.
  10. That the applicant was captured on the CCTV footage damaging his car by smearing unknown substance thereon, and, that he also destroyed the CCTV camera at this home a matter reported to the police.
  11. That the applicant has assaulted his relatives and caused unrest in the neighborhood and, he continues to intimidate the neighbours, his mother and extended family whose lives have been threatened.
  12. That the applicant has also made it difficult for them to access homes, he obstructs the main gate and entry points and has threatened to evict them. That he currently lives near the gate where he kicks the gate and hurls insults, chases away employees and the gateman as well.
  13. That the applicant also visited the Digital Central Registry and alleged before the in-charge that the IP's wife tampered with data records, facts which are untrue. The applicant also alleged that they were investigating dealings with LR No. 4984 which is also subject to Succession Cause No 305 of 2022, Estate of John Motungu Ngatia.
  14. The 1<sup>st</sup> IP further contends that if orders sought are granted the applicant is likely to interfere with the witnesses who are his mother and the applicant extended family, and, also likely to grievously injure another person.
  15. According to proceedings of the trial court, the applicant applied to be released on bail and the the court presided over by Hon. Gichobi PM called for a pre-bail report pending determination of the application. Later, Hon. Gesora CM determined the application, finding that the applicant had a permanent abode and a stable family; was not flight risk and an officer from the security sector.



16. Therefore, he was granted bond on condition that he posts bond of Ksh 100,000/= with one surety or Ksh 50, 000/= cash bail. The court gave a mention date, 31<sup>st</sup> October, 2023 before the trial court No. 10 when directions for hearing would issue.
17. The proceedings were conducted in the presence of Mr Wathuta for 1<sup>st</sup> IP, Mr Kilambyo, the State prosecutor, Mr Kalii for the 2<sup>nd</sup> IP and Mr Khadondi for the applicant.
18. Proceedings indicate that later Mr Wathuta told court that the conditions ought to be tightened to avoid grave consequences. In the result, the court then directed, which brings parties to this court, that the accused(applicant) finds another place of residence and should not contact, visit or interfere with parties other than through court or ADR; and, that he should report to the Investigating Officer every fortnight.
19. The application was canvassed through written submissions. The applicant submits that the proceedings do not show that the prosecution participated or supported the application by counsel watching brief for the applicant. That counsel watching brief for the complainant should not run a parallel prosecution. The applicant places reliance on the case of *Joseph Lendrix Waswa v Republic*, HCC No. 34 of 2014 BGM(2016)eKLR.
20. That allegations made in the replying affidavit are libelous and aimed at painting him in bad light and there is no proof of investigations and charges at lower court or elsewhere relating to his firearm.
21. The court ruling provides for possible contact with witnesses through ADR. That contact was already procured in premises and he has been barred from accessing and mother who is not a complainant in the case.
22. That the trial court ought to have interrogated the layout of shared premises and it is practical to live apart from each other within the same premises. That the court which is aware of the succession proceedings and the underlying complaints in the criminal case should be vigilant to avoid the possibility of abuse of court process.
23. Despite directions given by the court, the respondent or the IPs' submissions are not on record.
24. Revisional jurisdiction of the High Court is provided by Statute. Section 362 of the *Criminal Procedure Code* provides inter alia that:
 

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.
25. The High court's supervisory jurisdiction above is limited to correcting errors or mistakes, regularizing illegalities and procedural breaches in the subordinate court's decisions. This is done by the court setting aside, varying or issuing such orders that may be granted in the interest of justice.
26. In *Victor Kiprono Ngeno v Office of the Director of Public Prosecutions* [2021] eKLR, a case that is persuasive, the High court defined this jurisdiction as a superintendence jurisdiction and not a second appeal. It delivered itself thus:
 

“The threshold for determining whether a decision is correct, proper and legal is found in Constitutional and statutory provisions. The *Oxford English Dictionary* Vol. VIII defines the word propriety to mean fitness, appropriateness suitability, conformity with requirements, rule of principle rightness, accuracy, correctness, justness. The depth of



revisional jurisdiction of the high court was set out by the court of appeal in which cited the case of *Sriraja Lakshmi Dyeing Works v. Pangaswamy Chettair* [1980] 4SCC 259 where the Supreme Court of India elucidated the principles as follows:-

“The conference of revisional jurisdiction is generally for the purpose of keeping tribunal subordinate to the revising tribunal within the bounds of their authority to make them act according to law, according to the procedure established by law and according to well defined principles of justice. Revisional jurisdiction as ordinarily understood with reference to our statutes is always included in appellate jurisdiction but not vice versa. The question of the extent of appellate or revisional jurisdiction has to be considered in each case with reference to the language employed by the statute. The dominal ideal conveyed by the incorporation of the words ‘to satisfy itself’ under section 25 read (which has similar provisions with Kenya’s section 362 of the *Criminal Procedure Code*, Cap 75 of the Laws of Kenya) is essentially a power of superintendence. The scope of the revisional powers of the high court where the high court is required to be satisfied that the decision is according to law as to the legality and propriety of the order under revision, is quite obviously a much wider jurisdiction. That jurisdiction enables the court of revision, in appropriate cases, to examine the correctness of the findings of facts also, though the revisional court is not a second court of appeal (emphasis supplied).”

27. The court’s power does not extend to usurping the powers of the trial court which must as a matter of course retain exclusive power and discretion over its own proceedings.
28. Section 123 of the *Criminal Procedure Code* provides that:

When a person, other than a person accused of murder, treason, robbery with violence, attempted robbery with violence and any related offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a court, and is prepared at any time while in the custody of that officer or at any stage of the proceedings before that court to give bail, that person may be admitted to bail:

  - a. Provided that the officer or court may, instead of taking bail from the person, release him on his executing a bond without sureties for his appearance as provided hereafter in this Part.
29. The amount of bail shall be fixed with due regard to the circumstances of the case, and shall not be excessive. The High Court may in any case direct that an accused person be admitted to bail or that bail required by a subordinate court or police officer be reduced. It is recommended that the application for review of bond terms should be made before the trial court before a party moves to the High Court. However, the applicant has also cited the violation of his right to be heard and also procedural breaches which bring this application within the parameters of Section 362 of the *Criminal Procedure Code*.
30. The proceedings before the Chief Magistrate and the impugned orders are not clear whether the accused or the prosecutor were present.



31. Article 50 (1) of the Constitution enacts that:

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body .

32. That law also provides that all criminal proceedings must be taken in the presence and hearing of the accused. ( See Section 194 of the Criminal Procedure Code). Further, the accused right to respond or be heard before any step or decision is taken against them is a non-derogative and unlimited right.

33. The court had already allowed his application for bond on simple terms that he deposits cash bail or posts bond. The nature of orders issued subsequently required the accused presence and response. The court order granting him bond was made on consideration that the accused had a fixed place of abode and a family home; and, that he was not a flight risk.

34. The court also issued a mention date for further directions for hearing of the matter. By requiring the accused to get an alternative place of abode within 7 days, the court's action was oppressive and arbitrary. The report filed by the Probation officer indicated that the applicant is a family man with minor children, and, that he resides with his family in the home domiciled along Thika Super Highway. It also confirms that the property is subject to succession proceedings and further that there have been disputes and animosity in the family. These are issues which required adequate response and consideration before the terms of bond would be altered. It is not clear whether the trial court considered the probation officer's report in issuing the impugned orders. What is evident is that the court's decision was made after the complainant moved it ex parte and when it had already granted further directions on the trial.

35. The complainant's right to participate in the trial is protected by the Constitution and the Victim Protection Act. Section 4(2) and 9(1) of the Victim Protection Act as read with Articles 50(7) and 50(9) informs this law. Section 12 and Section 20 of the Victim Protection Act particularly refer to the right to submit information during plea bargaining, bail hearing and sentencing.

36. However, the victim's right to address court and participate in the trial is limited and in some cases supervised. It should not appear to be a parallel prosecution or proceeding since Article 157 as read with the ODPP Act requires that the prosecutor brings and takes charge of the criminal proceedings at all stages.

37. The case of *Sathyavani v Samuel Raji* (CRL.OP (MD) No. 5474 of 2010) was cited with authority in the case of *Joseph Lendrix Waswa v Republic* [2019] eKLR where the Court of Appeal made findings thus:

“29. From the cited Articles of the Constitution, 2010, provisions of the Victim Protection Act, 2014, and cases cited from within and outside, the law has shifted the traditional parameters of a victim in a criminal case and therefore the arguments advanced by the defence are certainly out of place and would if adopted by court, be contrary to the provisions of the Constitution and the Victim Protection Act, and by all means against progressive jurisprudence. The victims counsel can no longer be considered a passive observer.

30. However the participation cannot be active and parallel to that of the prosecutor as advanced in the Indian case of *Sathyavani* and as advocated by counsel for the family herein as the Victim Protection Act, 2014 gives



the parameters of involvement during trial to include; the victims views and concerns at various stages as the court may determine either directly by victim or his/her representative; at plea bargaining; at the level of sentencing or where a decision is likely to affect the right of the victim and not throughout the trial and parallel to the prosecution.”

38. The Court of Appeal in *Lendrix Waswa* (*supra*) held that:

“A rigid prescription would not only limit the exercise of rights and the judicial discretion of the trial court but would also impede the administration of justice and the development of the law. It is preferable that the exercise of the victim’s rights should be determined by the trial court as occasion arises and as the justice of each case requires.”

39. Further, in *IP Veronica Gitahi & PC Issa v Republic* Cr. Appeal No. 23 of 2016, the Court described and defined the parameters for intervention by victims’ representatives under the *VPA* as follows:

“The *Act* further provides the parameters of the victim’s representative’s participation in the trial. The victim’s views and concerns may be presented in court at any stage of the proceedings as may be determined to be appropriate by the court. Those views and concerns may be presented by the victim himself or herself or by a “legal representative” acting in the victim’s behalf, at the stage of plea-bargaining, bail hearing and sentencing, as far as possible to be heard before any decision affecting him or her is taken; to be accorded legal and social services of his or her own choice, and if the victim is vulnerable, to be given these services at the State’s expense, and to make a victim impact statement at the stage of sentencing. These rights must however not be prejudicial to the rights of the accused person or be inconsistent with a fair and impartial trial.”

40. The main principle is that the victim’s rights must be facilitated but must not compete with or be prejudicial to the accused right. The trial must be seen to be impartial and consistent with principles of fair trial. The Investigating Officer admits that he was not present and thus not aware of alteration of bond terms. The court committed an illegality and procedural breach requiring this court to intervene.

41. The 1<sup>st</sup> IP has deponed that the applicant had often used his fire arm to threaten harm and cause anxiety. This court has been enjoined to consider some videos and photographs. However, there is no evidence of any report made to the police posing the applicant as a security threat to the neighborhood and witnesses to this case. This is because the Investigating Officer Cpl. Paul Kivuva’s affidavit does not capture the fears, threats and intimidation cited by the IP. The IO depones that he ought to be made aware of the trial and further admits that the applicant has so far complied with the court orders. The allegations of threats and intimidation should be reported if they are indeed related to the case and appropriate action taken by the IO and the court.

42. The allegations in the affidavit are related to the charges which should be determined at the main trial. The applicant being an accused must benefit from the presumption of innocence including right to reasonable bond terms during his trial. The mere statement that the conditions had to be tightened to avoid grave consequences was speculative.

43. Threats to the complainant’s mother and brothers are not part of the accusation before court. This is because it has not been demonstrated that the threatened victims are witnesses in the criminal trial. A criminal court must not be swayed by a party to make improper orders that are a reserve of a civil court. This may amount to abuse of the court process.



44. The criminal proceedings were not intended to be a machinery to obtain an eviction order which may be the IPs aim. Further, the fact that the two proceedings run parallel should not give the complainant a leeway to have an upper hand or to keep the accused away from his entitlement. Instead the law should be allowed to take its course and each court should be able to make relevant orders within its power and jurisdiction.
45. The upshot of the above is that I call to this court secondary orders issued on 23<sup>rd</sup> October, 2023 in absence of the applicant and requiring him to seek an alternative place of abode which I quash and set aside. Accordingly, the bond/bail terms issued earlier on the same day are restored.
46. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT  
NAIROBI, THIS 19<sup>TH</sup> DAY OF MARCH 2024**

**L. N. MUTENDE**

**JUDGE**

