



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. E070 OF 2021

REPUBLIC.....PROSECUTOR

VERSUS

JOSPHAT MAITHYA MANZI 1ST ACCUSED

ALEX KALONZO KALAMBA ALIAS KIVANGA.....2ND ACCUSED

RULING ON REVIEW OF BAIL APPLICATION

1. By a Notice of Motion dated 10th December 2021, the Accused/applicants sought the reconsideration of their application for bail pending trial for the offence of murder c/s 203 as read with 204 of the Penal Code, the particulars of which were that the two accused persons had “on the 28th day of September 2021 at Karuguyune village, Kianda sub-location in Igembe South Sub-County within Meru County with others not before the court jointly murdered David Munywoki Kavita.”
2. This court had by its Ruling dated 29th November 2021 declined to grant the accused persons bail but directed that their application may be “renewed after days in the event of changed circumstances” having determined that “on the whole, the court finds that there is justification for denial of bail in the short term to allow for the investigation into related murders to complete and the arrest of the other suspects and for the security machinery to contain the fluidity of the situation on the ground engendered by the said ongoing process of demarcation of land in the area [and] the court considers that a period of 30-6- days is sufficient for that purpose.” Pre-trial directions were set for the 22/2/2022.
3. When the application for review of bail was first placed before this court on 15th December 2021, the court directed that the application be heard on 6th January 2021 when it sat as the vacation duty court. When the application came up for hearing on the 6th January 2021, Mr. Masila, counsel for the Prosecution said he had been instructed to take up the matter that morning as counsel who had the conduct of the case, Ms. Nandwa was indisposed. The application was set for hearing at 2.30pm to allow the said Counsel then present for the DPP to prepare to argue the application.
4. Counsel for the accused principally urged that the 30-60 days given by the court to complete investigations after which the accused could seek review of their refusal of bail had lapsed and they had not seen any form of investigations by the Investigations officer. Counsel urged that the charges arose in the context of land disputes between the Meru and Kamba communities, the former seeking to chase away the latter from the area, and said that “there were killings in a fight between the two communities[and] the accused persons were randomly picked based on their influence in the Kamba Community.”
5. Noting that there was no question of the 1st accused being a flight risk, and that his ill-health had been demonstrated and observed by the court in its ruling of 29th November, 2021, counsel urged that the two accused persons could relocate to their ancestral home at Tseikuru in Kitui County away from the area to avoid the incidence of interference with witnesses put forward by the prosecution, and the grant of bail may be conditional upon such terms that the accused would upon release not go back to their home at Kisimani village, Kianda sub-location of Igembe South Sub County, in the area of conflict and killings subject of the trial.
6. As regards the 2nd accused, counsel urged that the 2nd accused is also an accused in another case Meru HCCRC NO. E077 of 2021 for the same charge of murder where similar circumstances of likelihood of interference with investigations and witnesses had been presented by the prosecution and they were able to obtain an order for release on bail before another judge of the Court, P.J. Otieno, J, and prayed that this court similarly grant the 2nd accused bail pending trial.
7. For the DPP, it was contended that the accused had not shown on a balance of probabilities any changed circumstances to warrant the review of the previous order of the court refusing bail to the applicants, reference being made to **Republic v Diana Suleiman Said & another** [2014] eKLR, a decision of this court. It was urged that the issue of interference with witnesses goes to the core of justice and it did not matter that the accused could go to an alternative place of residence as associates may interfere with witnesses even if the accused person resides elsewhere. Counsel urged the court to fast-track the hearing of the case praying for a priority hearing date but the accused to remain in

custody as the circumstances had not changed.

Determination

8. In considering the changed circumstances test in Misc. Criminal Application. No. 55 of 2014 **Republic v Diana Suleiman Said & another** [2014] eKLR, this court held as follows:

11. *“The changed circumstances test is one of common sense that where the circumstances of the case are so altered that compelling reasons are disclosed for the refusal of bail or for review of terms thereof, the court as a court of justice must reserve for itself a power to revisit the issue in the interest of justice not only for the accused but also for the complainant and the society at large. In the same way that an unsuccessful applicant for bail may repeat his application if his circumstances changed in such a manner as to favour his release on bail, so may the prosecution urge that the situation has deteriorated to compel a reconsideration of bail granted to the accused.*

12. *I find nothing in the provisions of Article 49 (h) of the Constitution or section 123 of the Criminal Procedure Code to suggest that the court once grant or refuse bail becomes functus officio or that the issue of bail becomes res judicata upon decision to grant or refuse bail. Article 49 (h) entrenches the right of the arrested person to be released on bail pending charge or trial unless there are compelling reasons for refusing bail. The accused is constitutionally entitled to bail **until and unless** compelling reasons are demonstrated. If compelling reasons arise or are demonstrated after the arrested person has been released or granted bail but not yet released, as in this case, the court may properly review the matter on the basis of the compelling reasons shown. Section 123 of the CPC [as amended by the Constitution of Kenya 2010 to permit bail for all criminal cases] makes bail available at all times - where any arrested person **“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.”**”*

9. While the burden of proof with regards to changed circumstances may appear to fall on the accused as the applicant for bail review, it is really a matter that falls for consideration under the general principle that an accused person is entitled to bail unless compelling reasons exist for refusal, in which case it is for the prosecution, if it desires that an accused be held in custody during his trial, to demonstrate the existence of compelling reasons unless such reasons arise in the circumstances of the cases. Where bail has previously been refused and the court had given the prosecution time to complete its investigations or take other step in or towards the prosecution of the cases, it is for the prosecution to show any progress towards that end and it cannot be heard to say there has not been shown any changed circumstances when the change anticipated depended upon the action of the prosecution. The Prosecution ought to have shown the extent and result of the investigations and efforts to arrest all persons involved in the allegedly related murders, and what remained to be done bearing in mind the time allowed by the court for the exercise. Apart from the statement that the accused’s counsel had not seen any investigations into the matter, the accused could not be asked to prove the negative fact; it was for the prosecution to show what had so far been done, and if necessary request the court for continuation of the refusal of bail order for purposes of completion of such investigations.

10. The Prosecution, although served with the application for review of bail dated 10th December 2021, did not file any response thereto. The Prosecution cannot, in the respectful view of the court, block the review of an order on bail on the ground that there has not been demonstrated any changed circumstances where it has defaulted in the taking, or demonstrating that it has taken, steps to conclude investigations. To allow the prosecution to hide under the changed circumstances principle would be, wrongly to permit a party to benefit from its own default.

11. If there were no changed circumstances because the ground is still volatile there should have been an affidavit by the Investigation Officer in response to the application for review of bail indicating that there are still live hostilities. How would the accused prove that the situation on the ground is calm and not hostile? It was incumbent upon the Prosecution on service of the application for review to demonstrate the steps that it had taken since the ruling of 29th November 2021 to complete investigations, make the necessary arrest and prosecute any associates of the accused, and further describe the status of the situation on the ground as requiring further continuance of the order for denial of bail. Indeed, in **Republic v Diana Suleiman Said & another** [2014] eKLR, where the DPP sought review by denial of bail previously granted to the accused, as observed by the court in the ruling *“The affidavit of Police Constable David Chelelgo deposes that “the pattern of attacks in Lamu threatens to degenerate into widespread massacre of innocent Kenyans and serious economic sabotage against certain sections of residents of Lamu county.”*

12. In failing to show any progress in this matter by way of any investigations, arrests and prosecution of any alleged associates of the accused and or efforts at containment of the situation on the ground, the Prosecution has squandered the opportunity granted by his court in denying bail for the accused for a limited period of time to allow for such exercise. The court will consequently review the order on bail previously made. As I said in Mombasa Criminal Case NO. 23 of 2014, **Republic v Diana Salim Suleiman** [2014] eKLR with regard to accused’s likelihood to interfere with investigations:

“I would agree that there is cause for allowing the investigations to be concluded, and in the meantime to hold the accused to avoid his interfering with the investigations. I, however, do not agree that the investigations should be delayed indefinitely or that they should be so delayed as to excuse unduly long continued detention of the accused. I think that a period of 30 days since the attacks is reasonable time for the police authorities to have concluded investigations into the matter, and I do not see why the accused should remain in custody on the ground of likelihood of interference with investigations any time beyond one month after incident, that is after the 14th July 2014.”

13. The court is, of course, mindful that an accused who is facing multiple charges, especially of serious charges such as murder and, therefore, that much more probability of conviction and punishment, has that much more incentive to abscond, as with the 2nd Accused herein who faces another murder charge in Meru HCCRC No. E077 of 2021. The court considers that a compelling reason exists, within the meaning of Article 49(1) (h) of the Constitution, by way of likelihood of the 2nd accused to abscond in view of the multiple murder charges, and his bail shall continue to be denied.

14. As regards the 1st Accused, the court has previously noted his advanced age and ill health status. If the prosecution has not availed itself of the opportunity to complete necessary investigations in the matter, as no evidence thereof has been offered, there is no good ground for further continuation of the order for denial of bail. It must always be remembered that it is for the Prosecution, if it seeks denial of bail in the particular case, to demonstrate the existence of compelling reasons and not for the defence to prove the lack of such reason. All the defence needed to show in this case is that the Prosecution has had the 60-day period considered by the court to be reasonable for the conclusion of investigations and arrest and arraignment of perpetrators or associates of the accused. The Prosecution would then demonstrate what it has done since the date of the offence on 28/9/2021, a whole over three months, by way of progressing the investigation of the matter. The court cannot assume as urged by the DPP that investigations are still going on. There ought to have been filed an affidavit on oath or a status report on the matter of the investigations for the court to consider whether to review the order on bail or to continue it.

15. The court does not however, disregard the prosecution's concerns that the 1st accused for his influential status in his society may wittingly or otherwise galvanize the action of his community members in what the defence and prosecution appear to agree is an intercommunity conflict flowing from land dispute involving members of the Meru and Kamba communities in the Kianda sub-location of Igembe South Sub-County. In his affidavit opposing bail sworn at the first instance the Investigating Officer on 12/11/2021 said "*that the ground is still hostile and there is fear that the Ugoti Community and Kianda Community may harm the accused person in retaliation to the murder of David Munywoki Kavita. Therefore, for the accused's safety it would be better if the accused person remains in custody until the hearing and final determination of the case.*"

16. In addition, the court emphasizes because of its effect on the due administration of justice, the need to protect witnesses from interference as crucial for the effective discharge of the prosecutorial mandate of the DPP.

17. In these circumstances, the court is minded to review the bail refusal order in respect of the 1st accused on the twin account of advanced age and ill health of the accused coupled with the want of evidence of any ongoing further investigations in the matter to warrant continued denial of bail. However, in the public interest for protection of witnesses and for the general maintenance of peace, law and order in the area of Igembe South Sub-County of Meru County, there shall be a further order for restriction of the 1st accused when released on bail from travelling to and residing at Kianda sub-location of Igembe South and from communicating directly or by proxy with the prosecution witnesses in this trial, pending conclusion of the trial or until further orders of the court.

18. Breach of the terms of his Bail shall extinguish his bail and the Prosecution shall be at liberty to apply for such orders against the 1st Accused/applicant.

Orders

19. Accordingly, for the reasons set out above, the Court makes the following orders:

1. The application for bail pending trial dated 10th December 2021 on behalf of Alex Kalonzo Kalamba Alias Kivanga, 2nd Accused/Applicant, is hereby declined.

2. The application for bail pending trial dated 10th December 2021 on behalf of Josphat Maithya Manzi, 1st Accused/Applicant, is hereby allowed.

3. The bail pending trial to the 1st accused/Applicant, Josphat Maithya Manzi, is granted upon following terms:

a) The accused shall execute a bond of Ksh.500,000/= with one (1) Surety for the same amount;

b) The accused shall not visit or reside at any village in the locality of Kianda sub-location, Igembe South Sub-county of Meru County where the offence of murder is alleged to have occurred, until the conclusion of the trial or until further orders of the court; and

c) The accused shall not communicate with the prosecution witnesses whether by physical contact, mobile or other telephony or other means of communication, either directly or through proxy, until the conclusion of the trial or until further orders of the court.

d) The Prosecution shall be at liberty to apply for cancellation of the bail granted to the accused herein in the event of breach of any of the terms hereinabove set out.

20. Mention for pre-trial directions on 22/2/2022 as previously scheduled.

Order accordingly.

DATED AND DELIVERED ON THIS 14TH DAY OF JANUARY 2022.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S K.K Katsiya &Co., Advocates for the Accused/ Applicants.

Mr. Masila, Prosecution Counsel for the Respondent.