



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL DIVISION- MILIMANI**

**CRIMINAL CASE NO. E028 OF 2021**

**REPUBLIC.....PROSECUTOR**

**VERSES**

**FRANCIS MANDE WANJIKU.....ACCUSED**

**RULING**

1. Francis Mande Wanjiku, the Applicant, approached this court through an application dated 19<sup>th</sup> November, 2021, seeking review of this court's decision denying him (Accused) bail and in the alternative to execute a bond so as to be released from custody pending trial and /or to discharge the applicant from custody.

2. The application is premised on grounds that the applicant was denied bail for the reason that the 2<sup>nd</sup> witness who is also the key witness was to testify but the State failed to avail her on the two occasions that the case came up for hearing. That there has been change of circumstances as the prosecution did not disclose to the court that the witness is not willing to testify and she is not a compellable witness.

3. In response thereto, the State opposed the application for review of bail following the reason that circumstances had not changed as the court had directed that the witness testifies prior to the applicant being released on bail. That although the witness alleged to be the applicant's wife, the allegation remained unsupported.

4. In the case of **Republic v Diana Suleiman Said & Another (2014) eKLR** the Court stated that:

***“The changed circumstances test is one of a 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”***

5. It is apparent that spousal testimonial privilege precludes either party to a marriage from testifying against the other while marriage subsists. Where the spouse chooses to testify voluntarily, it would be her right to do so. In denying the applicant bail this court reached a finding that there existed genuine fear or anxiety that there would be interference of witnesses since the witness had chosen to testify voluntarily having recorded a statement and was lined up as a witness. The reason being that it was not practicable to release such a person to enable him go back to the same house occupied by the witness prior to her evidence being recorded.

6. This case was adjourned previously. On the 11<sup>th</sup> November, 2021, the case was adjourned following non-availability of witnesses. In particular the witness argued to be the accused person's girlfriend or wife was alleged to have relocated and switched off her phone.

7. On the 15<sup>th</sup> February, 2022 the prosecution availed two witnesses who testified. A witness, Bilha, turned up in court but it was stated by the prosecution that the suspected murder weapon that was to be identified by that particular witness was taken to the government chemist for examination and it was not known when the analysis could be done.

8. The statement made by the prosecution counsel meant that there would be a delay in determination of the matter. This particular fact must be balanced against the accused person's constitutional right to bail and the fact of being innocent until proven guilty.

9. The affidavit deposed by the Investigation Officer suggests that the key witness is the accused person's wife. The statement recorded by the witness tend to confirm the averment. According to the law such a witness cannot be compelled to testify against the accused and if she has re-located then circumstances have changed such that if released on bail the accused person will not return to the same house he once shared with the witness.

10. In the premises, following change of circumstances, the earlier ruling in this respect is hereby reviewed. Therefore, the accused person may be released on bond of Kenya shillings Five Hundred Thousand (Ksh. 500,000/-) with two sureties in a like sum.

11. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY, THIS 17<sup>TH</sup> DAY OF FEBRUARY, 2022.**

**L. N. MUTENDE**

**JUDGE**

**IN THE PRESENCE OF:**

Mr. Okeyo for ODPP

Mr. Mokaya for Accused

Accused

Mutai - Court Assistant