



**Ali v Republic (Criminal Revision E316 of 2021)  
[2022] KEHC 13198 (KLR) (Crim) (26 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13198 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL  
CRIMINAL REVISION E316 OF 2021**

**JM BWONWONG'A, J**

**SEPTEMBER 26, 2022**

**BETWEEN**

**MOHAMED ABDI ALI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*((Being an application for revision of the denial of bail pending trial delivered by Hon. Mutuku (C.M) in Milimani Criminal Case No. 835 of 2016 Republic vs Mohamed Abdi Ali & 3 Others))*

**RULING**

**The case for the applicant**

1. The applicant is the 1<sup>st</sup> accused person in Milimani Chief Criminal Magistrate's Court in Criminal Case No. 835 of 2016. He is jointly charged with other three persons with terrorism related offences under the Prevention of Terrorism Act, 2012 (POTA). The charges are with respect to membership of a terrorist group, soliciting for the commission of a terrorist act, recruitment of members of a terrorist group, possession of articles connected to the commission of a terrorist act, promoting a terrorist act, organizing a meeting in support of a terrorist group and directing the commission of a terrorist act contrary to the provisions of the Prevention of the Terrorism Act, 2012.
2. The applicant has filed a notice of motion dated 5<sup>th</sup> July 2021, brought under article 49 (1) (h) of *the Constitution* of Kenya, section 123, 123A, 124, 362 and 364 of the Criminal Procedure Code (Cap 75) Laws of Kenya, the Judiciary Bail/Bond Policy Guidelines and all enabling provisions of the law.
3. The applicant has urged the court to invoke its discretion and revise the ruling of Hon. Mutuku (C.M) delivered on 22<sup>nd</sup> June 2021, in which the learned magistrate declined to grant bond to the applicant and thereby admit the applicant to bail/bond. The application is supported by the affidavit of the



applicant sworn on even date. The gist of the application is that there were no compelling reasons advanced by the prosecution in denying him bail and yet the same had been granted to his co-accused persons.

4. The grounds raised in support of the application are that since his denial of bail/bond in 2016, he has been focused on fast tracking the case. That five years have since lapsed and there have been no complaints by the prosecution of any interference with the witnesses. He also avers that his continued incarceration has completely disconnected him from his social and economic fabric by rendering him redundant and useless while in remand. Further, that this has also put him at a risk of contracting covid-19 due to the confined nature of remand custody.
5. The applicant further avers that the circumstances of his case and those of his co-accused are similar, and it is therefore unjustified to deny him bail/bond, while the same was granted to them. He maintains that he is a Kenyan citizen with a fixed abode within the jurisdiction of the court. Further, that both his passport and national identity card are in the custody of the police and he is therefore not a flight risk. He states that he will abide by the bail/bond terms and will dutifully attend court as and when required to do so.
6. He therefore urges the court to apply the law uniformly and release him on reasonable bail/bond terms.

#### **The submissions of the applicant**

7. Mr. Chacha Mwita, learned counsel for the applicant filed written submissions dated 15<sup>th</sup> November 2021. He submitted that the delay in prosecuting the present application is a change in the circumstance, which is a ground for the grant of bail. He further contends that the other co-accused persons were similarly denied bail by the trial court but upon application to the High Court, the decision was overturned and they were granted bail. He argues that the court should apply the law uniformly and cited the case of *Guyo Gorsa Boru v Republic* [2020] eKLR, in which the High Court considered what constitutes change in circumstances in granting bail. In that case the court in part noted that:

“some of the grounds that constitute change in circumstances include where prosecution has inordinately or unjustifiably failed or delayed to avail witnesses before court; ...from the evidence presented the likelihood that conviction will ensue was remote; where health status of the accused has changed and requires medical attention that cannot be provided when in remand custody....”

#### **The case of the respondent**

8. The respondent did not file any replying affidavit in support or in opposition to the application. He also did not file any submissions; despite being given adequate opportunity notice to do so.

#### **Issues for determination**

9. I have considered the unopposed application. Additionally, I have also considered the authorities cited by counsel for the applicant. As a result, I find the following to be the issue for determination.
10. Whether the court should exercise its discretion and grant the revisionary orders sought.



## Analysis and determination

11. The power of this court in its revisionary jurisdiction is founded under section 362 of the Criminal Procedure Code (Cap 75) Laws of Kenya, which provides 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.”
12. In additionally to the foregoing, the provisions of article 165 (6) of the 2010 Constitution of Kenya provide that:

“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.”
13. I have considered the application and the written submissions by the applicant. I have also considered the ruling by Hon. Mutuku dismissing the application by the applicant for a review of his bail/bond terms. The main grounds argued in the trial court were that the accused was not a flight risk and that the delay in prosecuting the case constituted a change in circumstance to warrant his release on bail/bond.
14. In her determination, the learned magistrate stated that the delay in concluding the trial was occasioned by the accused person, who adjourned the matter when 10 consecutive days had been set for hearing. Consideration was also placed on the Covid-19 lockdown which affected court operations adversely. The court also noted that the accused was a flight risk in comparison with the co-accused persons.
15. I find that the trial court gave good reasons for denying the accused bail/bond and granting the same to the co-accused. This discrimination is justified and does not amount to unconstitutional discrimination for the case of each accused must be decided on its merits.
16. Furthermore, the applicant has not demonstrated that the medical facilities in prison are ineffective to cater for his asthmatic condition. The prison authorities have their referral system to other medical facilities where they are unable to cater for a more serious medical condition.
17. In the circumstances, I find that the authorities cited by counsel for the applicant are distinguishable from the instant application. I further find that the accused has not demonstrated that there has been a change in the circumstances to warrant the review of his bail/bond application.
18. I further find that the trial court gave good reasons for denying the accused bail/bond and granting the same to the co-accused. This discrimination is justified and does not amount to unconstitutional discrimination for the case of each accused must be decided on its merits. Additionally, I find that the trial court found that the accused caused the delay of his trial by causing an adjournment when 10 consecutive days had been set for the trial of his case.
19. Furthermore, the applicant has not demonstrated that the medical facilities in prison including the medical referral system are ineffective to cater for his asthmatic condition.
20. I therefore find that the applicant has failed to demonstrate that the learned trial magistrate did not apply the law properly or disregarded the facts of the case in denying him bail/bond.



21. I find no reason to warrant the review of the order and ruling of the learned trial magistrate delivered on 22<sup>nd</sup> June 2021 which denied the applicant bail/bond.
22. In the premises, I find the instant application for revision fails for lacking in merit and is hereby dismissed.

**RULING SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 26<sup>TH</sup> DAY OF SEPTEMBER 2022.**

**J M BWONWONG'A**

**JUDGE**

**In the presence of-**

Mr. Kinyua: Court Assistant

Mr. Chacha Mwita for the accused/applicant

Ms Maina for the Respondent

