



REPUBLIC OF KENYA



**Republic v Musau & another (Criminal Case E057 of 2021)
[2022] KEHC 15542 (KLR) (Crim) (21 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15542 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL CASE E057 OF 2021
JM BWONWONG'A, J
NOVEMBER 21, 2022**

BETWEEN

REPUBLIC PROSECUTOR

AND

DANIEL MUSAU 1ST ACCUSED

ROBERT MWANGI KIBORORO 2ND ACCUSED

RULING

1. Counsel for the 1st accused person (Mr Ogado) made an oral (informal) application for the 2nd review of the denial of bail by this court based on change of circumstances.
2. The application is brought under article 159 of the *Constitution* of Kenya and also pursuant to the unlimited inherent powers of the court to review the bail terms at any time.
3. Counsel submitted that the trial has progressed well with four witnesses having testified and so far, there has not been any reported incident of witness interference.
4. Furthermore, counsel submitted that on October 4, 2022 there was no evidence that the prosecution had bonded all the civilian witnesses. It is on that basis that a witness summons was issued for Beatrice Adhiambo, who was said to be out of Nairobi. It was submitted that interference with her evidence is serious diminished.
5. Counsel also submitted even if Beatrice Adhiambo fails to attend court, the court has sufficient evidence on record. Her evidence will not substantially change the evidence on record.
6. Finally, counsel submitted that the accused has been in custody for now one year, which is in breach of his right to be released on bail/bond.



The case for the respondent

7. Ms Maina opposed the application for review. She placed reliance on the ruling sought to be reviewed.
8. She further submitted that Beatrice Adhiambo is still a resident of Mathare Area 4, but only travelled to Homa Bay for a funeral. She also submitted that only Beatrice Adhiambo has not testified.

Issues for determination

9. I have considered the submissions of both counsel. As a result, find that there is only one issue that falls for determination.
10. And that issue is whether there has been a change in the circumstances of the case to warrant a review of the order denying bail/bond to the accused.
11. I have considered the submissions of both counsel in the light of the applicable law. I find that the burden of demonstrating a change of circumstances is upon the accused. The court must be satisfied that there has been a change of circumstances to warrant a review of the challenged order. The standard of proof is on a balance of probabilities.
12. I further find that the fact that four witnesses have testified and that there has not been any reported incident of interference with witnesses does not amount to a change of circumstances.
13. The fact that the accused has been in custody for one year and that the anticipated evidence of Beatrice Adhiambo will not substantially change the evidence on record, also do not in themselves constitute a change of circumstances.
14. The issue of whether Beatrice Adhiambo relocated to Homa Bay or went there to attend a funeral and that she will return to Mathare Area 4 are not matters that are based on affidavit evidence. These are statements coming from the bar. There is no way to test the veracity of those conflicting statements in the absence of affidavit evidence.
15. In the circumstances, I find that the accused have not discharged the burden of proof that there has been a change of circumstances in the instant case.
16. In the premises, the application fails with the result that it is hereby dismissed.

RULING SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 21ST DAY OF NOVEMBER 2022.

J M BWONWONG'A

JUDGE

In the presence of-

Mr Kinyua: court assistant

Mr Ogado for the 1st accused/applicant

Mr Karoki for the 2nd accused/applicant

Ms Peris Maina for the republic/respondent

