



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION - MILIMANI

CRIMINAL CASE NO. 78 OF 2019

CYRUS MAINA MWARIRI..... APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. **Cyrus Maina Mwariri**, the Applicant, was arraigned in court following allegations of having committed murder contrary to **Section 203** as read with **Section 204** of the Penal Code. He sought to be released on bail pending trial, an application that was declined by the court on grounds that he was a flight risk and admitting him to bail posed a security threat to himself, and crucial witnesses had not testified.

2 On 12th January, 2012, he approached this court through a Notice of Motion seeking review of the order of the court denying him bail. He sought setting aside of an order issued on the 21st May, 2020 so that he could be admitted to bail and on reasonable terms.

3. The Application is premised on grounds that there is change of circumstances arising in respect of the Accused to the effect that his father is ready and willing to accommodate him, hence enhancing his safety and security and to ensure that he attends court; the Accused is willing and prepared to subject himself and abide by any orders that the court may grant as to periodically report to any DCI office, area Chief or any other lawful authority that the court may be pleased to direct for purposes of mitigating on the possibility of being a flight risk; and that considering that the Accused has been in custody from 11th November, 2019 and the court has not been handling hearings given the Covid-19 situation that may not subside in the foreseeable future, it would be in the interest of justice that the Applicant is admitted to bail/bond as envisaged under the bail Bond Policy Guidelines.

4. The Applicant swore an affidavit in support of the application where he reiterates what is stated on the grounds of the application and also deposes that in the Ruling of the court dated 21st May 2020, it was found that he was a flight risk, a decision that was based on the probation officer's report which also stated that release on bail posed a security risk to himself.

5. A second affidavit in support of the affidavit was deposed by Joseph Mwariri Mwangi who described himself as the father of the Applicant who averred that he is aware of the gravity and magnitude of the offence and consequences of non-attendance to the matter and promised to ensure the Accused attends court and complies with the terms and conditions of the bond. That to ensure the Accused is not a flight risk and for purposes of ensuring his security he is willing to accommodate him within his home in Murang'a.

6. The application was canvassed by way of oral submissions where it was urged by Mr. Jumba, Counsel for the Accused, that circumstances had changed since the father of the Accused had promised to host him at his residence and to ensure he attends court. That having stayed in custody for two years, the Accused understands the significance of dutifully attending court and the consequences of being a flight risk. That the court be guided by the bail bond regulations policy to consider the issue of passage of time and the issue of administration of justice. He also called upon the court to consider rights of the Accused as enshrined in **Article 49(1) (h)** of the Constitution.

7. In response thereto, the State/Respondent urged that no circumstances had changed. That to establish the allegation, there should be evidentially material change of circumstances. That **Article 49(1) (h)** of the Constitution does not exist on its own, as the rights can be limited in certain circumstances as set out in **Article 24** of the Constitution. He called upon the court to consider the right to life that supersedes the right to bail. That it took the investigation team five months to arrest the Accused, therefore he is still a flight risk.

8. In reply thereto, it was urged for the Applicant that even if death occurred, there is the presumption of innocence until proven otherwise and in the absence of a replying affidavit, there was nothing to counter the allegations.

9. I have considered rival submissions of both parties herein, alongside the affidavit deposed in support of the application.

Of crucial importance herein is whether circumstances have changed that would require the Accused to be released on bail. The court reached a determination that the Accused was a flight risk having escaped after the offence as he could not be traced from June to November 2019. The act that transpired agitated Boda Boda operators as the deceased was one of them. Being incarcerated was therefore for the security of the Accused.

10. Arguably, the Accused person is presumed innocent until proven otherwise, a fact that should move the court to grant him bail, as pre-trial detention should not be encouraged.

In the case of **Republic Vs. Diana Suleiman Said & Another (2014) eKLR** the court which was of the view that bail can be reconsidered when volatility ceases to exist as to change of circumstances stated that:

“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.”

11. The alleged change of circumstances advanced by the accused is that he will live with his father in Murang’a. A person stated to be his father has sworn an affidavit expressing the willingness to accommodate him. What has not been explained is the alleged escape after the incident, an act that made the court to find that he was a flight risk.

12. The instant application is however not challenged by the Respondent who opted not to file a response thereto. This court called for a Probation Officer’s report. The Investigation officer in the matter was interviewed. He acknowledged the hostility that the community and the victim’s family at Ruai and Kasarani still harbours against the accused person to date. It was urged that since his arrest the situation in the area had calmed down and incidences of Motor Cycle robberies and murders had gone down significantly.

13. It was however the Probation Officer’s recommendation that the accused could be considered for bail on stringent conditions as to his supervision which could mitigate flight risk.

14. In its order, the court directed the accused to remain in custody until prosecution witnesses who were Boda Boda operators testified against him. So far the stated witnesses have testified.

15. The accused herein must be presumed innocent until proven guilty in accordance to the applicable law, this is what the prosecution is endeavoring to do. It would therefore be wrong to interfere with the accused person’s legal right until proven guilty.

16. As I have aforesaid, circumstances that led to his escape insinuating guilt on his part remain unexplained. The only issue to be considered is however the presumption of innocence at this stage. This therefore calls for grant of bail with stringent terms attached.

17. In the circumstances, I grant the accused bond of Kshs 500,000/- with two (2) sureties in a similar sum.

Further, it is ordered that:

(i) Upon release he shall be required to reside at his father’s homestead in Murang’a who has undertaken to ensure he does not flee.

(ii) Following the need to protect the victim’s family from the accused, he will be required to be reporting to the area Chief every first Monday of each month during pendency of his case without fail, who will be expected to monitor his progress and report to this court in case of any disobedience.

(iii) This order shall be served upon the Chief Ichichi Location, Kangema Sub-County, Murang’a County; Mr. Paul Mwangi for the purpose of ensuring that the accused adheres to conditions set.

DATED, SIGNED AND DELIVERED IN OPEN COURT, THIS 19TH DAY OF OCTOBER, 2021.

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Ms. Ogweno for the State

Accused person

Mr. Jumba for the Accused

Court Assistant - Mutai