



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL CASE NO. 9 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

MUNIR MURAD SALIM.....ACCUSED PERSON

RULING

1. On 16th April, 2020 the accused person filed an application under the provisions of Articles 159(2)(d) and 50(1) of the Constitution of Kenya, 2010 and Section 123 of the Criminal Procedure Code (Cap 75) Laws of Kenya. He seeks an order for review of this court's ruling declining to grant bail/bond to the accused person pending trial, which was delivered on 24th July, 2019.
2. The accused person also prays for other orders that this court may deem fit and meet to grant in the ends of justice. The application is supported by the grounds in support of it and the affidavit of the accused person's elder brother, Salim Murad Salim, sworn on 16th April, 2020.
3. Ms Rajab, Learned Counsel for the accused person indicated that following the outbreak of Covid-19, the Hon. Chief Justice on 15th March, 2020 gave directions for courts to review rulings on bail/bond. She stated that they filed an appeal against the ruling of this court delivered on 24th July, 2019 but due to the current pandemic they had not been given directions as to the hearing of the said appeal. She indicated that she thought it prudent to come to this court for review of the earlier orders made by this court.
4. She further submitted that under the provisions of Section 123 of the Criminal Procedure Code, this court has the powers to hear an application at any stage of the proceedings, She stated that the emergence of Covid-19 all over the country makes prisons a high risk area. Due to the new circumstances, she prayed for this court to reconsider its earlier decision declining to admit the accused person to bail/bond.
5. She indicated that the accused person's case was deserving of the orders for review and that they were anticipating that the hearing of his case would move fast as he was in custody. She stated that his family was willing to stand surety for him and it would ensure that he would attend court at all times.
6. Ms Rajab also submitted that under the provisions of Article 50 of the Constitution of Kenya, the accused person was presumed innocent until proved guilty; and that justice would be served if this court was to review its earlier ruling. In her view, the admission of the accused person to bail/bond pending trial was one of the measures that would assist the government in decongesting prisons. She further stated that the accused person was willing to adhere to all the conditions imposed on him, if he was granted bail/bond.
7. Ms Mwangeka, Prosecution Counsel, opposed the application for the reasons that the directive by the Hon. Chief Justice for review of bail/bond terms was supposed to be for petty offences and deserving cases. She submitted that the offence herein is serious and the conditions upon which the court grants bail/bond to accused persons had not changed. She stated that the current pandemic should not be used as an excuse to force the court's hand to grant the accused person bail/bond. Further, that the fact that his application for admission to bail/bond was declined, did not mean that the court infringed on his right to innocence as in instances where there are compelling reasons, the right to be granted bail/bond can be limited.
8. She submitted that some witnesses had expressed fear in having the accused person released on bail/bond and this court delivered a ruling thereon and no valid reason had been given to warrant review of the ruling by this court. She prayed for the application to be dismissed.
9. In response to Ms Mwangeka's submissions, Ms Rajab stated that the application for bail/bond was not dismissed on the basis of the fear expressed by the witnesses. She once again referred to the directive of 15th March, 2020 by the Hon. Chief Justice and more particularly, to paragraph 8 thereof which called for Judges in all stations to review their files in deserving cases and make appropriate review of bail/bond terms, to mitigate the spread of Covid-19.

ANALYSIS AND DETERMINATION

10. This court has considered the submissions made by the Counsel for the accused person, the grounds in support of the application and the affidavit sworn by the accused person's brother. This court has also considered the directives given by the Hon. Chief Justice on review of bail/bond terms for accused persons who are in remand, during the current Covid-19 pandemic.

11. Unbeknown to the Counsel for the accused person, this court undertook the exercise of review of bail/bond terms in deserving cases. This case did not fall in the category that qualified for review of the ruling delivered on 24th July, 2019. Without be-labouring the point, this court wrote and delivered a considered ruling on the said date on whether the accused person should be admitted to bail/bond pending trial. As stated in the said ruling, 2 factors militated against the accused person being released on bail/bond. The first one is that he had previously absconded court after being released on a police bond for a case which he was required to attend in Shanzu Law Courts. Secondly, he was found in possession of different identification cards which he could not account for. This court concluded that the accused person could easily obtain identification cards bearing different identities and take flight to Tanzania, which was a country which he frequently traveled to. His conduct of not turning up in court in Shanzu and the fact that he could obtain a multiplicity of identity cards were not factors that worked in his favour.

12. Ms Rajab urged this court to play its role in decongesting prisons during the current pandemic. Inasmuch as this court is expected to play its role in doing so, it must do so responsibly. This court takes Judicial Notice of the fact that covid-19 pandemic has been declared to be endemic by the World Health Organization (WHO), and the world populace has to learn to live with it until an effective vaccination is found. If courts were to behave irresponsibly, all the gates of prison would have been swung open by now to allow all remandees and convicts to walk home.

13. The current crisis must be considered in light of the provisions of Section 123A(1) of the Criminal Procedure Code which provides for the exceptions which a court has to consider in an application for bail pending trial. As stated in the ruling of 24th July, 2019 the character and antecedents of the accused person were not in his favour. This court has said enough to demonstrate that he does not fall in the category of deserving cases, which call for review of the earlier decision by this court.

14. Nothing has arisen to change the depositions in the affidavit of PC King'ori sworn on 27th May, 2019 which persuaded this court not to admit the accused person on bail/bond pending trial. The application dated 16th April, 2020 is hereby dismissed.

DELIVERED, DATED and SIGNED at MOMBASA on 30th day of June, 2020. Ruling delivered through Microsoft Teams online platform due to the outbreak of covid-19 pandemic.

NJOKI MWANGI

JUDGE

In the presence of:-

Accused present

Ms. Rajab for the accused person

Mr. Muthomi, Prosecution Counsel for the DPP

Mr. Oliver Musundi - Court Assistant.