



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NUMBER 173 OF 2020

UNKNOWN *Alias* MIRE ABDULLAHI ALL.....APPLICANT.

VERSUS

REPUBLIC.....RESPONDENT.

RULING

1. On 9th October, 2019, this court delivered a Ruling in *Unknown v Republic [2019] e KLR* vide **H.C Misc. Cr. Application No. 211 of 2019** where it declined to allow the Applicant's application for revision of the denial of bail pending trial in *Milimani Chief Magistrates Criminal Case No. 474 of 2019*.

2. By way of a Chamber Summons dated 16th June, 2020 brought under **Articles 2, 49(1)(h), 50(2)(a) and 165(3)** of the **Constitution; Section 123** of the **Criminal Procedure Code**, the inherent jurisdiction of the court and all other enabling provisions of law, the Applicant now urges this court to review its orders of 9th October, 2019 with a view to admitting him to reasonable bail/bond terms pending trial. The main ground upon which the application is premised is that there has been a change of circumstances that were not in existence at the time the *Unknown v Republic [2019] eKLR* was heard and determined.

3. The application was supported by an affidavit sworn by the counsel for the Applicant, Mr. **Abdulkhikim Abdullahi** advocate. It was further supported by four other affidavits, one by **Deka Mohamed Musa** described as the Applicant's wife and three by **Abdirahman Ibrahim Yussuf, Hassan Hajj Abdi And Jamaa Omar Elmi** who are said to be willing to stand surety for him in case this application is allowed.

4. The application was opposed vide a Replying Affidavit of the investigating officer, **Sergeant Geoffrey Busolo** of the Anti-Terrorism Police Unit sworn on 23rd June 2020.

5. During the hearing of the application, Mr. Abdulkhikim for the Applicant reiterated the contents of the application. Firstly, he invited the Court pursuant to **Section 60** of the **Evidence Act** to take judicial notice of the Covid-19 global pandemic. He submitted that the congestion in prison puts the Applicant at a very high risk of contracting the Covid-19 disease which is now within the prison facilities. He referred the court to a recommendation by the National Council on the Administration of Justice (NCAJ) for review of bail/bond terms as a measure of decongesting prisons due to the pandemic.

6. Secondly, counsel submitted that early this year, the Applicant fell while in prison and suffered a hip joint fracture that has rendered him permanently disabled. He argued that in view of that, the Applicant is required to seek urgent specialized care outside prison. However, counsel stated that he did not attach any medical documents in proof of the same since the prison are now out of bounds for outsiders due to the pandemic.

7. Thirdly, counsel submitted that the Applicant is apprehensive that his trial will be protracted and delayed. He argued that despite having been denied bail, the hearing of the matter in the trial court has never kicked off since February, 2019 when the Applicant was charged due to numerous adjournments at the instance of the prosecution on the basis that they require more time to complete disclosures.

8. He also argued that the issue of public interest has already been defeated by the fact that three of the Applicant's co-accused in the trial court are out on bail.

9. Fourthly, counsel stated that he has now brought the Applicant's passport No. BK038076 to prove that he is a Kenyan citizen. He submitted that he did not note any inconsistencies in the documents attached by the prosecution to disprove the Applicant's nationality. He argued that in any event, the evidence presented in opposition to his application for bail has not been tested through trial. He placed reliance on the case of *Republic v Danson Mgunya (2008) eKLR*. He also relied on the case of *R v Dwight Sagany & 4 Others (2012)e KLR* in

which foreigners were granted bail.

10. Learned State Counsel, Mr. Kiarie for the Respondent pointed out that the Applicant has made several attempts to be admitted to bail premised on similar grounds. He submitted that there exists no change in circumstances to warrant this court to review its decision of 9th October, 2019. He argued that the Covid-19 disease is a global pandemic that is not unique to Kenya. He stated that the recommendation by NCAJ is only applicable to deserving cases and the Applicant's case does not qualify as it is a matter of great public importance and touches on the national security of this country. Further, he noted that in any event, the Kamiti Maximum Security Prison where the Applicant is currently remanded has not reported any Covid-19 cases within the facility.

11. As regards the Applicant's health, Mr. Kiarie submitted that whereas it is true that the Applicant fractured his hip bone, his condition has been well taken care of by the prison facility and he is now fully healed. Counsel noted that the Applicant has not demonstrated how his health has deteriorated while in custody to show that he requires to be released for specialized treatment. He pointed out that counsel for the Applicant has not demonstrated the attempts made to get the Applicant's medical reports from Kamiti Prison as proof of the same, if at all. He referred the court to the case of **R v Diana Suleiman Said & Another [2014] eKLR**, where Mureithi, J. cancelled bond despite the fact that the accused had health issues.

12. On the issue of the Applicant's nationality, it was averred that two of the offences which the Applicant has been charged with touch on his acquisition of passport number BK038078/B079172 and a Kenyan ID Card number 27675037. Mr. Kiarie submitted that as per the evidence so far gathered, the Applicant's nationality is unknown and as such if granted bail, he will definitely abscond the jurisdiction of the court and render the trial nugatory. He highlighted various inconsistencies in documents obtained from various government institutions regarding the national identification card and passport acquired by the Applicant.

13. Further, he pointed out that the documents that the Applicant has attached in the current application were not attached in the previous applications in any court. He submitted that in any case, the fact that they have been disowned by government offices shows that they are not legitimate and thus should be disowned. Counsel also noted that the authorities cited on the fact that non- Kenyans were granted bail are distinguishable from the Applicant's case since his nationality is unknown.

14. Further, Mr. Kiarie submitted that the delay in the hearing of the matter in the trial cannot be blamed on the prosecution. He stated that the matter has so far only been set down for hearing twice with the first time being sometime in August, 2019 and the second in February, 2020. It was his submission that the hearing could not kick off as scheduled in August because the trial court file in **Criminal Case Number 474 of 2019** was in the High Court for reference to the various applications. That in February, 2020, the trial court was informed that the Applicant had fractured his leg and the trial magistrate was also bereaved. Counsel further argued that the issue of disclosure does not arise because under the Constitution, the same can be made at any time as long as defence is granted time to prepare.

15. In totality, Mr. Kiarie submitted that the application is an abuse of the court process and urged the court to dismiss it.

Determination

16. The procedure to be followed when entertaining such applications was set out in **R. v. Nottingham Justices Ex parte Davies[1981] QB 38** as follows;

“The court considering afresh the question of bail is both entitled and bound to take account not only of a change in circumstances which has occurred since the last occasion, but also circumstances which, although they then existed, were not brought to the attention of the court. To do so is not to impugn the previous decision of the court and is necessary in justice to the accused. The question is a little wider that “Has there been a change?” It is “Are there any new considerations which were not before the court when the accused was last remanded in custody?”

17. In **Guyo Gorsa Boru v Republic [2020] eKLR** the court stated as follows:

“Some of the grounds that constitute changed circumstances include where the prosecution has inordinately or unjustifiably failed or delayed to avail witnesses before court, where it is established that from the evidence already presented in court by the prosecution witnesses, the likelihood that conviction will ensue was remote, where the health status of the accused has changed that requires medical attention which cannot be availed when he is in remand custody; that` the accused has been able to partially meet the terms that the court imposed for his release on bail pending trial, and where it is established that the basis upon which charges were laid against the accused has changed. This may include where the charge facing the accused is reduced from a more serious charge to a less serious one. The above list is not exhaustive but is meant to serve as a guide when the court is considering whether there exists changed circumstances to warrant the review of the denial or the grant of bail.”

18. I cannot add more save to state that in considering the parameters raised, each case must be decided based on its unique circumstances. In this case, the main ground on which the Applicant was denied bail was that he was a flight risk since his nationality is unknown which predisposes him to absconding court if released on bail. I note that the Respondent has presented *prima facie* evidence obtained from the National Registration Bureau, Busia and the State Department of Civil Registration Services demonstrating that the Applicant's birth certificate and national identification card are questionable. Some of the information on the questionable documents are replicated on his passport number BK038076 which he has now presented as proof of his Kenyan citizenship.

19. I also note that the whereas it is indicated in the registration Form 136A and identification report obtained from the National Registration Bureau that the Applicant's home District is Lagdera, Garissa County, the supporting affidavit of his wife indicates that his ancestral home is Manderla East Township Ward, Manderla County. It is therefore evident that *prima facie*, the Applicant's nationality is unknown and the same can only be determined on merit after a full trial. In so holding, I find solace in the fact that two of the offences charged are Obtaining registration by false pretences contrary to Section 320 of the Penal Code, the subject matter in issue herein being Kenyan identification card

No. 27675037 and False declaration of Passport contrary to Section 321 of the Penal Code in which it is alleged that he made a false representation to the Immigration Department for purposes of obtaining a Kenyan Passport No. B079172. Whilst I warn myself the accused remains innocent until otherwise proven, the fact that prima facie, the Respondent has demonstrated that some of the identification documents have been denounced by their purported source is good ground to attach the averment that the Applicant of unknown Nationality. I however emphasize that on this ground the best forum to ventilate evidence in support, or in defence of, the same is at the trial. I add no more on this issue.

20. Taking into account the aforesaid, *prima facie* evidence demonstrates the Applicant as a flight. He thus does not qualify as a deserving case for review of bail terms.

21. Further and any event, it is factual that Kamiti Maximum Security Prison where the Applicant is currently remanded has not reported any case of persons infected with the of Covid-19 disease. It is therefore not factual that he is at risk of contracting the disease.

22. I add that no material was placed before this court to show that the Applicant's health has deteriorated so much that it cannot be managed by the prison facility while he is in custody. Furthermore, he was escorted to hospital by the prison authorities when he sustained the fracture. The prison authority too has a system of referral of prisoners to better health facilities when need rises.

23. On the submission that the prosecution has contributed to the delay of the trial, the record of proceedings of the trial court attest a contrast scenario. As correctly argued by counsel for the Applicant, the trial court took cognizance of the fact that the disclosures by the prosecution had taken quite long. However, on the other hand, some delays can be attributed to the various interlocutory applications filed in the trial court by the accused persons as well as revision applications in the High Court which sometimes necessitated the calling for the trial court's record by the latter Court. Further and as correctly submitted by learned state counsel, the second time the trial was scheduled for hearing in February 2019, the same did not proceed since the trial court was informed that the Applicant herein had fractured his hip bone and therefore could not attend court. I would now urge that all parties now settle and concentrate on the trial with a view to expedite the wheels of justice, more so because the Applicant is in custody.

24. The upshot of my observations is that the Applicant has not established that there exists any change of circumstances to warrant this court to review the earlier order that denied the Applicant bail pending trial. I find the application without merit and the same is hereby dismissed. I direct that the trial court file be remitted forthwith to the trial magistrate for mention on 6th August, 2020 to fix a hearing date. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF JULY, 2020.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. Mr. Abdulhakim for the Applicant.

2. Mr. Muteti h/b for M/s Fatma h/ b for Mr. Kiarie for the Respondent.