



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.269 OF 2019

GUYO GORSA BORU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Guyo Gorsa Boru, is facing 11 charges under the **Prevention of Terrorism Act** before the Chief's Magistrate's Court at Milimani, Nairobi (**i.e. Criminal Case No.273 of 2018**). In the first count, he has been charged with **being a member of a terrorist group** contrary to **Section 24** of the **Act**. In the second count, he is charged with **collection of information** contrary to **Section 29** of the **Act**. In the remaining counts (9), he has been charged with **being in possession of articles connected with the commission of terrorism** contrary to **Section 30** of the **Act**. According to the charge sheet, the said articles were found in the Applicant's mobile phone when he was arrested by the police. When the Applicant was arraigned before the trial court, he pleaded not guilty to the charge. The majority of the prosecution witnesses have testified. According to the prosecution, there are only two witnesses remaining for the prosecution to wrap up its case. The Applicant made several applications to be released on bail pending trial. All applications were denied. This provoked the Applicant to make the present application before this court for the revision of the last order issued by the trial court denying him bail.

In his application, the Applicant explained that since he was arraigned in court on 13th January 2018, the prosecution has not been diligent in the prosecution of the case. He set out instances where the prosecution failed to supply him witnesses' statements within the stipulated period; instances where the prosecution without reasonable excuse, sought adjournments whose ultimate aim was to delay the just conclusion of the trial. The Applicant explained that the circumstances that were prevalent when he was first denied bail pending trial were no longer in existence. He pointed out that the trial magistrate had indeed acknowledged that those circumstances were no longer germane. He was of the view that there no longer existed compelling reasons which could persuade the court to deny him bail pending trial. In addition, he urged the court to consider his antecedents and relationship with the Anti-Terror Police Unit (ATPU), prior to his arrest and arraignment before court to face the charges. The Applicant asserted that he was not a flight risk, and in any event, had no capacity to flee from the jurisdiction of the court. As regard whether his release would pose a danger to public security, the Applicant stated that there was no evidence that such threat existed. In essence, the Applicant is saying that he is a law abiding citizen who should benefit from the constitutionally guaranteed right to be released on bail pending trial.

In response, the prosecution filed grounds in opposition to the application. The prosecution was apprehensive that the Applicant may be incentivized to abscond and leave the country due to the fact that if he were to be convicted, he would serve a substantial term in prison. The prosecution urged the court to take into consideration the fact that terrorism is a serious offence and undermines the national security and tranquillity of the people of Kenya. The prosecution contends that it would be risky to release the Applicant on bail pending trial because he was not likely to attend court to face trial. In the premises, the prosecution urged the court to dismiss the application as it was without merit.

Prior to the hearing of the application, counsel for the Applicant and the prosecution filed written submission in support of their respective opposing positions. Mr. Chacha for the applicant reiterated the contents of the application and relied on several decided cases in support of the Applicant's application. In addition, he emphasized that the reasons the prosecution previously advanced to persuade the trial court to deny the Applicant bail pending trial were no longer prevailing. The Applicant was a person of fixed abode, had work and was not a flight risk. As regard whether the Applicant was a danger to society, Learned Counsel submitted that the charges brought against the Applicant did not include radicalization which would have entitled the prosecution to make such a claim. He pointed out that the majority of the charges brought against the Applicant were based on alleged terrorism material found in his phone. In any event, he reiterated that someone charged with terrorism related cases cannot be denied bail pending trial based on that basis alone. He urged the court to release the Applicant on bail pending trial on reasonable terms.

Mr. Momanyi, Learned Prosecutor, submitted that the reasons that led to the Applicant being denied bail pending trial were still in existence. He reiterated that the likelihood that the applicant will abscond from the jurisdiction of the court was high. He denied the Applicant's claim that it was the prosecution which solely contributed to the delay in the just conclusion of the trial. He attributed some of the blame to the unavailability of an interpreter during some of the days that the case had been scheduled for trial. He urged the court to take into

consideration the fact that the trial is at an advanced stage, and the fact that if convicted, the Applicant is likely to face a stiff custodial sentence. It was his view that the application was unmerited and should be dismissed.

This court has carefully considered the rival submission, both written and oral made by the parties to this application. For the Applicant to succeed in his application for reconsideration of bail pending trial, in addition to displacing the grounds put forward by the prosecution as constituting compelling reasons, he must establish existence of changed circumstances. In **Republic vs Diana Suleiman Said & Another [2014] eKLR**, Muriithi J. held thus:

“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.”

In **Republic vs Francis Maina Wairimu [2020] eKLR**, Wakiaga J. held that:

“In an application for review for denial of bail, the Applicant is under a duty to convince the court that there had been a change of circumstances from the time when he was denied bail to warrant the court reviewing its earlier order.”

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 and requires medical attention that cannot be provided when he is in remand custody; that the accused has been able to partially meet the terms the court imposed for his release on bail pending trial and where it is established that the basis upon which the charges were laid against the accused has changed. This may include where the charge facing an 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 denial or grant of bail.

In the present application, the applicant has based his arguments on changed circumstances on essentially two grounds; that the prosecution had inordinately delayed the trial by failing to avail witnesses on the dates scheduled for trial. The Applicant complained that this has caused him prejudice as he has continued to remain in remand custody with no clarity as to when his trial will be concluded. The Applicant's second ground is that the circumstances on the ground that led the trial court to conclude that there exists compelling reason is no longer prevalent. He points out that the persons who were charged with causing civil disturbances were acquitted by the court. There was no possibility that he would be a threat to the security and peace of the community. On the other hand, the prosecution insists that the charges facing the Applicant are serious; all the prosecution witnesses save two had already testified; that the reasons the court adjourned the trial included failure of attendance in court of an interpreter which could not solely be blamed on the prosecution.

On evaluation of the grounds put by the Applicant, it was clear to this court that the said grounds do not meet the threshold constituting changed circumstances. It was evident from the submission made that the prosecution did not solely contribute to the delay in the expeditious conclusion of the trial. Some of the delays were attributed to the non-attendance on the schedule dates of trial of the interpreter. In any event, the reason given by the prosecution when they sought adjournment were cogent that it persuaded the trial court to grant the same. The prosecution persuaded the court that it had made efforts to avail the witnesses before the trial court. Only two witnesses are remaining to give their testimony. This court formed the view that the prosecution is keen to have the case disposed of as the Applicant is. The court therefore holds that the Applicant was not able to establish the existence of changed circumstances to warrant this court to revise the earlier order issued by the court denying the Applicant bail pending trial.

In the premises therefore, the application lacks merit and is hereby dismissed. The prosecution is ordered to present their witnesses before the trial court and close its case within three (3) months of today's date, failure of which the Applicant shall be at liberty to reapply before this court to be released on bail pending trial. This order shall only apply if the Applicant does not apply to adjourn the hearing when the case is listed for trial. The Deputy Registrar of this court shall notify the trial court of this court's direction. It is so ordered.

DATED AT NAIROBI THIS 22ND DAY OF JULY 2020

L. KIMARU

JUDGE