



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CRIMINAL DIVISION

MISCELLANEOUS CRIMINAL APPLICATION NO. 1 OF 2018

REPUBLIC.....APPLICANT

VERSUS

SALAH MOHAMED KHALIF.....RESPONDENT

RULING

The Director of Public Prosecutions was aggrieved by the decision of the Chief Magistrate (Hon. Martha Mutuku CM) made on 20th February, 2020 in **Nairobi CMCCR Case No.823 of 2016**. In the decision, the Chief Magistrate allowed the application by Salah Mohammed Khalif alias Prince to be released on bail pending trial. The Chief Magistrate allowed the application on essentially two reasons: that the Respondent, who is ailing, requires medical attention which cannot be provided while he is in prison. The second reason is more pertinent. In her ruling, the learned Chief Magistrate stated thus:

“24 Similarly, disclosure and ten witnesses having testified, there has been no overwhelming evidence has so far presented before court to show an overwhelming likelihood of success. The Applicant has not, to this end (been) adversely mentioned by the witnesses.

25. While I do agree with counsel for the State that it is not possible to predict what the remaining witnesses have to say against the Applicant/Accused person, I also recognize that an accused is innocent until proven guilty. I do note that the 2nd accused person was released by the court and has dutifully attended court.

26. I am satisfied on a balance of probabilities there exists compelling reasons that justify the granting of bail in this case. However, the accused person shall not have the option of cash bail to ensure attendance to the court when required.”

The learned Chief Magistrate then released the Respondent on bail pending trial.

Upon the Respondent’s release on bail pending trial, the bond was approved by the court and he was released from prison. However, at the gate of the prison, the Respondent was arrested by officers from the Anti-Terror Police Unit (ATPU). An application was made before the High Court which sought the stay of the orders issued by the Chief Magistrate directing the release of the Respondent on bail pending trial. The application was granted. The Respondent is under detention at the ATPU pending the hearing of the application.

In the application for revision under **Section 362 and 364 of Criminal Procedure Code**, the Director of Public Prosecutions sought the setting aside of the particular orders releasing the Respondent on bail pending trial on the following grounds:

- i) “That the issue of bond having been placed before the High Court, the trial court lacked jurisdiction to determine the same.**
- ii) The accused person did not provide any medical report to lay credence to his allegation of ill health which the medical doctor at Kamiti prison could not deal with.**
- iii) The Trial Magistrate completely ignored a finding by the High Court that the delay in the trial was caused by the accused and not he prosecution which is ever ready to proceed.**
- iv) The Trial Magistrate also ignored, without any justification the finding by the High Court that it would be against national security and public safety to release the accused person”.**

During the hearing of the application, Mr. Okello for the State reiterated the contents of the application for revision. He pointed out that the trial court and the High Court have rendered several decisions regarding whether or not the Respondent should be released on bail pending trial. In all occasions, the two courts have consistently denied the Respondent bail pending trial. If the Respondent was to succeed in his application, he must establish existence of changed circumstances. Learned prosecutor was of the view that the Respondent had not demonstrated changed circumstances, and further, the fact that the trial court had previously ruled that the Respondent was a threat to public security, those circumstances had not changed.

Mr. Okello took issue with the finding by the trial court that, based on the evidence already adduced by the prosecution witness, there was likelihood that he would not be convicted. He submitted that the trial court was not at liberty to make such comments yet the prosecution had not yet called all its witnesses. Mr. Okello pointed out that there was no medical evidence which was presented before the trial court to prove that the Respondent suffered from medical ailment which could not be medically attended to while he is in remand custody. He was emphatic that the trial magistrate did not have jurisdiction to reconsider the issue of bail pending trial when the High Court had rendered itself on the issue. In the premises therefore, Learned Prosecutor urged the court to allow the application for revision and reverse the order of the trial magistrate directing the release of the Respondent on bail pending trial.

Mr. Chacha for the Respondent opposed the application. He submitted that he Respondent had established existence of changed circumstances to entitle the court reach the finding that it did. He observed that he trial court had jurisdiction to issue the orders that it did. He set out the history of the case in relation to the applications that the Respondent had made seeking to be released on bail pending trial. He submitted that Respondent had established that his health had deteriorated during the period that he has been in remand custody. A recommendation had even been made that the Respondent undergoes surgery to address his medical challenge. The issue of the respondent's medical condition had been established as constituting changed circumstances which entitled the trial court reach the decision that it did. He pointed out that the Respondent did not produce the medical records because the same had been kept by the prison authorities. Effort by the court to obtain the same had proved futile. Learned counsel was concerned by the continued detention of the Respondent by the ATPU. He noted that the Respondent had missed several appointments that he was required to be seen by doctors at the Kenyatta National hospital. He explained that at the ATPU, the Respondent was been hand and leg cuffed which has made his medical situation worse.

Mr. Chacha submitted that the Respondent has always been interested in having the trial expeditiously concluded. If he was released on bail pending trial, he was not a flight risk as his passport had been confiscated by the police when he was arrested. He undertakes that he will attend court on the scheduled date for hearing if he is released on bail pending trial. The respondent urged the court to dismiss the application for revision.

This court has carefully considered the rival submission made by the parties to this application. It has also had the benefit of reading the proceedings of the trial court and the decision that is sought to be revised. The first issue for determination is whether the trial court had jurisdiction to consider the Respondent's application to be released on bail pending trial. It was contended by the Applicant that the trial court did not have jurisdiction to consider the Respondent's application in view of the various decisions that had been made by the High Court in respect of his application to be released on bail pending trial. The Respondent was of view that the trial court had the requisite jurisdiction to consider the application where existence of changed circumstance was established. This court agrees with the trial court that it has jurisdiction to reconsider the issue of whether or not to grant bail pending trial, where changed circumstances are established notwithstanding the fact that the High Court had previously rendered a decision on the matter. The only caveat being that the issues that are presented as constituting changed circumstances should not be the same issues that the High Court considered and rendered an opinion in respect of the same.

On the merits of the application, the Respondent argued that his deteriorating medical condition and the fact that the evidence so far adduced by the prosecution witnesses does not implicate him in the charges brought against him constitute changed circumstances that entails the court to grant him bail pending trial. The prosecution is of a contrary view. The prosecution insists that there are no changed circumstances to warrant the court reach a different verdict than it had earlier reached and that the Respondent should not be released on bail pending trial.

What constitutes changed circumstances in bail applications?

A leading decision in that respect is the case of Republic vs. Diana Suleiman Said & Another [2014] eKLR where Muriithi J. held thus;

“The changed circumstances test is one of common sense where the circumstances of the case are so altered that compelling reasons are disclosed for 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 society at large. In the same way that an unsuccessful Applicant of 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 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 change of circumstances from the time when he was denied bail to warrant the court reviewing its earlier orders”.

The court in Nairobi H.C.Criminal Revision No. 269 of 2019 Guyo Gorsa Boru vs Republic (unreported) held 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 ensure was is 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 charges 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.”

In the present application, it was apparent to this court that the Respondent indeed established existence of changed circumstances when he applied to be released on bail pending trial before the Chief Magistrate’s Court. The trial court observed that the medical condition of the Respondent was dire that his continued stay in remand custody may have adverse effect on his long term wellbeing. The prosecution complained that the Respondent had not availed to the court medical documents to establish his medical condition. The court notes that the trial court requested the prison authorities to avail the said medical documents to enable the court make a decision. Unfortunately, the same was not forthcoming. The proceedings reveal that at certain times during trial the Respondent informed the court that he would not be able to attend court at a particular date on account of the fact that he was scheduled to undergo surgical operation. This fact is within the knowledge of the prosecution. The issue of Respondent’s deteriorating health situation was not an issue that was argued before the court in the previous applications for bail pending trial which were denied.

A more pertinent charged circumstance is the observation made by the trial court in regard to the evidence so far tendered by the prosecution witnesses in the trial. The trial magistrate noted that no evidence had so far been tendered to incriminate the Respondent. This is after about two thirds of the prosecution witnesses had already testified. This observation by the trial court shows that it is unlikely that the prosecution may establish the charges brought against the Respondent. That being the case, there is no reason why the Respondent should be denied bail pending trial in such circumstances. The previous decisions made by the court regarding the existence of compelling reasons were made before the prosecution witnesses had tendered evidence in support of the charges brought against the Respondent. In that regard, the observations made by the court at that time are no longer applicable in light of new information that has emerged in respect of the evidence already tendered before the trial court.

In the premises therefore, this court holds that the prosecution has failed to establish a case for this court to revise the ruling of the trial court rendered on 20th February, 2020. The Application for revision dated 26th February, 2020 is hereby dismissed. The Respondent shall be released forthwith on bail pending trial on terms proposed by the Trial Magistrate. It is so ordered.

DATED AT NAIROBI THIS 22ND DAY OF JULY, 2020

L. KIMARU

JUDGE