



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CRIMINAL CASE NO. 36 OF 2019**

**REPUBLIC.....PROSECUTOR**

**VERUS**

**LOYFORD MUNENE.....ACCUSED**

**R U L I N G**

1. **Loyford Munene (“the accused”)** applied vide a Motion on Notice dated 12<sup>th</sup> March, 2020 for the review of the orders made on 17/10/2019 that denied him bond. He therein sought that he be granted bond pending the hearing and determination of his case.
2. The application was supported by his affidavit sworn on 12/3/2010. He averred that the major reason why he was earlier on denied bail was that he was a flight risk. That his whereabouts had been unknown since 18/12/2017.
3. He averred that from 30/8/2017, he was at the National Youth Service, **Lamu field Station** where he served for seven months. He was later sent to **Yatta Field Station** before joining the Meru National Polytechnic to pursue a diploma in automotive engineering when he was apprehended.
4. He further averred that he was supposed to go through an industrial attachment as required by the provisions of the syllabus of the Course he was undertaking. However, the terms imposed by this court were likely to prejudice him as he cannot fully attend to the same while in custody.
5. In reply to the application and vide an affidavit sworn by **P.N. Namiti**, the Prosecution Counsel, the state did not oppose the application but proposed that the Court do impose stringent conditions if it granted bond to the accused.
6. **Kaimenyi Kithinji**, advocate for the family of the victim opposed the application through a Preliminary Objection dated 23/6/2020. It was contended that the matter was *Res judicata* since this court had substantially dealt with the same as between the same parties.
7. In his submissions, **Kaimenyi** relied on **Republic v Jane Muthoni Mucheru & Another [2019] eKLR, Republic v Fredrick Ole Leliman & 4 others [2019] eKLR, Republic v Raphael Muoki Kalungu [2020] eKLR, Feisal Mohammed Ali alias Feisal Shabal v Republic [2015] eKLR** in support of the submissions that the application be declined.
8. The genesis of this matter commenced on 20/5/2019 when the accused made an oral application for bail. The same was rejected on 4/7/2019. On 9/7/2019 he once again applied by Motion for the review of the order denying him bond. Vide this Court’s ruling made on 17/10/2019, the Court found that there had been no new to warrant a review of the earlier order.
9. In the said ruling, the Court observed: -

*“I am alive to the denials of the applicant. I am also alive to the fact that the prosecution did not give specifics as to the family members of the victim who recorded the messages to withdraw the case. However, I note that the allegation that the applicant has avoided his home abode was not seriously challenged. The applicant on his part did not specify any of the days that he may have visited his home village as he alleged. It is not true that he was at the Meru National Polytechnic between December 2017, and May 2019. He has been there between December 2018 and May 2019 when he was apprehended.*

*One other thing the pre-bail report alluded to the possibility of the applicant being harmed if released, the applicant did not dispute this fact.*

*In this regard, I find that there exists compelling reasons why not to release the applicant. His alleged co-conspirator and brother is still at large.”*

10. The core reasons for the denial of bond was the likelihood of his absconding. The other reasons were the alleged interference with witnesses, and fear for his security.

11. The first issue for determination is whether the application is *Res Judicata*. This is the second application the accused has made. In **Republic v. Diana Suleiman Said & Another [2014] Eklr**, the court observed: -

*“With respect, I do not agree that the review of bail on the ground of changed circumstances, or changes in the circumstances of the case, including circumstances of the accused, witnesses, victims or the society affected by alleged crime is a strange phenomenon. I would say our courts do it every day when we sit to consider renewed applications for bail such as when volatility on the ground is established to have ceased or for the cancellation of bail on account of accused’s refusal to attend court while on bail, when sureties withdraw or for other reasons.*

*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.*

*I find nothing in the provisions of Article 49 (h) of the Constitution or section 123 of the Criminal Procedure Code to suggest that the court once grant or refuse (sic) bail becomes functus officio or that the issue of bail becomes res judicata upon decision to grant or refuse bail. ...”*

12. I reiterate the foregoing in toto. An accused may bring a fresh application for the review of bond terms when there exists changed circumstances. This can be made as many times as circumstances may permit. The matter is therefore not *res judicata*.

13. In the present application, the applicant has produced a letter from the National Youth Service dated 20/1/2020. The same confirms that he was recruited to that institution on 30/3/2017. That he was at Gilgil Training College until 8/8/2017. He was sent to Witu Field Station on 30/8/2017 where he served for seven months.

14. In his supporting affidavit, the accused supplemented the said information and explained that, he was later sent to Yatta Field Station before joining the Meru National Polytechnic in May, 2018.

15. In the initial pre-bail report which the Court had relied on to deny the accused bond, it had been indicated that the applicant had been granted a pass from Witu Field Station in December 2017 and came home. He started operating a *bodaboda* business at Miuririi. That he thereafter disappeared after the commission of the offence. The present pre-bail has reiterated the same information but failed to clarify his having gone to Yatta and the National Polytechnic.

16. From the information now on record, it is clear that the accused was with the National Youth Service. The accused has given a full account of where he was. If he was on duty at both Witu and Yatta Field Stations, there is no way he would have been found within his village where it is said he disappeared from. The period between December 2017 and May, 2018 has been satisfactorily explained.

17. In the earlier ruling, the Court was not convinced that satisfactory evidence had been produced to prove the allegations of witness interference. I note that Mr. Kaimenyi has repeated the same in his submissions. He has also alluded to the safety of the accused. With respect, submissions cannot and have never been evidence. If the victims needed to have the said issues considered, they should have sworn an affidavit which the accused would have had an opportunity to respond to.

18. The respondent did not show that the circumstances relating to the safety of the accused still prevails. In the replying affidavit by the Prosecution Counsel, which **Mr. Kaimenyi** quite correctly impugned, the state conceded that it had no objection to the accused being released on bond.

19. In view of the new evidence that explained the accused’s whereabouts for the period it was alleged he had run away, and in the absence of any cogent evidence to support the allegations alluded to in the pre-bail report made in July, 2020, I do find that there exists new circumstances for the review of the order denying the accused bond.

20. I therefore find the Motion to be meritorious and allow the same on the following terms: -

- a) **The accused may be released on a personal bond of Kshs. 500,000/= with a surety of a similar amount.**
- b) **The surety do provide proper details for the confirmation by the OCS, Igoji Police Station about the whereabouts of the accused person once, every two months.**
- c) **The accused do find an appropriate alternative place of residence other than the one he may face danger.**

**DATED and DELIVERED at Meru this 12<sup>th</sup> day of August, 2020.**

**A. MABEYA**

JUDGE