



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL REVISION NO.8 OF 2018**

**REPUBLIC.....APPLICANT**

**VERSUS**

**GILBERT JUMA DEYA.....RESPONDENT**

**RULING**

On 19<sup>th</sup> September 2017, this court, in declining to grant the Respondent's application to be released on bail pending trial, noted as follows:

***“For the above reasons, the Applicant’s application lacks merit and is hereby dismissed. The decision of the trial court is upheld subject only to the condition that the trial of the Applicant must be expedited. The trial court noted that “the prosecution must prepare to present its witnesses and prosecute its case on the first date fixed and thereafter on the day to day basis until conclusion unless otherwise prevented by circumstances that have to be determined by the court to be compelling.” This court reiterates this directive by the trial court and adds that the prosecution must present its entire case within 120 days of the date of delivery of this Ruling since they have indicated that they are ready to present their witnesses and prosecute the case. The Applicant must co-operate with the trial court to secure expedition of the trial. If the prosecution shall not have closed its case within the days specified above, the Applicant shall be at liberty to renew his application for bail pending trial. It is so ordered.”***

It is common ground that the prosecution has already presented fourteen (14) witnesses before the trial court. As at 21<sup>st</sup> December 2017, the prosecution was remaining with nineteen (19) witnesses to present before the trial court. From the submission made before this court, it is apparent that, despite its tight schedule, and the fact that the trial court is hearing other cases, the trial of the Respondent has been expedited. The trial court explained that it could not proceed with the case between 27<sup>th</sup> December 2017 and 18<sup>th</sup> January 2018 because the trial magistrate would be away on his annual leave. The Respondent made an application before the trial court to be released on bail pending trial essentially on the following grounds: *that the Respondent was ailing and would require medical attention which cannot be availed to him while in remand custody; that he was willing to provide substantial sureties for his attendance before court; that his advocate was willing to give an undertaking that he would attend court without fail if the court granted his application to be released on bail pending trial and finally, that he would abide by any terms that may be imposed by the trial court, including submitting himself periodically before the police and also surrendering his travel documents before the court.* Despite objection by the prosecution, the trial court granted the Respondent's application on the terms that he sought bail save that its application would take effect from 17<sup>th</sup> January 2018.

Aggrieved by this decision, the Director of Public Prosecution moved this court pursuant to the provisions of **Section 362** of the **Criminal Procedure Code** seeking to have the said decision revised. The prosecutor complained that the trial court had granted the Respondent bail yet the circumstances under which the court found that they were compelling reasons not to release the Respondent on bail pending trial were still prevalent. He was of the view that there was no justification to release the Respondent on bail while the prosecution had done its best to avail the witnesses within the period stipulated by the court. The prosecutor doubted that the professional undertaking given by an advocate acting for an accused person had any weight or value in determining whether or not an accused person will attend court. In the premises therefore, learned prosecutor urged the court to call for the decision rendered by the trial court and order that the Respondent remains in remand custody pending the hearing and determination of the case.

During the hearing of the application, Mr. Mutuku the Deputy Director of Public Prosecution reiterated the above grounds. He submitted that the concurrent finding earlier made by the trial court and by this court that the Respondent was a flight risk had not changed. The circumstances prevailing then were still the same. The fact that the Respondent claims that he is sick cannot be a ground for this court to vary its earlier decision that there were compelling reasons to deny the Respondent bail pending trial. In any event, he submitted that there were facilities within the prison service, and if necessary, referral at Kenyatta National Hospital, where the Respondent will be provided the required medical attention.

In response, Mr. Swaka for the Respondent defended the decision of the trial court to release the Respondent on bail pending trial. While conceding that the prosecution had availed witnesses before the trial court, he faulted the manner in which the prosecution presented the said witnesses, which in his view, caused considerable delay in the expedition of the trial. He stated that since December 2017, the Respondent had become ill thus necessitating medical attention outside the facilities available at the prison. He was of the strong view that the circumstances of the Respondent's failing health demanded that the court considers releasing the Respondent on bail pending trial. He emphasized that the Respondent was an old man who would not be a flight risk. The Respondent was prepared to abide by any terms that the court may impose to secure his release on bail pending trial. As an advocate, he was willing to provide professional undertaking to secure the Respondent's attendance before court. He urged the court to consider that it may take a long time before the trial is concluded if the time it took for the prosecution to present the witnesses who had already testified is anything to go by. In the premises therefore, he urged the court not to vary or set aside the decision of the trial court.

This court has carefully considered the rival submission made by the parties to this application. It is important to reiterate that under **Article 49(1)(h)** of the **Constitution**, the Respondent is entitled to be released on bail pending trial unless there are compelling reasons. The circumstances of the Respondent are rather unique. The Respondent was a fugitive from justice for a period of twelve (12) years before the Government of Kenya succeeded in having the Respondent extradited from United Kingdom to Kenya to face trial. In its earlier Ruling, the court observed that the Respondent had used all possible means, including forging a court order to avoid his day before the court in Kenya. It was clear to this court that the Respondent is not only a flight risk but someone who has the means to give effect to such flight.

It is trite that this court can reconsider its earlier decision not to release the Respondent on bail pending trial if the Respondent is able to present the court persuasive changed circumstances that would persuade this court to vary its earlier decision. In the present application, the Respondent claims that since December 2017, he has been ailing. He has presented to the court a medical report which indicates that he is suffering from an ailment which he is currently undergoing treatment. He has responded positively to treatment but is yet to undergo further tests to determine the extent of his ailment. What is important for this court to point out is that the Respondent has undergone this treatment while he is in remand custody.

No one can doubt the thrust of the prosecution's argument that the fact that the Respondent is undergoing such treatment in remand custody is sufficient to prove that his medical condition can be treated while he is in remand custody. The age of the Respondent may be a factor when it comes to sentencing if the Respondent is convicted. However, his age is no bar to the Respondent facing trial if he is alleged to have committed an offence. The fact that the Respondent is able to provide substantial surety including a professional undertaking given on his behalf by his advocate (this court is not sure whether it is ethical for an advocate to give a professional undertaking to secure the attendance of a client before court in a criminal case), and the fact that he is offering to abide by any further terms that may be imposed by the trial court does not distract this court from the primary concern that this court had earlier found that the Respondent is a flight risk.

For the above reasons, this court finds merit with the application filed by the Director of Public Prosecutions. The decision rendered by the trial court on 21<sup>st</sup> December, 2017 releasing the Respondent on bail pending trial is hereby called to this court and is set aside. It is substituted by an order of this court directing that the Respondent shall remain in remand custody until the conclusion of the trial. The prosecution has shown that it is acting in good faith in the presentation of its witnesses before court. It has not delayed the trial. The period in which the trial is concluded is hereby extended by a further 90 days. Either party shall be at liberty to apply to this court. It is so ordered.

**DATED AT NAIROBI THIS 25<sup>TH</sup> DAY OF JANUARY 2018**

**L. KIMARU**

**JUDGE**