

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISCELLANEOUS CRIMINAL APPLICATION NO.1 OF 2018

SALAH MOHAMED KHALIF APPLICANT

VERSUS

REPUBLIC RESPONDENT

RULING

The Applicant, Salah Mohamed Khalif is facing terrorism related charges before the trial magistrate's court. His application to be released on bail pending trial was denied. His application to this court to have the said decision denying him bond pending trial revised was also denied. The Applicant has now renewed his application for bond essentially on the grounds that the circumstances that prevailed at the time the court denied him bail had changed, and therefore, this court ought to reconsider its decision. In particular, the Applicant stated that since his arraignment before the trial court, the trial had not commenced. He attributes this failure to commence trial to lack of diligence on the part of the prosecution. He reiterated that he had suffered while in remand custody yet the prosecution was not ready to prosecute the charges brought against him. The prosecution on its part threw the blame back to the defence counsels who had, by their recalcitrance, frustrated the trial of the case. In particular, the prosecution alleged that the defence counsels were unwilling to take hearing dates for trial even when the trial court offered to have the case heard on a day to day basis until the conclusion of the case. It was the prosecution's case that the Applicant had laid no basis at all for this court to interfere with its earlier decision declining to release the Applicant on bail pending trial. The circumstances prevailing then had not changed.

This court has read the pleadings filed by the parties in support of their respective opposition positions. It has also considered the submission made on behalf of the Applicant by Prof. Nandwa and Mr. Kang'ahi and by Mr. Ondimu for the prosecution. In an application such as this one, for this court to revise its earlier decision declining to grant the Applicant bail pending case, the Applicant must establish changed circumstances that will make the court reconsider its earlier decision. The changed circumstance includes whether the prosecution has inordinately delayed in availing witnesses before the court. In the present application, the Applicant contends that since the court denied him bail, the prosecution had made no efforts to prosecute the case. The Applicant further submitted that the prosecution had not made full disclosure of the evidence that it will rely on during trial. For these reasons, the Applicant was of the opinion that he had been extremely prejudiced by his continued incarceration in remand custody, and should therefore be released on bail pending trial. In opposition to the application, the prosecution gave a different picture from that of the Applicant. Whereas the prosecution conceded that it had not made full disclosure to the Applicant, nevertheless, on the basis of the disclosure already made, the prosecution was ready, able and willing to prosecute the case. The prosecution accused the Applicant and his co-accused for frustrating the trial of the case by refusing to have the case fixed for hearing.

This court has perused the Ruling that was delivered by the trial court on 4th January 2018. It was clear to this court that the prosecution has always been ready to have the case tried. In fact, the prosecution is ready to have the case heard on a day to day basis if the defence cooperates. Unfortunately, it appears that the defence is not ready to have the trial expedited. Indeed, the prosecution has indicated to this court that it would be willing to have the case heard on a day to day basis until its conclusion. That being the case, the claim by the Applicant to the effect that it is the prosecution that has frustrated the trial of the case has no basis. That being the only circumstance that the Applicant alleged had changed, means that there is

nothing before this court that can persuade it to exercise jurisdiction in favour of the Applicant. The application lacks merit and is hereby dismissed. It is so ordered.

DATED AT NAIROBI THIS 11TH DAY OF JANUARY 2018

L. KIMARU

JUDGE