



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**CRIMINAL REVISION NO. 169 OF 2015**

REPUBLIC..... APPLICANT

**VERSUS**

1. UMMULKHEIR SADRI ABDALLA )
2. KHADIJA ABUBAKAR ABDULKADIR )
3. MARYAM SAID ABOUD )
4. HALIMA ADAN ALI )..... RESPONDENTS

**RULING**

By an application dated 13<sup>th</sup> day of October 2015 the Prosecution Counsel seeks a Revision of the orders by Mr. Odenyo, the Senior Principal Magistrate dated 12<sup>th</sup> October, 2015 as per the provisions of sections 362, 363, 364 and 365, all of the Criminal Procedure Code.

In the application, the prosecution seeks to have the record of the magistrates court file in Criminal Case No. 799 of 2015, REPUBLIC VRS UMMULKHEIR SADRI ABDALLA and 3 OTHERS, called so that this court examines it and satisfies itself as to the correctness, legality and appropriateness of the orders of the learned Senior Principal Magistrate in granting bail to all the Respondents having previously been denied bail on an earlier application.

The grounds for the Revision are;-

1. That the learned magistrate did not consider that some of the respondents are not of Kenyan nationality and hence the granting of bail was without any legal or factual basis.
2. That no new facts were presented before the trial court to warrant a change of circumstances.
3. That the nature and gravity of the offence was a compelling reason to denying the Respondent bail.

The first three (3) Respondents are charged with being members of a terrorist group contrary to section 24 of the Prevention of Terrorism Act, 2012 in count I.

“The particulars being that on the 27<sup>th</sup> March, 2015 at Elwak, Kenya-Somalia border within Mandera County the first three accused persons/respondents knowingly engaged in criminal activity by being members of terrorist group namely Al Shaabab.”

In count II, the 4<sup>th</sup> Respondent is also charged with being a member of a terrorist group contrary to

section 24 of the Prevention of Terrorism Act, 2012.

The facts are that;-

“On 3<sup>rd</sup> April, 2015 along Kyumri-Nairobi road within Machakos County, the 4<sup>th</sup> accused persons/respondent knowingly engaged in Criminal activity by being a member of terrorist group namely Al Shaabab.”

On the 6<sup>th</sup> and 7<sup>th</sup> day of May, 2015, the defence counsel applied for the respondent/accused person to be admitted to bail/bond pending the hearing and determination of their case before Hon. Odenyo, the Senior Principal Magistrate but he declined to grant the same while ruling;-

“... it is my view that the case should be heard or partly heard before bond is considered as there is a possibility of them leaving the jurisdiction of the court.”

He went on to state;-

“In effect, I decline to grant bond at this stage of the proceeding. Bond application to be reviewed before the trial court as the hearing progresses.”

The case was then fixed for hearing on 10/7/15 for two consecutive days, being 31<sup>st</sup> day of August 2015 and 1<sup>st</sup> day of September 2015.

The hearing commenced on 31/8/2015 but after PW 1 testified, the prosecution applied for an adjournment indicating that the hearing could not proceed on 1/9/15 as scheduled and that he would be applying to have PW 1 recalled to identify a passport. And despite the objection by the defence counsel, the court granted the prosecution the adjournment sought.

This then resulted into the renewed application for the accused person to be released on bond/bail, which application was canvassed on 23/9/2015.

In his ruling to the said application, Hon. Odenyo proceeded to grant the accused person a bond of Kshs.500,000/- with one surety of a similar amount each on 13<sup>th</sup> October, 2015. Hence this application seeking to have the said orders revised.

Section 362 of the Criminal Procedure Code provides that;-

“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purposes of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any subordinate court.”

In consideration of the grounds upon which the revision has been sought for by the state, I have read through the records of Mombasa Criminal Case No. 799 of 2015.

The first ground stated is that one of the accused persons is a non-Kenya and the granting of bond was without any legal or factual basis. This was raised by the state when the defence counsel made their first application to have the accused persons released on bond.

In his ruling delivered on 27<sup>th</sup> May 2015 Hon. Odenyo, the learned magistrate at page 3 of the same observed and rightly so, that;-

“In the present case, one of the accused persons said to be from Zanzibar. That in itself is not a ground for denial of bond but considering other factors like the several recent terrorist attacks attributed to the Al-Shaabab, the same group the accused persons are alleged to belong, it is my view that the case be heard or

partly heard before bond is considered ...”

Clearly, the learned magistrate denied the accused persons bond then on other considerations other than one of them being non-Kenyan or being flight risk. He also created a window through which the defence has come up with a renewed application for accused persons to be released on bond.

The records show the case has proceeded partly. But in objecting to the accused persons being released on bond, the prosecution has not shown that the circumstance prevailing at the time, and which the lower court relied on in declining to grant the accused persons bond then, still exist. The burden of doing this was entirely on them.

In granting the accused persons bond on 12/10/15, the learned magistrate observed that;-

“... I concur that the pace at which the matter is proceeding is not in tandem with what the court referred to earlier as fast-tracking. The record speaks for itself ...”

In his first ruling, where the learned magistrate declined to grant the accused persons bond, he noted that;-

“I am also mindful of the prosecution’s submissions that they can avail all their witnesses if the matter can be fast-tracked. I find this a safer option than granting bond at this stage.”

And from the records, it is clear that the rate at which the prosecution were moving in the case, by calling one witness on each day scheduled for hearing the same is far from being fast-tracked. Infact, the next hearing date, I noted, is in December 2015, which is so far considering that accused persons are in custody.

I have read through the authorities submitted by the defence and I am persuaded by authorities such as *R Vs. William W. Mwangi, Kerugoya High Court Criminal Case No. 36 of 2008* and *R. Vs. Diana Salim Suleiman, Mombasa High Court Criminal Case No. 23 of 2014*, where accused person facing serious offences such as murder were released on bond.

As for the authority submitted by the prosecution, *Mombasa Criminal Case No. 81 of 2015*, I agree with the learned magistrate that the circumstance of the case were different in that in that case the prosecution was able to demonstrate that the accused person was a flight risk having found to have escaped to a foreign country before his arrest.

All in all, I find nothing illegal, improper or irregular or incorrect in the orders by the learned magistrate in which he granted the accused persons bond of Kshs.500,000/- with one surety of a similar amount. I therefore find no merit in the application to review the said order and dismiss the same accordingly.

However, in view of the nature and gravity of the offence the accused persons are charged with, and the frequency with which these acts are known to occur in our country, I wish to add the following orders;-

**1. For all the accused persons;-**

- a. *None shall leave the jurisdiction of the court without a court order to this effect.*
- b. *Each accused to deposit his/her passport and any travel document if any in his/her possession in court.*
- c. *To attend court for mention of the case once every month.*

**2. For the 1<sup>st</sup> accused person who is alleged to be a non-Kenyan to provide a Kenyan surety.**

***Ruling delivered, dated and signed this 22<sup>nd</sup> day of October, 2015.***

**D.O. CHEPKWONY**

**JUDGE**

**In the presence of:-**

Mr. Wamotsa for the state

Mr. Mwadzogo for the accused persons

Court Assistant Mr. Kinoti