



**Nunda v Republic (Criminal Case E030 of 2023)
[2024] KEHC 12092 (KLR) (16 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 12092 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL CASE E030 OF 2023
TA ODERA, J
SEPTEMBER 16, 2024**

BETWEEN

FRED NUNDA ACCUSED

AND

REPUBLIC RESPONDENT

RULING

1. The Accused person herein through his learned counsel, Mr. Ombeta and Mr. Ochoki made an oral Application on 27th June, 2024 asking this court to yet again review its Ruling delivered on 27th February, 2023 denying the Applicant bond and the accused be granted reasonable cash bail or bond terms.
2. In support of his Application, Mr. Ochoki submitted that the Accused Person’s Co- accused persons had been released on bond. He also referred to this court to a probation report filed in this court on 14th June, 2024, which he argued had recommended that there were no compelling reasons not to release the accused person on bond and that the accused person was not a flight risk. Just like he had contented the Accused person’s previous Application which this court dismissed, Ochoki argued yet again that this court did not take into account that the warrants of arrests had been issued while the accused person was still in his remand. He insisted just like in the previous Application that all matters in which warrants of arrest had been issued against the accused person had been settled or withdrawn. Mr. Ochoki contended that the accused person has been in prison for one year and has suffered in prison. He argued that the accused person is unwell and would require medical attention. Mr. Ombeta reiterated that since all the cases against the accused persons had been settled and that he was not a flight risk, the court should proceed and admit the accused person to reasonable bail/bond terms.
3. In response the learned counsel for the state, Mr. Koima left it upon the court to make a determination on whether to admit the accused person on bond or not. Mr. Morara, learned counsel for the victims



on his part stated that he had on previous occasion made clear the position of the victims and asked the court to take the same into consideration while making its determination.

Issues for Determination

4. I have carefully considered the oral application made by the learned counsel for the Accused person the Probation report filed on 14th June, 2024 and I find that the main issue for determination is whether this court should review its Ruling dated 27th February, 2024 and admit the accused person to reasonable bond and bail terms

5. This court has a discretion review or vary its earlier order by invoking its inherent jurisdiction under Article 165(3)(a) of *the Constitution* which confers on the High Court unlimited original jurisdiction in civil and criminal matters. In the case *Kalala Paulin Musankishay & another v Republic* [2020] eKLR the court faced with an Application similar to the one before made the following observations which I agree with;

“..... this court may review or vary its earlier order by invoking its inherent jurisdiction under Article 165(3)(a) of *the Constitution* which confers on the High Court unlimited original jurisdiction in civil and criminal matters. This is possible in circumstances where it is deemed necessary so as to serve the ends of justice like for instance where new matters are brought to its attention that were not within the knowledge of an Applicant when the order sought to be varied was granted. (See *Director of Public Prosecutions v Betty Njoki Mureithi* [2016] eKLR).

16. In the instant case, the documents that the Applicants allege that this court did not have sight of when making its earlier decision, were available during the determination of their initial respective applications for revision. Indeed, this court had an opportunity to examine the trial court’s record upon calling for the same as required of it when exercising its revisionary jurisdiction. The 1st Applicant’s pre-bail report was part of the said record and its contents were accordingly taken into consideration. Further, in the application for revision of bail filed herein on 27th September, 2019, the 2nd Applicant attached the medical reports which are now being alleged to constitute new evidence as proof of her son’s demise.

17. It is therefore clear that the Applicants are in essence asking this court to sit on appeal of its earlier decision which cannot happen as this court has no jurisdiction to do so.

6. As observed in my previous Ruling dated 27th February, 2024 which this Application sought to review, in an application for review of the denial of bail, the applicant is under a duty to convince the court that there has been change of circumstances from the time when he was denied bail to warrant the court reviewing its earlier orders. This principle has since been coined as the changed circumstances test.

7. As equally observed in the said ruling principle of changed circumstances is captured in Judiciary in the Bail/Bond Policy Guidelines as one of the additional features a court is required in deciding whether to grant an accused person bail: -

- a. The period the accused person has already spent in custody since arrest.
- b. The probable period of detention until the conclusion of the trial if the accused is not released on bail.



- c. The reason or reasons for any delay in the conclusion of the trial and any role of the accused with regard to such delay.
 - d. Change of circumstances during the trial.
 - e. The maximum custodial sentence in case the accused person is convicted. (Emphasis added)
8. Further as I underscored in my ruling, the changed circumstances test was expounded in the case of Republic v Diana Suleiman Said & another [2014] eKLR where the court held as follows:
- “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.”
9. Before making my decision it is important to revisit the circumstances that led the court to dismiss the Accused persons review application before determining whether the circumstances have since changed to warrant another review. While considering its Ruling dated 17th October, 2023 which was the subject of the 27th February, 2024 this court comprehensively analyzed the affidavit of deponed by CPL/W Julian Mwola which outlined the status of the warrant of arrest in all the 4 cases including Kisii MCRC No. 1693 of 2019 in which warrants of arrests had been issued against the accused person. The court observed that in so far as warrants of arrests had been withdrawn for three (3) cases, there was an active warrant of arrest relating to Kisii MCRC No. 1693 of 2019 which matter had only been withdrawn under section 87A for reasons that the accused had absconded court and a warrant of arrest had been issued against him.
10. The court in its ruling dated 27th February, 2024 observed that even though accused person had argued in his Application the matter (Kisii MCRC No. 1693 of 2019) had since been withdrawn through an out of court agreement, there no such evidence tendered to demonstrate such settlement nor was any evidence presented to demonstrate that the accused person had since presented himself before the lower court to have the pending warrants of arrest therein lifted. Further the court noted that the accused person had not demonstrated that such evidence was one that was not available to him before this court delivered its ruling to warrant a review of the previous orders.
11. The above notwithstanding the court reiterated that its previous finding that the records produced from the lower court were clear that the accused previously jumped bail in all 4 cases a finding that applicant had conceded to. The court went on to reiterate that any reason or circumstance that may affect the attendance of the accused at his trial is a compelling reason to warrant this court to deny the appellant bail. Relied in the case of R vs Rasto Wanyama Masinde & Another (2014) eKLR.
12. Counsel submitted that all the 4 matters have since been settled or withdrawn was central to his previous Application. The learned counsel for the accused has equally claimed that he has been sick period of one year that he has been in custody and would wish that he be admitted to bond to pursue further medical care. However, the argument regarding sickness of the Applicant was one of the grounds that this court took into consideration and cannot be new evidence that can warrant this court to review its ruling. In any case, our prison facilities have well established medical arrangements that the accused person can pursue and he can be referred to the county hospital if need be.



13. Though the pre -bail review report indicates that Accused 1 is no longer a flight risk and that the wife to deceased has no problem with his release of accused 1 and that he did not attend court as he was seeking treatment, the finding that he is a flight risk still stands.
14. From the foregoing it is clear as I observed in my previous ruling dated 27th February, 2024 that this court is functus officio in so far as the issues raised by the learned counsel for the accused person are concerned and thus it has to down its tools. I reiterate that remedy to this issues lies in appealing rulings of this Court of Appeal which is constitutionally and statutorily mandated to hear appeals from this court. This court cannot sit as an appellate court on its own decision.

Conclusion

15. Accordingly, for the reasons set out above, I decline to allow the Review of bond Application made orally by the learned counsel for the accused person.
16. Hearing be expedited.
17. Hearing on 16.10.24.
18. It is so ordered.

T.A ODERA

JUDGE

16.9.24

Delivered Virtually via Teams Platform in the Presence of:

Accused

Mr. Ochoki appearing alongside Miss Ndemo -for 1st accused.

Mr. Koima -for the State.

Oigo -Court Assistant

Mr. Morara -appearing alongside Mr Bonuke for the victim

Ochoki: We seek near dates or additional dates

Order: Hearing on 16.10.24 and 4.12.24.

T.A ODERA

JUDGE

16.9.24

Accused 1: I seek hand written statement as my advocate is not in. May prosecution reveal all the witnesses and supply their statements.

The first time I raised the issue of my phone and Kshs 126,000/= which was taken by police. This has not been addressed. I have rights as complaint also has right lastly I asked for the court to grant me orders to be taken to the bank to withdraw school fees.

Koima: This is the first time I am hearing about the issue of the money and phone. May Investigating officer be summoned to shed light on the issues of money and phone. On the issue of access to his account, on the issue of withdrawal of money he can be escorted. I only have printed copies of statements in a duplicate file Investigating Officer can confirm if there are hand written statements and supply on hearing date.



Order: Summons to Investigating officer to shed light on the issue of money and phone. On withdrawal. Hand written statements be supplied if they exist. Prison authorities to arrange for Accused 1 to register for online banking for purposes of withdrawal of funds. Hearing 16.10.24. Mention on 9.10.24.

T.A ODERA

JUDGE

16.9.24

