



REPUBLIC OF KENYA



**Republic v Kariuki (Criminal Case 34 of 2020)
[2023] KEHC 2175 (KLR) (Crim) (22 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2175 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL
CRIMINAL CASE 34 OF 2020**

LN MUTENDE, J

MARCH 22, 2023

BETWEEN

REPUBLIC PROSECUTOR

AND

DAVID MIGWI KARIUKI ACCUSED

RULING

1. David Migwi Kariuki, the accused/applicant, was arraigned following allegations of having murdered an unknown female adult at Umoja II Estate within Nairobi County at an unknown time.
2. He applied to be released on bond, an application that was considered by Kimaru J (As he then was) who found the application lacking in merit. The court was of the view that for the security of the society, it was in the interest justice for the accused to remain in custody pending trial; he had no fixed abode or income such that if released on bail he could abscond from the jurisdiction of this court.
3. It was ordered that he remains in custody until the conclusion of the trial or until further orders are made following change of circumstances.
4. Through an application dated November 30, 2022 the accused seeks review of the ruling and a further order that he be escorted to Noonkopir Secondary School, Kitengela to pick his KCSE certificate and any other school certificates.
5. The application is premised on grounds *inter alia* that while in custody, the accused has undertaken various courses including; a paralegal course in the Justice Defenders and Prisons Services, Diploma in Biblical studies for AFCM International Training Centre, Diploma in Bible studies from Emmaus Bible School, a certificate in Bible studies from the Prisoners Journey, a programme or Prison fellowship International among others.



6. That he was admitted to a scholarship in a paralegal course at Strathmore University through his participation in the Paralegal Training Course with the Justice Defenders and Prison Services, he is required to present his certificate to Strathmore University which is held at in his alma mater Noorkopir Secondary School, Kitengela. In the result, he needs to be escorted to the school to collect the certificate and also to be released on bail so as to attend the Paralegal Certificate Course at Strathmore University.
7. The applicant swore an affidavit in support of the application where he deposes that having presented himself voluntarily to the Investigating Officer, he cooperated and he has no other criminal record. That the matter has not proceeded following transfer of various Judges; his brother Antony Wanjama Kariuki is willing to be his surety; his rural home is Gacharu village Muchunguache Sub-location; Mbini location; Kiharu Sub-County, Muranga County is well known.
8. Further, that he is a family man, a father of one daughter, an event organizer and entrepreneur.
9. In response, the Respondent/State urged that the applicant/accused has not demonstrated circumstances that have changed.
10. I have been asked to reconsider the instant application and doing so, I should be guided by the Law as set out in the proviso to Section 123A of the *Criminal Procedure Code* (CPC) which provides that:
 - “Subject to Article 49(1)(h) of the Constitution and notwithstanding section 123, in making a decision on bail and bond, the Court shall have regard to all the relevant circumstances and in particular—
 - (a) The nature or seriousness of the offence;
 - (b) The character, antecedents, associations and community ties of the accused person;
 - (c) The defendant’s record in respect of the fulfillment of obligations under previous grants of bail; and;
 - (d) The strength of the evidence of his having committed the offence;
 - (2) A person who is arrested or charged with any offence shall be granted bail unless the court is satisfied that the person—
 - (a) Has previously been granted bail and has failed to surrender to custody and that if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody;
 - (b) Should be kept in custody for his own protection.”
11. Bail review is not automatic. Grounds for bail review were emphasized in the case of *R V St Cloud* (2015) (J)471 N R256(SCC) where the Supreme Court stated thus:
 - “(a) Where there is change in circumstances or new evidence is submitted by the accused;
 - (b) Where the impugned decision contains an error ;
 - (c) Where the decision is clearly inappropriate.”



12. In the case of *Republic versus Diana Suleiman Said & Another* (2014) eKLR, Mureithi J referred to the practice in the International Criminal Court which applied *Rome Statute* and reached a persuasive finding thus:

“Article 60 (3) of the Rome Statute of the International Criminal Court provides for review of bail in these terms:

“The pre-trial Chamber shall periodically review its ruling on the release or detention of the person, may do so at any time on the request of the Prosecutor or the person. Upon such review, it may modify its ruling as to the detention, release or conditions of release, if it is satisfied that changed circumstances so require.”

See also decision of Pre-trial Chamber II in the case *The Prosecutor v Jean Pierre Bemba Gombo* ICC-01/05-01/08.

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.”

13. It therefore behooved the accused/applicant to demonstrate existence of new circumstances that favour his release on bail. The court was of the view that the accused is a security risk following further investigations that were being conducted in his respect. This issue has not been addressed in the instant application.
14. It was established that the accused is a flight risk. He alleges that his brother is willing to stand surety for him. No averments from his alleged brother were forthcoming to establish the allegation.
15. The fact that the accused has pursued various courses while in custody and obtained certificates cannot be a ground for review of bail as he can pursue further studies while in custody.
16. On the question of being escorted to Noorkopir Secondary School to collect KCSE certificate to enable him enroll for a paralegal course at Strathmore University. Evidence has been provided of an application having been made in October, 2022 by the accused but there is no response to that effect. It would however, be the duty of the officer in-charge of Nairobi Remand Prison where he is held to assist him get his certificates.
17. In this regard, I do direct the Stated Officer to so act without the accused being moved from prison to the school. In the result, the application to be escorted to Noonkopir School is declined. Therefore, the application fails, save for the direction given.



18. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT
NAIROBI, THIS 22ND DAY OF MARCH, 2023.**

L. N. MUTENDE

JUDGE

In The Presence:

Accused

Mr. Ng'ang'a

Mr. Mwaura for DPP

Court Assistant - Mutai

