



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO.84 OF 2016

HENRY KABURU KARANI.....1ST APPLICANT

GEOFFREY MURIITHI.....2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The two accused persons/applicants, who are brothers, were initially denied bail by Lady Justice Ong'ingo on 24/1/2018 and have now, by the application dated 28/4/2021, approached the court seeking that the court reviews the orders denying them bail on the basis that the circumstances have since changed.

2. The grounds put forth by the applicants to support review of the order declining bail are that the first applicant left behind a young wife with children but the wife has since eloped and left the children in the care of their old and ailing grandmother. He added that the bad blood and differences with his siblings had been resolved as shown in the affidavit sworn by one James Gichuru Marete. In addition, they assert to known as people of good conduct by the local administration and have exhibited a letter from the Assistant chief, Matetu sub-location in support of such assertions. The second accused then adds that their elder brother has offered to accommodate them at Buuri sub-county so as to debunk the fear that they are likely to interfere with witnesses and, lastly, that they are prepared to abide by and fulfill all conditions imposed by the court. Also exhibited were certificates of participation in programmes within the prison including training as a paralegal, bible study and teaching English and literature in the prisons formal education program.

3. The application was vehemently opposed by the respondent through the replying affidavit sworn by PC Titus Bett on 18/6/2021. The deponent contends that the applicants reside within the same locality as the remaining prosecution witnesses, therefore there is a real apprehension that they will interfere with them. There is also fear of vengeance from the members of the community. He has exhibited a replying affidavit sworn by the applicants' brother namely John Mwangi Karani. He has also exhibited another letter from the area assistant chief renouncing his earlier letter.

4. For the applicants to succeed in their application, they must establish to the satisfaction of the court, that there has been a change in circumstances since the order sought to be reviewed was made. Such a requirement calls upon the court to look at the facts and circumstances that informed the denial of bail. I see the principles to have been disclosed in *R v Joseph Kuria Irungu Alias Jowie & Anor* [2019] eKLR, where the court had this to say: -

“The Applicant bears the burden on review to show on a balance of probability why the earlier order should be vacated and why it should be unjust not to vacate the order. He must show that the circumstances of the case are so altered that compelling reasons are disclosed for review of the earlier order.”

5. The same position was similarly taken in *R v Diana Suleiman Said & Anor* [2014] eKLR where the court observed that 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 favor his release on bail. I find nothing in the provisions of Article 49(1)(h) of the Constitution or Section 123 of the Criminal Procedure Code to suggest that the court once grant or refuse bail becomes functus officio or that the issue of bail becomes res judicata upon decision to grant or refuse bail. Article 49(h) entrenches the right of the arrested person to be released on bail pending trial unless there are compelling reasons for refusing bail’.

6. In declining to grant bail, the court observed that there had been a pre-bail report which recommended that the accused persons were then not suitable for release on bail. Indeed, the pre-bail report by Mary Kiama depicted accused persons as dangerous persons who abuse drugs

and capable of misbehaving without caring; had been chased away from home by the deceased and if released would interfere with witnesses besides disrupting the operation of the school the deceased used to operate to the detriment of the pupils' teachers and staff.

7. In this matter I find that there has been substantial change in the circumstances, in two material aspects, since the request for bail was declined. The first is the fact that the matter has now been substantially heard with the evidence of six witnesses having been taken. The second is that the accused persons say they will not insist in going to the father's home where the incident took place because their brothers prepared to house them at buuri.

8. With such altered circumstances, I find no compelling reason to continue denying them bail. I do grant them bail/bond of Kshs 250,000/=, each with one surety in the like sum. In the alternative each may be released upon deposit of cash bail in the sum of Kshs 100,000/=

9. In addition, I do give conditions that the accused persons shall, during the pendency of the case, not contact any witness in the matter and shall not visit any area within Imenti Central sub-county pending further orders of the court. Counsel is directed to counsel his clients that the court will not hesitate to cancel the bond if any of the terms above are breached.

DATED, SIGNED AND DELIVERED AT MERU, VIRTUALLY BY MS TEAMS THIS 22ND DAY OF SEPTEMBER 2021

Patrick J.O Otieno

Judge

In presence of

Mr. Maina for the prosecution

Mr. Mutisya for the accused.

Patrick J.O Otieno

Judge