



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**

**CRIMINAL CASE NO 16 OF 2019**

**NADIFO MOHAMED ABSHIR.....ACCUSED/APPLICANT**

**VERSUS**

**REPUBLIC.....PROSECUTOR/RESPONDENT**

**RULING**

The accused has applied for review of the order of this court (Lesiit, J, as she then was) dated 28<sup>th</sup> May 2019, which denied her bail pending hearing and determination of the murder charge against her in this court. In her application the applicant seeks the following orders.

1. Spent.

2. An order to revisit, vary, and/or vacate its orders (of Hon. Justice Lesiit made on 28<sup>th</sup> May 2019) that denied the applicant bail pending her trial.

The application of the accused is supported by 12 grounds that are set out on the face of the chamber summons dated 2<sup>nd</sup> November 2020; with the major grounds being the following.

The applicant is entitled to personal liberty and bail pending her trial. The presumption of innocence operates in her favour.

The trial court denied the applicant bail in disregard to the relevant provision of the Constitution, the Criminal Procedure Code and Judiciary's Bail/Bond Policy Guidelines. The applicant's bail was denied for two reasons namely for being a flight risk and for her own safety.

Furthermore, the applicant has now been in custody for one year and that the tension has now disappeared. The applicant's health has deteriorated and her continued detention violates her right to human dignity and has subjected her to anguish. The applicant's two children are now suffering due to her detention and it is in the best interests of the children that their mother be released.

**The submissions of counsel for the applicant.**

Messrs Abdullahi & Associate Advocates have filed written submissions in support of the application.

Counsel cited R v Diana Suleiman Said & Another (2014) e-KLR, in support of his proposition that this court has jurisdiction to hear and determine this application. They also cited Guyo Gorsa Boru v Republic, Nairobi High court Criminal Revision No. 269 of 2019 (unreported), in support of the proposition that where there have been changed circumstances, the court has power to review its order that denied applicant bail.

Furthermore, counsel also cited the provisions of article 165 (3) (a) of the 2010 Constitution of Kenya which vests in this court unlimited jurisdiction in both civil and criminal matters in support of the proposition that this court has jurisdiction to hear and determine the application.

Counsel also submitted that the relatives of the applicant (Mohamed Abdi Noor and Ahmed Hirsi Farah) filed affidavits in support of the grant of bail before Lesiit, J. They offered to accommodate the applicant during the pendency of this case.

**The case for the prosecution/Respondent.**

The Respondent filed written submissions in opposition to the application for review of the order denying the applicant bail. Counsel for the respondent (Ms Sarah Ogwen) has submitted that there is no change in circumstances considering that the witnesses who are related to the accused have not testified.

Furthermore, the investigating officers (PC Godfret Munene and Rawi Mohamud Jama) have sworn affidavits that demonstrates that the relatives of the accused are residents of Somali and the USA and have jetted into the country and are working on plans to facilitate her escape from Kenya.

The accused is still a flight risk as found by Lesiit, J in her ruling.

The accused has not raised any new grounds in her application for review. The application lacks merit and should be dismissed.

### **The submissions of counsel for the victims.**

Counsel for the victims (Keaton & Keaton, Advocates) have filed written submissions in opposition to the application.

The application is without merit as no new and important matter has been discovered. Furthermore, there is no error or mistake apparent on the face of the record to warrant review of the ruling of Lesiit, J that was delivered on 28<sup>th</sup> May 2019.

This court is functus officio and is bereft of jurisdiction to sit on appeal in its decision as the current application seeks to appeal the decision/and ruling of Lesiit, J. although it is clothed as a review application.

Counsel have also submitted that the accused is a foreigner residing in Eastleigh with no fixed abode and with relatives to accommodate her. They have also submitted that the accused is a flight risk. They have additionally, submitted that the community have expressed apprehension which still poses a danger to the safety of the accused. Counsel has finally submitted that the ruling of Lesiit, J should not be set aside.

They have therefore urged the court to dismiss the application.

I have considered the affidavits of the parties, their submissions and the authorities they cited.

I find the following to be the issues for determination.

1. Whether this court has jurisdiction to hear and determine the application.
2. Whether the circumstances have changed to warrant the order of Lesiit, J to be set aside.

### **Issue 1**

I find that this court has jurisdiction to hear and determine the review application; since Lesiit, J was appointed and sworn as a Judge of the Court of Appeal. If she was still a judge of the High Court, this application would have been heard and determined by her. Following her appointment and being sworn as a Judge of that court she ceased to exercise jurisdiction in this application. This is the position following the repeal of section 64 (4) of the 1963 Constitution as amended, whose provisions read as follows.

“Where a puisne judge has been appointed as a judge of appeal he may continue to exercise the functions of a puisne judge to enable him to complete proceedings in the High Court that were commenced before him prior to his being so appointed.”

It therefore follows that she may not be recalled to hear and determine the instant application. In this regard, I find as instructive the observation of this court (Bwonwong’a, J) in Republic versus Musa Lotolim Chakartin & 8 others, sitting at Kapenguria in Criminal Case No. 11 of 2016 in which that court observed that:

“It is of historical interest to note that the Independence Constitution of 1963 in section 64 (4) allowed a puisne judge who had been appointed as a judge of appeal to continue to exercise the functions of the puisne judge to enable him to complete proceedings in the High Court that were commenced before him prior to his being appointed. See also the decision of the High court (Nyamu, JA, Wendo & Anyara Emukule, JJ) in *Jesse Kamau & 25 Others v Attorney General (2010) e-KLR*. The procedure facilitated quick disposal of cases and also promoted a fair trial in that the trial court had the advantage of hearing and seeing the witnesses and therefore was in a position to assess the demeanour of witnesses. The repeal of the foregoing provision was unfortunate.”

Furthermore, I find as persuasive the decision of this court (Muriithi, J) in *R v Diana Suleiman Said & Another (2014) e-KLR*, in which that court held that it had power to review bail terms where there has been changed circumstances such as cancellation of bail of an accused person who has refused to attend court or where sureties have withdrawn.

Additionally, I also find as persuasive the decision of this court in *Guyo Gorsa Boru v Republic*, Nairobi High court Criminal Revision No. 269 of 2019 (unreported) in which that court ruled that changed circumstances include where the prosecution has inordinately or delayed to avail witnesses, amongst other circumstances.

I am unable to agree with the observation of this court (Korir, J), in *Republic v Dwight Sagaray & others*, High court Criminal Case No. 61

of 2012 that that the panacea for possible flight risk, is not to automatically deny bail but to impose stringent conditions that would attract attendance at trial.

I further find that since the case is still pending trial in this court, the provisions of article 165 (3) (a) of the 2010 Constitution of Kenya which vests in this court unlimited jurisdiction in both civil and criminal matters is applicable.

I find from the authorities cited and by virtue of the provisions of article 165 (3) (a) of the 2010 Constitution of Kenya that this court has the jurisdiction to hear and determine the instant application.

I further find that this court is not functus officio.

## **Issue 2**

I find that there has not been any change in circumstances to warrant a review of the order that denied the accused bail; since she is still a foreigner namely a national of Somali and has no fixed abode of her own.

Furthermore, there are medical facilities in prison to cater for the bad health of the applicant. The suffering of her children does not amount to a changed circumstance that warrants the setting aside of the order denying her bail.

I also find that the presumption of innocence operates in favour of the applicant and this has preserved her dignity.

Furthermore, the offer by Mohamed Abdi Noor and Ahmed Hirsi Farah, to accommodate the applicant who are relatives of the applicant, to accommodate the applicant was a matter that was placed before Lesiit, J and it appears that Her Ladyship rejected their offer to accommodate her. It is therefore not a new matter that warrants the order rejecting bail to be reviewed.

I further find that the case of Guyo Gorsa Boru v Republic, supra, is inapplicable in the instant application since the circumstances in this case have not changed.

Counsel has submitted that the applicant should be released on bail since the case has not proceeded since March 2019 and that it is bound to be protracted. I take judicial notice of the fact that the lack of progress of the trial of the applicant has like in many similarly placed cases due to the Covid -19 pandemic that led to trials being stopped. It is not due to the failure of the police to avail witnesses.

In the premises, the applicant's application fails and is hereby dismissed.

I direct that the trial should be expedited.

**RULING SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 9<sup>TH</sup> DAY**

**OF DECEMBER, 2021**

**J M BWONWONG'A**

**JUDGE**

In the presence of-

Mr. Kinyua court assistant

Mr. Abdullahi for the applicant

Ms Ogwen for the Respondent

Mr. Keaton for the victims.