



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**CRIMINAL DIVISION**

**HIGH COURT CRIMINAL CASE NO. 36 OF 2010**

**REPUBLIC.....PROSECUTOR**

**-VS-**

**PHILIP ONDARA ONYANCHA.....1<sup>ST</sup> ACCUSED**

**TOBIAS NYABUHANGA ARADI.....2<sup>ND</sup> ACCUSED/APPLICANT**

**DOUGLAS OBIERO MAKORI.....3<sup>RD</sup> ACCUSED**

**RULING**

1. The three accused persons are charged with murder contrary to **Section 203** as read with **Section 204** of the Penal Code. On the 29<sup>th</sup> November, 2018, Mutuku J. having considered bail application by the 2<sup>nd</sup> and 3<sup>rd</sup> Accused persons granted orders on the following terms:

(a) *The 2<sup>nd</sup> and 3<sup>rd</sup> accused persons shall each execute a bond of Kenya shillings two million (Kshs 2,000,000) with one similar surety of similar amount.*

(b) *In the alternative each of them shall deposit with the Registrar of this court cash bail in the sum of Kenya Shillings One Million (Kshs 1,000,000/-).*

(c) *The accused persons shall attend court without fail until this case is fully determined.*

(d) *The accused persons are cautioned against doing any act that may compromise the fair trial*

2. By an application dated 24<sup>th</sup> day of August, 2020, the 2<sup>nd</sup> accused (Applicant) seeks review and/or variation of bail/bond terms set by the court, so as to be allowed to execute a bond of Kshs one Million (1,000,000/-) with one surety of similar amount or in the alternative deposit a cash bail of Ksh. Five Hundred Thousand (500,000/-)

3. The application is premised on the grounds that:

(i) The 2<sup>nd</sup> accused was unable to comply with the bond terms issued by this court in its ruling of 29<sup>th</sup> September, 2018.

(ii) The accused has been in custody for over 10 years and the trial started afresh following orders of the court issued on 5<sup>th</sup> April, 2018.

(iii) That only one witness has testified and the case might not be heard due to the Covid-19 pandemic.

4. In an affidavit in support of the application the applicant depones that he is optimistic that his family would raise a surety bond of Ksh. 1,000,000/- or cash bail Ksh.500,000/- if the application is granted. That he is not a flight risk and no prejudice would be suffered if the application is granted.

5. The State did not file any response to the application.

6. The application was canvassed through oral submissions. Mr. Gichuru, learned Counsel for the applicant submitted that the prosecution

intends to call 20 witnesses and therefore the case is likely to take long. That the strength of the evidence should be considered in line with **Section 123 A** of the Criminal Procedure Code on the parameters of granting bond and that the applicant is innocent until proven guilty as per **Article 50** of the Constitution.

7. The State through learned Prosecuting Counsel, Mr. Omirera urged that the applicant has not established grounds for review of the earlier bail terms. That the applicant must prove on a balance of probability that conditions of the case have changed to warrant review of bail terms. That after the applicant's submissions were addressed by Mutuku J. on bail there is no independent evidence to prove change in conditions.

8. That although the trial may take long, the State filed appeal against the ruling on retrial of the case, by Wakiaga J. It is hopeful and looks forward to prosecuting the appeal. That the appeal may put an end to the matter. Counsel also argued that merely alluding to the Covid-19 pandemic is not sufficient, that a person may be released only if he has been affected and the authorities cited are distinguishable.

9. In a rejoinder, it was submitted for the applicant that the case before the court of appeal buttresses the need to review the bail terms and that the pre-bail report filed earlier captures the applicant's financial position.

10. I have considered rival submissions of both parties. I am called upon to re-consider bail granted herein. There is no law that deters me from re-considering the bail terms. All I have to do is to enquire whether there is change of circumstances, and if so, whether the change is a significant one? In the case of *Kolman –vs- Wolfson 48 N.Y.2d 230*, the court stated that:

***“...Change in relevant facts, of course may require reconsideration of a bail determination. If there be pertinent evidence of which was not submitted to the bail fixing court in the first instance, principles of orderly process dictate that a renewal of the application for setting or reduction of bail be made on return to trial court.”***

11. In the case of *Republic -vs- Diana Suleiman Said & another [2014] eKLR* Muriithi J. was of the view that the practice of courts is that bond is reviewed every day and not necessarily when circumstances of the case change. The learned Judge stated as follows:

***“ 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.”***

As regards change of circumstances the court stated 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 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.”***

12. Black's Law Dictionary, 10<sup>th</sup> Edition, defines review as a consideration, inspection or re- examination of a subject or a thing. It entails a second view or revision; consideration for purposes of correction. Bail review means, **“A process of re-examination of bond terms to an accused person who has been unable to post bail before the same court.”**

13. This matter has been in court for the last eleven years. In its orders issued on 5th April, 2018, Wakiaga J. found that there was a mistrial and ordered a retrial. Prior to the court's ruling the prosecution had closed its case and the accused had been put on their defence. The applicant's Counsel has alluded to the strength of the case, a fact that should prompt this court to consider not continuing to subject the applicant to pre-trial detention.

14. Mutuku J. who was seized of the matter in granting bail considered the issue of evidence against the accused persons being weak and was of the view that the matter ought to be taken as a fresh trial and that the initial evidence was inconsequential. Therefore the 2nd and 3rd accused grounds that the prosecution did not have any evidence against them and that the 1st accused made a confession exonerating them was inconsequential.

15. The court in granting bail gave stringent terms to guard against the danger of the accused thinking that there is no evidence against them because of the evidence adduced in the course of the previous trial.

16. In considering whether there is change of circumstances that favour granting lesser bond terms, I have perused a pre-bail report that was filed in court prior to the court's ruling which indicated that the applicant's siblings did not have a stable income. That the family relied on the applicant's cousin who would be able to deposit a log book as collateral. They prayed for consideration of cash bail of Kshs. 50,000/-

17. The circumstances may have not changed since the accused still states that his family's economic status prevents him from complying with the bail terms. But an indication that they are able to raise Kshs. 500,000/- is a significant departure from Kshs. 50,000/- that had been proposed.

18. Furthermore, during the determination of the ruling sought to be reviewed, the country was not faced with the Covid-19 pandemic and the adverse effect on access to courts and fast-tracking of criminal trials. However as at time of making this application the country had been shut down and it was no longer business as usual in the court process.

19. It is apparent that following the order made for a retrial, this matter has not proceeded as expected because of many challenges. The State has demonstrated its inability to secure attendance of witnesses who had testified and the fact of an appeal pending in the Court of Appeal. This court may not shut its eyes to the fact that the applicant had spent many years in custody by the time the court ordered a retrial and since the matter has to start afresh, the accused is likely to spend more time in prison.

20. Therefore the fact that the remand period seems to be extended with the new developments directing a retrial, the Covid-19 pandemic and the challenges in access to justice and lastly the fact that the applicant is able to raise a reasonable amount are factors that call for review, but, I must exercise the *discretion judiciously and in the interest of justice*.

21. Paragraph 3.1 (d) (page 9) of the Bail and Bond Policy Guidelines underpins the right to reasonable Bail and Bond terms. It is provided as follows:-

**“d) Right to Reasonable Bail and Bond Terms:**

*Bail or bond amounts and conditions shall be reasonable, given the importance of the right to liberty and the presumption of innocence. This means that bail or bond amounts and conditions shall be no more than is necessary to guarantee the appearance of an accused person for trial. Accordingly, bail or bond amounts should not be excessive, that is, they should not be far greater than is necessary to guarantee that the accused person will appear for his or her trial.*

*Conversely, bail or bond amounts should not be so low that the accused person would be enticed into forfeiting the bail or bond amount and fleeing. Secondly, bail or bond conditions should be appropriate to the offence committed and take into account the personal circumstances of the accused person. In the circumstances, what is reasonable will be determined by reference to the facts and circumstances prevailing in each case.”*

22. In this case, the fact that the applicant has been in custody despite being granted bail in 2018 is evidence that he is unable to comply with bond terms set. From the foregoing, I find that the application has merit. In the circumstances, I review bail terms set which I substitute with orders as follows:

(i) The 2<sup>nd</sup> Accused shall be released on bond of Kenya shillings one Million, Five hundred thousand. (Kshs 1,500,000/-) with a surety of a similar sum or a cash bail of Kenya Shillings Seven Hundred Thousand (Kshs 700,000/-).

23. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY, THIS 2<sup>ND</sup> DAY OF DECEMBER, 2021.**

**L. N. MUTENDE**

**JUDGE**

**IN THE PRESENCE OF:**

Court Assistant – Mutai

Applicant

Mr. Gichuru for the Applicant (Accused 2)

Mr. Wamwayi for (Accused 1)

Mr. Omirera for ODPP