



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO 61 OF 2019**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**FRANCIS MAINA WAIRIMU.....ACCUSED**

**RULING**

1. The accused person faces a charge of murder contrary to Section 203 of the penal code to which he pleaded not guilty. He applied to be released on bail pending trial and by a ruling dated 14<sup>th</sup> November 2019 Mutuku J declined to release the same on bond and stated as follows: -

***“I am alive that the accused is healing following an injury during the time of his arrest. Indeed, this court has been following up on the matter with the prison authorities. I have noted that the accused jumped bail in another matter as deposed by the PC Muturi and confirmed in the probation report. This alone is sufficient reason to persuade this court that the accused is a flight risk. An accused person that is released on bond and breaches the terms of that bond cannot come back to court and ask to be released on another bond”.***

2. By a notice of motion allegedly under Order 45 Rules 1(1), 2; Order 51(1) of the Civil Procedure Rules the accused moved the court for review of the order denying the accused bail on medical grounds, on the grounds that the same had missed three important appointments at Kenyatta National Hospital and the prison facility had never given attention to it. It was contended that due to covid 19 pandemic the prison where unable to take him to Kenyatta and that the family was willing to take the responsibility.

3. The application was supported by affidavits sworn by the accused Advocate on record and by his mother Catharine Muthoni Maina in which it was deposed that the accused was nursing a surgery wound inflicted by the police who shot his left leg, for which he underwent surgery and had missed his three appointments at Kenyatta.

4. It was stated further that the prison had developed a tendency of not taking the accused to hospital prompting the trial court to issue several orders to that effect and the accused was at risk of developing more complications. It was deposed that the accused had developed chest pains which had not been attended to.

5. At the hearing hereof Ms Odiya submitted that there had been orders issued by the court on the plight of the accused to access treatment which had not been honoured and therefore the accused had not attended to post surgery healing and treatment appointments and was therefore in great pain without any pain killers. It was submitted that he had further developed chest complications which had been made worse due to covid 19 pandemic, making it difficult for him to access medical help.

6. It was submitted that the accused was entitle to the constitutional right to health having been shot at by the police at the time of arrest, some twenty days after the date of the alleged commission of the offense. It was submitted that even if the accused had jumped bail, he was a sick man who needed medical attention.

7. In opposing the application, Ms Kimani submitted that the fact that the accused needed medical attention was brought to the attention of the trial court and was not therefore a new issue. It was stated that the accused was denied bond because there was an outstanding warrant of arrest issued in Criminal Case No.10516/2018 at Kiambu and therefore there were no change of circumstances to enable the court review the earlier order. It was stated that the prison had capacity to deal with the accused case and to refer him to Kenyatta where there is need the issues of Covid 19 challenges notwithstanding.

8. In an application for review of the denial of bail, the applicant is under a duty to convince the court that there had been change of circumstances from the time when he was denied bail to warrant the court reviewing its earlier orders. This was stated in the following terms by Justice Muriithi:-

*“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.*

11. *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, so may the prosecution urge that the situation has deteriorated to compel a reconsideration of bail granted to the accused.*

12. *I find nothing in the provisions of Article 49 (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 charge or trial unless there are compelling reasons for refusing bail. The accused is constitutionally entitled to bail until and unless compelling reasons are demonstrated. If compelling reasons are arising or are demonstrated after the arrested person has been released or granted bail but not yet released, as in this case, the court may properly review the matter on the basis of the compelling reasons shown. Section 123 of the CPC [as amended by the Constitution of Kenya 2010 to permit bail for all criminal cases] makes bail available at all times - where any arrested person “is prepared at any time while in the custody of that officer or at any stage of the proceedings before that court to give bail, that person may be admitted to bail.” See the case of **REPUBLIC v DIANA SULEIMAN SAID & ANOR [2014] eKLR.***

9. As stated by Ms Kimani, the issue of the accused medical condition was alive before the trial court and she addressed her mind on the same, leading to the several orders made to the prison authorities to attend to the same. The main ground upon which the applicant was denied bail, was that he had earlier been given bail and he absconded, thereby portraying him as a flight risk.

10. The accused did not address the court on this limb and as it stands the issue of him being a flight risk as not been address and I am unable to find any change of circumstances as regards the issue of whether or not he had been granted bond and did not honour those terms, which is one of the compelling reasons for denial of bail as per the Bond and Bail Policy Guidelines.

11. On the issue of medical attention, there was no material placed before me to show that the same cannot be managed successful while the accuse is in custody. I have taken note that the same had been taken to Kenyatta and had a further pending appointment as at the time of this ruling the challenges of Covid-19 notwithstanding.

12. It is therefore clear that there is no material placed before the court on change of circumstances to enable me review the earlier order and find no merit in the application herein which I dismiss.

**Dated, Signed and Delivered at Nairobi This 9<sup>th</sup> Day of July 2020 Through Microsoft Google Teams.**

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**J. WAKIAGA**

**JUDGE**

**In the presence of: -**

*Ms Ogweno for the State*

*Ms Odiya for the accused*

*Accused person present*

*Court clerk Karwitha*