



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 15 OF 2017

FRANCIS MUTETI MULL.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

Background

1. This is an application by the Accused for the review of the bond application now that crucial witnesses have since testified. By its ruling dated 7/11/2017 on an application for bail by the accused who was charged with murder, the court dismissed the application but however allowed the accused to renew application for Bond once vulnerable witnesses have testified.

The Initial Application

2. By Notice of Motion dated the 12th July 2017, the Application sought for bail pending trial and the application was supported by an affidavit of the applicant.

3. The application was opposed by the affidavit of the investigating officer, Chief Inspector George Kipkoros sworn on 4th September, 2017.

Application for Review

4. The Counsel for the Applicant presented the oral application for review of bail on 15.10.18 on the ground that crucial witnesses had testified. The prosecution opted to rely on a pre-bail report which was to be presented by the County Probation office Machakos

5. For the defence, no affidavit or submissions were made as to whether any new matter as compelling reason to warrant the reconsideration of the bail application that had been denied by the court was made. Learned counsel stated that they would rely on the affidavit that was on record. The state also has put in no affidavit in addition to the earlier one that had been deposed by the investigating officer.

Issues

6. The issues for determination in considering the application for review of bail are

- a. Whether the court is empowered to review bail on account of changes in circumstances.***
- b. Whether there exists changed circumstances to justify review of bail.***
- c. What principles to adopt in considering the review or cancellation of bail.***

The power to review bail

7. 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 arise 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.”***

The test of changed circumstances

8. The changed circumstances test is 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.

Whether changed circumstances exist

9. What changed circumstances have been demonstrated? The pre-bail report that has been availed to the court. I have noted from the said report that the Probation Officer found that the situation at home is still volatile as the remaining prosecution witnesses are close relatives and children of the deceased. They are still in fear of the accused being released on bond and taking into consideration his two sons who are still at large. The said officer recommends to this court to suspend granting him bond until the remaining prosecution witnesses testify.

The principles in considering review or cancellation of bail

10. I consider that the principles generally of the accused's ability or propensity to interfere with the due administration of justice having regard to the circumstances of the case and the considerations of the society or public interest are matters to be considered in considering a review of bail. This was observed in the cases of **Aboud Rogo Mohamed & Another v. R, Nairobi HCCR.C. No. 793 of 2010** and **The Defence Forces Council & 6 Others v. Gabriel Kirigha Chawana & 26 Others**, Court of Appeal Civil Application No. 9 of 2014.

11. Article 24 of the Bill of Rights recognizes a limitation on the rights of a person based on conflict with the rights of others, as is reasonable and justifiable in an open and democratic society. The court must then consider a proper balance between the individual rights and the rights of the society so that the individual is entitled to enjoy the greatest extent of his rights consistent with the rights and interests of others or the public interest in the particular matter.

12. The justice of the case appears to lie in the balancing of the accused's right to bail against the interest of the deceased's family. On the one hand, there is the accused person's right to be presumed innocent and to be released on bail emphasized by his mother's condition of being a jobless widow and his wife and 4 children who totally depend on him, on the other hand, there is the Thinu Village, and specifically the deceased's family interest in the emotional peace without fears of any attacks.

13. I consider that it is in the interest of justice for both the accused and the deceased's family members that the criminal prosecution of the applicant be conducted expeditiously. The Court in **Eliphaz Riungu v. Republic Misc. Criminal Application No. 472 of 1996** observed as follows:

"We think that public interest demands that whatever goes on in a criminal trial should be in the interest of justice. And the constitution which is the mother of all laws clearly states that the accused shall be afforded a fair hearing within a reasonable time. Justice demands that the guilty be appropriately punished and the innocent be let free. A long trial which is likely to lead into confusion of prosecution case as to result in an acquittal is certainly not in the interests of public interest and justice."

14. This way, the court will be able to render swift justice in the matter with a view to punish the perpetrators of the offence, and consider the interests and rights of the accused herein whose innocence must be presumed by the court at this point.

Determination

15. Accordingly, I am unable to review the bail order on the accused at the moment in view of the apprehension by the family of the deceased that is expressed in the pre-bail report. The applicant is free to renew the application once all the prosecution witnesses testify. The prosecution is hereby directed to fast-track the trial by calling the remaining witnesses to testify as a matter of priority.

Orders accordingly.

Dated, signed and delivered at Machakos this 17th day of January, 2019.

D.K. KEMEI

JUDGE