

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.162 OF 2019

MUKTAR IBRAHIM ALI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

On 12th April 2019, this court allowed the Applicant's application in which he sought to be released on bail pending trial. The court ordered the Applicant to be released on bail of Kshs.5 million with two sureties of the same amount. Additionally, the Applicant was ordered to report to the Anti-Terror Police Unit (ATPU) at Mandera for a period pending further orders of the court. It was apparent that the Applicant was unable to fulfill the terms for his release on bond pending trial.

On 15th May 2019, he made an application seeking to have the bond terms reviewed. In essence, the Applicant stated that he was not able to meet the terms imposed by the court for his release on bond pending trial. He proposes that the terms be reviewed so that he is ordered to post bail of Kshs.1 million with one surety of the same amount. During the hearing of the application, Mr. Imanyara for the Applicant submitted that the Applicant's co-accused's bond terms had been reviewed downwards, and applying the principle of equality, the same reviewed terms should apply to the Applicant. He submitted that since the Applicant's arrest and charge, no new circumstances had emerged to make his release on bail pending trial untenable. Mr. Kiarie for the State opposed the application. He reiterated that the charges facing the Applicant were serious. The circumstances had changed since the last time the court considered his application for bail pending trial. The Applicant had been charged with more counts therefore requiring this court to impose even stringent bond terms. He further submitted that the fact that the Applicant's co-accused bond terms were reviewed downwards did not automatically translate to the bond terms of the Applicant being similarly reviewed. Each accused person's case should be treated on its own merit. He urged the court to disallow the application.

That this court has jurisdiction to vary bond terms for an accused released on bail pending trial is not in doubt. The court can review the bond terms where it is established that there are changed circumstances. Muriithi J in **R v Diana Suleiman Said & Another [2014] eKLR**, held thus in regard to the test that should be considered by the court in determining whether or not there exists changed circumstances:

“10. 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 change 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. 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 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.”

In the present application, it was clear to the court that since the ruling was delivered, the Applicant's circumstance has changed. The charges initially brought against him were withdrawn. He has now been charged with others in a consolidated charge sheet. This court has in the past a couple of weeks revised the bond terms of the Applicant's co-accused. Despite objection by the prosecution, this court sees no legal impediment for this court to similarly review the bond terms of the Applicant. This court agrees with the Applicant that unless the contrary is established, bond terms issued to co-accused persons should be more or less the same where they are facing similar charges arising from

similar circumstances.

In the premises therefore, this court finds merit with the Applicant's application for revision of bond terms. The Applicant's bond terms are revised from the previous terms imposed. The Applicant shall be released on bond of Kshs.2 million with two sureties of the same amount. It is so ordered.

DATED AT NAIROBI THIS 17TH DAY OF JULY 2019

L. KIMARU

JUDGE