REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISCELLANEOUS CRIMINAL APPLICATION 256 OF 2017.

SAMUEL MBURU NJENGA.....APPLICANT.

VERSUS

REPUBLIC.....RESPONDENT.

RULING.

1. The Applicant herein lodged the present application, filed on 14th March, 2018, urging the court to review its decision in **Samwel Mburu Njenga v. Republic[2017] eKLR** where it refused to allow an application for; (i) revision of the denial of bond in Nairobi Chief Magistrate's Criminal Cases 1152, 1153, 1154, 1175, 1601 and 1602 of 2015, (ii) revision of bond terms in Kibera Chief Magistrate's Criminal Cases 1494, 1792 and 1504 of 2017, and (iii) the consolidation of the bond terms in the cases in question. The grounds upon which the application is premised are that; (i) three of the six cases before the Chief Magistrate's court at Milimani had been withdrawn and a new charge sheet read, (ii) the trial courts are willing and ready to review the Applicant's bond terms but were unable to do so as they were bound by this court's decision, and (iii) the Applicant has been in custody for more than 6 months and it is fair and just that the court reviews its determination.

2. The application was supported by an affidavit sworn by the Applicant in which he deponed that there was a fundamental change of circumstances that warrants a review of this court's decision. First, that three of the six cases the Applicant was faced with at the Chief magistrate's court at Milimani had been withdrawn and consolidated into new charge sheet. Second, that the Applicant, in an affidavit sworn 23rd November, 2017, apologized to the trial court for not being in court for close to two years and to the complainant who felt threatened by his action. Third, that he also attached a Chief's letter confirming his residence.

3. Learned counsel, Mr. Ayuo acted for the Applicant and Ms. Kimiri for the State. Mr. Ayuo cited the cases that were consolidated as Criminal Cases 1152, 1153 and 1154 of 2015, with 1152 acting as the main file. That Criminal Cases 1601 and 1602 of 2015 were consolidated with 1601of 2015 being retained. He submitted that there were radical changes in the number of counts that the Appellant was facing after the consolidation as some charges were dropped. He was of the view that the Applicant's continued stay in remand was unfair and that there had been numerous adjournments in the trial which meant he has spent more than 9 months in remand. He submitted that the Applicant had apologized to the trial court and to the complainant through the investigating officer. That the area chief, Rongai wrote a letter to the court on 1st November, 2017 indicating he knew where the Applicant resides. He urged the court to vary its ruling and grant the Applicant his freedom as he has a young family that needs his presence and financial support. Further, that the Applicant's brother was in court and would ensure that the Applicant would appear in court when and if needed.

4. Ms. Kimiri submitted that the apology to the complainant could not be confirmed. She pointed out the reason why the court had refused to grant bail was the threats to the complainant and the fact that the Applicant was a flight risk. She submitted that a mere apology for going underground defeats the constitutional provision on the right to bail and that an accused must present himself to court when and if required. That the letter from the Chief was not sufficient evidence that the Applicant would attend court as he had previously gone underground for a period of two years in an effort to frustrate justice. That the money involved in the offences was huge and in relation to the Applicant's conduct there was no assurance that the Applicant would attend court. Further, that there was no assurance he would not threaten witnesses. She therefore urged the court to dismiss the application.

5. Mr. Ayuo, in reply, submitted that the Applicant had never been arrested before he took plea and neither had a warrant of arrest been issued. He submitted that only a charge sheet was filed in his respect but that he was never arrested. Therefore, it was misleading to state that he absconded court. Further, that only one complainant had alleged was threatened. That he has since apologized to that witness. He concluded by urging the court to allow the application.

DETERMINATION.

6. As noted in my ruling, that is subject of this application, the criterion to be followed when considering a consequent application for bail

was set out in **R. v. Nottingham Justices Ex parte Davies[1981] QB 38**, viz.:

> **"The court considering afresh the question of bail is both entitled and bound to take account not only of a change in circumstances which has occurred since the last occasion, but also circumstances which, although they then existed, were not brought to the attention of the court. To do so is not to impugn the previous decision of the court and is necessary in justice to the accused. The question is a little wider that "Has there been a change?" It is "Are there any new considerations which were not before the court when the accused was last remanded in custody?""**

7. In light of the above the Applicant has set out three considerations; (i)that the charges facing him have reduced drastically, (ii)that he has apologized to the Court, for his absence and a complainant he was accused of threatening, and (iii)the trial courts were willing to reconsider his bail applications.

8. This court in reaching its decision to not allow the initial application found that; (i)The Applicant posed a threat to witnesses, (ii)the Applicant's absence for two years did not bode well to his future attendance of court, and (iii)the Applicant posed a likelihood to re-offend.

9. The Applicant seeks to assuage these court fears on the first and second grounds by stating that he has filed an affidavit dated 22nd November, 2017 in which he apologized to the Court and the investigating team for the anguish and hardship they went through when trying to trace him for a period of two years. He also deponed in the affidavit that he had since apologized to Caroline Mumbi for any impression she might have formed through his actions. He attached the letter of apology. It is not clear whether the letter in question has been served on the complainant and what her reaction to the same has been. With that in mind, I agree with Ms. Kimiri that the purported apology could not be proved. This therefore did not amount to a change in circumstances.

10. Furthermore, the affidavit in question was curiously only filed in Chief Magistrate's Criminal Case 1175 of 2015(which is consolidated with Criminal Cases 1601 and 1602 of 2015) and from the records of those files it is clear that the same has not been considered by that court. Therefore, the assertions contained therein have not been ascertained and with that in mind this court cannot make a finding as to whether the apology for absconding was accepted by the court and the investigating team. I therefore maintain that the circumstances leading to the conclusion that the Applicant posed a threat to witnesses and that he posed a flight risk have not changed.

11. With regard to the Applicant's likelihood to re-offend this court pointed to the fact that the offences before the Kibera Chief Magistrate's Court, particularly in **Criminal Cases 1492 and 1792 of 2017,** were similar in nature and committed while warrants of arrest were in force in the criminal cases before the Milimani Chief Magistrate's court. In his submission, Mr. Ayuo stated that there were no warrants of arrest against the Appellant but on perusing the record in Chief Magistrate's Court at Nairobi Criminal Cases 1152, 1153 and 1154 of 2015 it was clear that warrants of arrest against the Applicant were issued on 23rd July, 2015, 7th September, 2015 and 7th September, 2015 respectively. This flies in the face of the Applicant's assertion that no warrant of arrest was issued. It is doubtless also that he committed the offences the subject of the Kibera Criminal cases while at large.

12. In the case of **Francis Nehemia Oluoch v. Republic(Misc. Crim. App. No. 228 of 2017)** at para. 8 the court held that:

> **"I bear in mind that in making a determination as to the possibility of re-offending, the court is merely making an analysis of risk but not determining the guilt of an accused. This statement guides the rationale of always upholding the tenet of the presumption of innocence unless otherwise proven."**

13. The Kibera Criminal cases 1494 and 1792 of 2017 are offences similar to those charged at the Nairobi Chief Magistrate's court, which ultimately point to a high re-offending factor particularly in light of the Applicant's status of being a flight risk. And so, even if the Applicant has not been tried and found guilty, his antecedents speak volumes of his likelihood to reoffend.

14. It is true that the charges facing the Applicant have been reduced through the consolidation of the case files. However, this does not affect the circumstances of the present application as the only duty the court has to ascertain is the central tenet to the admission to bail or bond, that is; whether the Applicant will attend court.

15. In view of the foregoing, i find that the answer to the question, "**Are there any new considerations which were not before the court when the accused was last remanded in custody**?" The answer is in the negative. Accordingly, the application is hereby dismissed with no orders as to costs. The Deputy Registrar of this court shall forthwith remit back the respective trial court files.

DATED and **DELIVERED** this 13th day of June, 2018

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Mr. Ayuo for the Applicant

2. Miss Atina for the Respondent.