



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL CASE NO. E057 OF 2021**

**DANIEL MUSAU.....1<sup>ST</sup> ACCUSED/1<sup>ST</sup> APPLICANT**

**ROBERT MWANGI KIBORORO.....2<sup>ND</sup> ACCUSED/2<sup>ND</sup> APPLICANT**

**VERSUS**

**REPUBLIC.....PROSECUTOR/RESPONDENT**

**REASONS FOR THE RULING ON APPLICATION FOR REVIEW**

The accused have applied for review of the order of this court (Bwonwong'a, J) dated 22<sup>nd</sup> December, 2021, which denied them bail pending hearing and determination of the murder charge against them in this court. In their applications the applicants are seeking the following orders.

1. Spent.
2. An order to revisit, vary, and/or vacate its orders of 22<sup>nd</sup> December, 2021 that denied them bail pending their trial.
3. That the Court do exercise its discretion and grant them reasonable bail terms and impose conditions it deems fit.

The application is supported by grounds that are set out on the face of the notice of motion dated 27<sup>th</sup> December 2021 and a supporting affidavit sworn by the 1<sup>st</sup> applicant dated 22<sup>nd</sup> December, 2021.

The main grounds as follows.

The applicants are charged with murder and had applied for bail. However, the court's ruling dated 22<sup>nd</sup> December, 2021 denied them bail citing the possibility of disturbing the public order and that their release would pose a danger to themselves.

In this application they state that there is sufficient change in circumstances that warrant being released on bail/bond. They contend that they are no longer a threat to the public order since they have already been interdicted with effect from 18<sup>th</sup> August, 2021 and are no longer serving as police officers. Furthermore, they have stated that they have no intention of interfering with witnesses and are not a threat to witnesses and the public. It is their case that the investigating officer has already concluded investigations and there is no evidence that they would interfere with witnesses. Furthermore, the prosecution has not invoked the provisions of the Witness Protection Act if such a threat exists.

Additionally, that since the alleged murder took place on 4<sup>th</sup> May 2020 in Mathare, the applicants had until their arrest in August 2021 been performing their respective duties within Mathare and there have been no reports of personal danger or attacks directed at them during the period. Furthermore, they do not and will not pose any danger to the public.

They contend that the 1<sup>st</sup> applicant is based in Igoji Embu, far away from where the alleged murder took place. That the 2<sup>nd</sup> applicant also has a fixed abode and has family ties. It is their contention that they can be available whenever called upon and are closely monitored in their residence within the police lines as was required upon interdiction. Furthermore, that due to the stringent measures imposed upon the applicants, they are unlikely to abscond and are not a flight risk.

The applicants assert that they are both bread winners in their respective families and their children who are in school and colleges will suffer greatly if they are not released on bail. They have urged the court to review its ruling denying them bail and release them on bail on humanitarian grounds.

The application is also supported by an affidavit sworn by Evelyn Wayua Musau dated 6<sup>th</sup> January 2022. She has deposed that she is the wife of the 1<sup>st</sup> applicant with whom they are blessed with two children. She has also deposed that the 1<sup>st</sup> applicant is the sole breadwinner in their family and since his incarceration, she has been facing difficulties in supporting herself and the two children. She has further deposed that she is willing to stand as a surety for the 1<sup>st</sup> applicant in the event he is granted bail/bond.

One George Musau Mbinda has also filed an affidavit dated 3<sup>rd</sup> February 2022 in support of the application for review. He has deposed that he is the father of the 1<sup>st</sup> applicant and is ready and willing to stand surety for him if released on bail. He has also deposed that he will ensure his son complies with all the terms and conditions set by the court if released on bail. Furthermore, he has deposed that he is the registered owner of a parcel of land situated in Machakos and that the 1<sup>st</sup> applicant has a fixed abode therein.

In response to the application, the prosecution filed a replying affidavit dated 11<sup>th</sup> January 2022 sworn by Benedict Otieno in opposition to the application. He has deposed that circumstances have not changed since the applicants were denied bail. He has also deposed that the interdiction of the applicants does not negate their ability to interfere with witnesses and to disturb public order. Furthermore, he has also deposed that the applicants are well known in the area and can cause disharmony and disturb public disorder either directly or through proxies. Furthermore, he has deposed that the applicants did not cease being police officers upon their interdiction and therefore the apprehension of the public and victims is negative.

Furthermore, since the applicants having been interdicted they have lost a significant portion of their income and they do not have any other source of livelihood which may interfere with their ability to attend court.

The deponent has deposed that Evelyn Wayua, the spouse of the 1<sup>st</sup> applicant is an armed police officer with corresponding powers and privileges of a police officer and may facilitate access of arms to the 1<sup>st</sup> applicant.

Furthermore, if this court releases the applicants during their interdiction, they are required from time to time to report to their respective police station commanders. Consequently, the 2<sup>nd</sup> applicant will have to report at Muthaiga Police Station which is close to the scene and to the relevant witnesses. Furthermore, the respective stations have not demonstrated means of routine and continuous surveillance upon the applicants to determine their movements.

He has therefore urged the court to dismiss the application for review for lacking in merit.

### **The submissions of the accused persons/applicants**

Messrs Owang and Associates have filed written submissions in support of the application for review of the denial of bail. In their written submissions, they have reiterated the contents of the application and the supporting affidavit. They have submitted that no facts or evidence has been placed before the court to show that they would interfere with witnesses or cause public disorder. They cited the cases of Republic vs Mbiti Munguti [2020] e-KLR where the Odunga J released the accused on bail. Further reliance was placed on Christopher Kyalo Kitila Vs Republic [2021] e-KLR in which the High Court released the accused on bail after an application for review upon denial by the magistrate's court.

The applicants also cited Republic v Naomi Nechesa Sanya & Another [2020] e-KLR in support of their case. They called upon the court to apply similar standards as was applied in the cited cases and release the applicants/accused persons on reasonable bond/bail terms.

### **The submissions of the Respondent (the Republic).**

Ms Maina, counsel for the respondent has opposed the application for review of the order denying the grant of bail to the accused/applicants. She has pointed out that there was real apprehension that the accused/applicants were likely to interfere with witnesses. Furthermore, the witnesses are yet to testify and their fears are still alive. She cited the decision of this court (Lesit, J as then was) in Republic v Leliman & 4 Others [2019] e-KLR in which that court held that:

“In regard to public interest and the compromise of the criminal justice system through various forms of interference with the case, all that the law requires is that there is interference in the sense influencing or compromising or inducing or terrifying or doing such other acts to a witness with the aim that the witness will not give evidence or will give particular evidence in a particular manner. Interference with witnesses covers a wide range; it can be immediately on commission of an offence, during investigations, at inception of the criminal charge in court or during trial; and can be committed by any person including the accused, witnesses or other persons.”

Furthermore, the issue raised by the accused persons to wit being a change in circumstances between the time the court delivered its ruling and the filing of the present application has not demonstrated any change of circumstances to warrant the grant of the orders sought. Counsel submitted that reviewing the ruling without change in circumstance would be tantamount to the court sitting in an appeal in its own decision.

Counsel submitted that it is in the interests of justice that the witnesses testify before any decision on bail is made. She urged the court to deny the two accused persons bond/bail pending the hearing and determination of this case.

### **Issues for determination**

I have considered the affidavits of the accused/applicants, their submissions and the authorities cited. I have also considered the affidavit and the submissions of the respondent and counsel for the victims.

I find the following are the issues for determination.

1. Whether there is a change in circumstance(s) for the court to review its own ruling
2. Whether the accused/applicants have made out a case for the grant of the orders sought.

### **Issue 1**

I find as credible the replying affidavit dated 11<sup>th</sup> January 2022 sworn by Benedict Otieno that there has not been any change in the circumstances. I further find that the interdiction of the accused does not change the fact that they are still police officers. And by virtue of their interdiction they will be required to report to the OCS Muthaiga police station; which is near the scene of crime. This in itself will still act as catalyst to disturb public order.

Furthermore, the existence of the covid-19 pandemic in prison does not constitute a change of circumstance; since the prison authorities have put in place containment measures to protect prison inmates. Additionally, the fact that they are bread winners of their families is also not a change of circumstance.

The impending retirement of the 2<sup>nd</sup> accused is also not a change of circumstance. It is also not a change of circumstance that the father and wife of the 1<sup>st</sup> accused have filed affidavits in which they have indicated their willingness to stand as his sureties.

In the premises, I find that the applicants are inviting the court to sit in appeal in its own judgement which is constitutionally and legally impermissible.

**Issue 2**

I find that the applicants have not established a change of circumstances to warrant a review of the denial of their bail.

I therefore find that their application fails and is hereby dismissed in its entirety.

**RULING SIGNED, DATED AND DELIVERED IN OPEN COURT THROUGH VIDEO CONFERENCE THIS 1<sup>ST</sup> DAY OF APRIL, 2022**

**J. M. BWONWONG'A**

**JUDGE**

In the presence of: -

Mr. Kinyua: Court Assistant.

Ms Maina for the Republic/Respondent

Mr. Ogado for the 1<sup>st</sup> accused/applicant

Ms. Ochola holding brief for Mr. Karoki for the 2<sup>nd</sup> accused/applicant

Ms Mbugua for IPOA

Mr. Otieno for the victims



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