



**REPUBLIC OF KENYA**

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

**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION**

**ACEC REVISION NO 12 OF 2019**

**(CONSOLIDATED WITH ACEC REVISION NO 11 OF 2019 AND ACEC REVISION NO 11 OF 2019)**

- 1. REUBEN MARUMBEN LEMUNYETE**
- 2. STEPHEN SIRINGA LETININA**
- 3. DANIEL NAKUO LENOLKIRINA**
- 4. LINUS MILTONLENOLNGENJE**
- 5. PAUL LOLMINGANI**
- 6. BENARD LTARASI LESURMAT**
- 7. LILIAN BALANGA**
- 8. HESBON JACK WACHIRA**
- 9. JOSEPHINE NAAMO LENASALIA**
- 10. GEOFFREY BARUN KITEWAN.....APPLICANTS**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. I have before me three applications for revision of the orders of the Chief Magistrate's Court with respect to bail in Nairobi Chief Magistrate's Court Anti-Corruption and Economic Crimes Case No 3 of 2019- Republic v Moses Kasaine Lenolkulal and Others. With the consent of Counsel for the parties, the applications were consolidated and heard together, with ACEC Revision No. 12 of 2019 as the lead file.

2. ACEC Revision No. 12 of 2019 is brought on behalf of Reuben Muramben Lemunyete, the 5<sup>th</sup> accused person before the Chief Magistrate's Anti- Corruption and Economic Crimes Court Case No. 3 of 2019. The 5<sup>th</sup> accused is jointly charged with his co-accused with the offence of conspiracy to commit an act of corruption contrary to section 47A (3) as read with section 48(1) of the Anti- Corruption and Economic Crimes Act 2003 (hereafter ACECA). The particulars of the offence in this count are that between the 27<sup>th</sup> of March 2013 and 25<sup>th</sup> March 2019 in Maralal Town within Samburu County in the Republic of Kenya, being a County Chief Officer, Samburu County Government, conspired to commit an offence of corruption namely abuse of office leading to unlawful payment of Kshs 84,695,996 to Moses Kasaine Lenalkulal t/a Oryx Service Station.

3. The 5<sup>th</sup> accused is charged at count VIII with the offence of abuse of office contrary to section 46 as read with section 48(1) of ACECA. The particulars of this offence are that between 1<sup>st</sup> March 2013 and 25<sup>th</sup> March 2019 at Samburu County, being the Chief Officer Agriculture, Livestock and Fisheries of Samburu County used his office to improperly confer a benefit Kshs 9, 261, 550 to Moses Lenolkulal t/a Oryx Service Station.

4. ACEC Revision No 11 of 2019 is brought by the 2<sup>nd</sup>, 3<sup>rd</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 11<sup>th</sup> accused persons in Chief Magistrate's ACEC Case No. 3 of 2019. These are Stephen Siringa Letinina, Daniel Nakuo Lenolkirina, Linus Milton Lenolngenje, Lilian Balanga, Paul Lolmingani, Bernard Ltarasi Lesurmat and Hesbon Jack Ndathi Wachira. With the exception of the 11<sup>th</sup> accused, these applicants are charged with their co-accused in count 1 with the offence of conspiracy to commit an offence of corruption contrary to section 47(A)(3) as read with section 48(1) of ACECA.
5. Three of the applicants in ACEC Revision No. 11 of 2019 each face a second count of abuse of office contrary to section 46 as read with section 48(1) of ACECA. In each of these counts the applicants are charged with abuse of office to confer benefits of various amounts to Moses Kasaine Lenolkulal t/a Oryx service Station for supply of fuel to Samburu County Government. As County Secretary, Stephen Siringa Letinina is charged with abusing his office to improperly confer a benefit of Kshs 10,480,840 to the 1<sup>st</sup> accused; Daniel Nakuo Lenolkirina, as Chief Officer abused his office to improperly confer a benefit of Kshs 19,826,956.35 to the 1<sup>st</sup> accused; while Bernard Ltarasi Lesurmat is charged with abusing his office as Chief Officer, Lands, Housing and Urban Development of Samburu County Government to improperly confer a benefit of Kshs 9,030,640 to Moses Kasaine Lenolkulal t/a Oryx service station for supply of fuel to Samburu County Government.
6. The 9<sup>th</sup> accused, Lilian Balanga, is charged that as Chief Officer- Gender, Culture and Social Services in Samburu County Government abused her office to improperly confer a benefit of Kshs 548,870 to Moses Kasaine Lenolkulal t/a Oryx Service station for supply of fuel to Samburu County Government.
7. ACEC Revision No. 10 of 2019 was lodged by Josephine Naamo Lenasalia and Geoffrey Barun Kitewan, the 4<sup>th</sup> and 10<sup>th</sup> accused persons respectively. They too face the same conspiracy charge contrary to section 47(A) (3) as read with sections 48(1) of ACECA. In addition, Josephine Naamo Lenasalia faces a second count of abuse of office contrary to section 46 as read with section 48(1) of ACECA. The charge against her states that as the Chief Officer, Environment and Natural Resources, Health Services and Sanitation, and Tourism and Trade, she abused her office to improperly confer a benefit of Kshs 3,940,925 to Moses Lenolkulal t/a Oryx Service Station to supply fuel to Samburu County Government.
8. In a ruling delivered on 3<sup>rd</sup> April 2019 in **ACEC Revision No. 7 of 2019- Moses Kasaine Lenolkulal v Republic**, this court reviewed the terms of bond and bail that the Chief Magistrate's Anti-Corruption Court (Hon. D. Ogoti) had imposed on the 1<sup>st</sup> accused, Moses Kasaine Lenolkulal from a bond of Kshs 150 million with one surety of the same amount or a cash bail of Kshs 100m to a bond of Kshs 30m or cash bail of Kshs 10m.
9. The applicants in the consolidated matters before me took plea before Hon. Mugambi (CM) on 5<sup>th</sup> April 2019. They all pleaded not guilty to the offences charged and applied to be released on bail.
10. In his ruling dated 5<sup>th</sup> April 2019, Hon. Mugambi directed that the applicants maintain the same terms as had been imposed by the High Court on the 1<sup>st</sup> accused Moses Kasaine Lenolkulal, in ACEC Revision No 7 of 2019. The effect of this order is that each of the applicants would be required to either post a bond of Kshs 30 million with one surety of a similar amount or deposit cash bail of Kshs 10 million. The court indicated that it was of the view that uniform bond and bail terms should be maintained for all the accused persons in the matter.
11. It is this ruling that all the applicants are aggrieved by and which they seek to have reviewed. In the application for review by the 5<sup>th</sup> accused, Reuben Marumben Lemunyete which is supported by an affidavit sworn by the applicant on 6<sup>th</sup> April 2019, his Counsel, Mohochi & Co Advocates, argue that he is a citizen of Kenya with a fixed abode and is therefore not a flight risk. That he is a man of modest means who should be accorded reasonable bond terms. Further, that the court, in considering his application for bond, should give him the benefit of the presumption of innocence and consider that a fair trial envisages reasonable bond and bail terms for an accused person.
12. The applicant also asks the court to note that he was not arrested but voluntarily presented himself to the authorities pursuant to summons.
13. It is further argued on his behalf that the applicant is of fragile health and in need of constant and specialized medical attention. The applicant avers in his affidavit in support of his application that he has cirrhosis of the liver and asthma, requires regular daily medication and a specialized diet, and that he has been placed in a secluded facility at the prison where he is being held.
14. It is his submission therefore that in the circumstances, the cash bail of Kshs 10m granted by the trial court without an alternative is manifestly oppressive, excessive and depicts pre-trial punishment. In his view, the Chief Magistrate's Court had ignored serious compelling reasons relating to his terminal illness and that he is a public servant of modest earnings who would require over 25 years to accumulate the cash bail of Kshs 10m.
15. The applicant relies on Article 49 of the Constitution, the Judiciary's Bail and Bond Policy Guidelines and various judicial precedents to urge the court to *inter alia* set aside the bail terms imposed by the trial court and to grant bail terms that are in tandem with his means.
16. In their application for revision, the 2<sup>nd</sup>, 3<sup>rd</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 11<sup>th</sup> accused persons argue through their Counsel Gumbo and Associates, Mirugi Kariuki & Co Advocates and Njue Muriithi & Co Advocates that the Chief Magistrate's Court fell into error in the manner it considered the applicants' application for bond. It is contended further that the court acted in an unjust and capricious manner and ignored all the legal principles with respect to bail.
17. These applicants also cite the provisions of the **Bail and Bond Guidelines** to submit that the purpose of bail is to ensure the attendance of the accused person at the trial. They note that the prosecution did not oppose the grant of bail nor did it indicate that the applicants were a flight risk or likely to interfere with witnesses. It is their case that a bond of Kshs 30m or cash bail of Kshs 10m is manifestly excessive when the circumstances of the applicants are considered. They set out in the application for revision their personal circumstances to justify their

submission that they should be released on bail in amounts ranging between Ksh 200,000-Kshs 500,000.

18. In this regard, they state that the 2<sup>nd</sup>, 3<sup>rd</sup>, and 8<sup>th</sup> accused are the County Secretary, Chief Officer, Finance and Chief Officer, Lands respectively. As public officers, they would be required to be placed on suspension in accordance with section 62 of ACECA. The 6<sup>th</sup> accused is Deputy County Director of Education, while the 7<sup>th</sup> accused is a former Chief Officer of the County who retired in 2017 and currently has no income.

19. The 9<sup>th</sup> accused was a Chief Officer who retired in 2017, having served in the county between 2014 and 2017 and it is alleged that she has no job and is incapable of raising the cash bail imposed. As for the 11<sup>th</sup> accused person, it is stated that he has never been an employee of the County or any other state entity but is a businessman with limited income.

20. By way of comparison, the applicants set out the bail and bond terms imposed by courts in Kenya in various corruption cases to submit that given the amount allegedly in issue in this case, being Kshs 64 million, the offence should have attracted a reasonable amount of bail or bond.

21. The applicants submit that contrary to what the DPP seems to have persuaded the Chief Magistrate's Court to accept- that reasonable bail terms are encouraging people to commit crimes- the implication being that tough bail and bond terms will deter offences- what should act as a deterrence to corruption offences is the sentence upon conviction, not unreasonable bail terms.

22. It was submitted for the 4<sup>th</sup> and 10<sup>th</sup> accused persons that granting them the same bail and bond terms as were granted by the High Court to the 1<sup>st</sup> accused in ACEC Revision No 7 of 2019 is to condemn them unheard as the 1<sup>st</sup> accused had been heard prior to the grant of the bail terms. This would, in their view, amount to a violation of their right to a hearing. They argue further that the personal and economic circumstances of the accused are different and it would be unfair to subject and expect them to meet the same terms as the 1<sup>st</sup> accused. It is argued that the 4<sup>th</sup> accused is a woman from a marginalized community who has no income as she was no longer within the County service or otherwise employed as she left the county in 2017 and was unemployed. The 10<sup>th</sup> accused person had been earning Kshs 200,000 prior to his arrest.

23. The 4<sup>th</sup> and 10<sup>th</sup> accused persons argue that applying the same bail terms as were granted to the 1<sup>st</sup> accused will be grossly discriminatory against them as they are from a marginalized community. They also contend that bail terms as set in this case have never been witnessed in other corruption cases where the accused were charged with causing loss of billions of public funds. They cite in this regard the case of **Rogers Nzioka & 10 Others v Republic ACEC Appn. No. 12 of 2018 ( Consolidated with ACEC Misc. App Nos 13,14,15,17, 18 and 19 of 2018** in which the accused were asked to execute bonds of Kshs 5m plus a surety of Ksh 2m and cash bail of Kshs 2m.

24. It is further submitted that the 4<sup>th</sup> and 10<sup>th</sup> accused, who face 2 and 1 counts respectively unlike the 1<sup>st</sup> accused who faces 4 counts, are not key suspects and are not alleged to be recipients of the sums in question. They should therefore not be subjected to the same quantum of bail or bond as the 1<sup>st</sup> accused.

25. In further elaboration of the personal circumstances of the applicants, it is submitted that the 10<sup>th</sup> accused person is under continuous observation by a doctor due to back pain; that he has to wear a corset and he should therefore be granted reasonable bail terms to enable him resume treatment. They urge the court to release them on bond and cash bail of Kshs 30,000 and 10,000 and Kshs 100,000 and Kshs 50,000 respectively.

26. Under section 362 of the Criminal Procedure Code (CPC), the High Court is granted jurisdiction to review decisions of subordinate courts in the following terms:

***The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.***

27. With respect to the exercise of the powers of revision by the High Court, section 364 of the CPC provides that:

***(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—***

***(a) ...;***

***(b) in the case of any other order other than an order of acquittal, alter or reverse the order.***

***(c) ....;***

***(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence.***

28. While I do not understand section 362 CPC to require that parties should be heard except in the circumstances prescribed under section 362(2), I directed the office of the Director of Public Prosecutions to respond to the applications in this case. Learned Prosecution Counsel, Mr. Nyamache, submitted that the applicants were seeking revision of the ruling of Hon Mugambi dated 5<sup>th</sup> April 2019 in which the court

taking the accused's plea had adopted the terms given by this court on 3<sup>rd</sup> April 2019 in respect of the 1<sup>st</sup> accused.

29. According to the Prosecution Counsel, the reason was to maintain uniformity on the conditions imposed on the accused in line with Article 27 of the Constitution. Mr. Nyamache observed that the prosecution had sought additional conditions to be imposed on the applicants but the court declined the application for additional conditions and directed that all the accused should be given uniform terms.

30. While Mr. Nyamache did not oppose the release of the applicants on bail, it was his submission that the position of the state was that all the accused persons should be given uniform terms and conditions. That there should be no disparity in the terms of bail imposed on accused persons with similar charges as to allow this would be to allow discrimination, inequality and inconsistency which would offend Article 27 of the Constitution. Since the 1<sup>st</sup> accused had been charged with the same offence as the other accused persons and was out on a cash bail of Kshs 10 million, if the accused are given different terms, there would be deemed to be discrimination.

31. With respect to the medical records and reports annexed to the applications in ACEC Revision Nos. 10 and 12 of 2019, his submission was that they were not placed before the trial court, were not certified and the prosecution had not had a chance to verify them. The applicants also had a chance to apply for revision of the bail terms before the trial court, and he urged the court not to allow the applications.

32. Mr. Kahiga for the 5<sup>th</sup> accused person submitted in response that contrary to the assertion by the DPP, the principle that emerges from the various authorities that they had cited is that it is proper for the court to apply different bond terms based on the peculiar circumstances of the accused. That a revision by the High Court is not only premised on the inability to meet the bond terms. That under section 123(3) of the Criminal Procedure Code, the High Court has power to intervene and revise the terms if it considers them to be excessive and unreasonable. It also has the power to reduce the bail or bond terms even without proof of inability to raise the bond. Finally, Counsel cited Article 49 which he termed the guiding principle for a court in deciding whether to reduce bond, taking into account the personal circumstances of the accused and the presumption of innocence.

33. Mr. Opolo for the 4<sup>th</sup> and 10<sup>th</sup> accused persons relied on Rule 9 (sic) of the Bail and Bond Policy Guidelines which he submitted provides for the personal circumstances of an accused person to be considered. His submission was that it cannot properly be argued that persons charged together should be given the same bond without considering the personal circumstances of each accused person. He informed the court that the 10<sup>th</sup> accused person had pleaded his personal circumstances, which were that he has financial constraints and poor health which entitled him to bail. He was currently remanded at the Industrial Area Prison where he was secluded due to poor health.

34. Mr. Nyamodi relied on the decision of Chesoni J in **Ng'ang'a v Republic (1985) eKLR** to submit that in order to achieve equality, it is necessary to treat accused person differently. Further, that differential treatment of accused persons is not discrimination, relying in this regard on section 82 of the former Constitution which he submitted was the same as Article 27 of the current Constitution.

35. It was his submission further that the important parameter that the court should bear in mind when determining the severity of the offence in order to determine the bail to set is not the colossal amount that is placed in the charge sheet but the penalty upon conviction. In this case, the penalty under section 48(1) of the Anti-corruption and Economic Crimes Act is a fine of Kshs 1m or imprisonment for 10 years. He urged the court to bear in mind the sentence provided for upon conviction when considering the reasonableness of the amount set as bail by the trial court.

36. Mr. Omoke for the 4<sup>th</sup> and 10<sup>th</sup> accused persons submitted that if these two accused persons are asked to provide the bail set by the trial court, the presumption of innocence will be lost. That they would have to go through agony to raise the bail and would have suffered for a crime yet they are presumed innocent until proven guilty. He also submitted that Article 49 does not require that persons charged together should be subjected to the same bail terms. Rather, what the court should consider is what is reasonable for each accused person. He reiterated that the accused did not have a chance to present documents when the court delivered the ruling in ACEC Revision No. 7 of 2019, and to apply the same bail terms to them is to violate their right to a fair hearing.

37. He further submitted that the Bond and Bail Guidelines enjoin the court to grant bail terms that ensure the attendance of parties in court. In the present case, the applicants had traveled from Samburu to present themselves to the court and will do so again when released on bail. Counsel also drew the court's attention to the medical report of the 10<sup>th</sup> accused person, Geoffrey Barun Kitewan, to show that he is under constant medical observation. The cheaper the bail terms, the faster it will be for him to raise bail and receive medical attention.

38. Finally, it was his contention that what is discrimination in this matter is to require the 4<sup>th</sup> accused, an unemployed woman from a marginalized community and Mr. Kitewan, the lowest ranking official in the County, to provide the same bail terms as the highest ranking official in the County, the Governor.

### **Analysis and Determination**

39. I have considered the applications before me and the submissions of the applicants' respective Counsel, as well as the submissions of the Learned Prosecution Counsel. I believe that there is no dispute about the starting point in considering an application for bail for an accused person awaiting trial. That point is Article 49 1(h) which guarantees to all accused persons the right to be released on bail unless there are compelling reasons, to be supplied by the state, why they should not be admitted to bail.

40. This Article must be read alongside Article 50(2) with respect to the rights of an accused person to a fair hearing. One of the core components of the right to a fair hearing is the right to be presumed innocent until proven guilty.

41. The constitutional provisions with respect to bail are given statutory effect in section 123 and 123A of the Criminal Procedure Code. Section 123 provides that:

*When a person, other than a person accused of murder, treason, robbery with violence, attempted robbery with violence and any related offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a court, and 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:*

*Provided that the officer or court may, instead of taking bail from the person, release him on his executing a bond without sureties for his appearance as provided hereafter in this Part.*

*(2) The amount of bail shall be fixed with due regard to the circumstances of the case, and shall not be excessive.*

*(3) The High Court may in any case direct that an accused person be admitted to bail or that bail required by a subordinate court or police officer be reduced.*

42. Section 123A CPC states as follows:

*Exception to right to bail*

*(1) Subject to Article 49(1)(h) of the Constitution and notwithstanding section 123, in making a decision on bail and bond, the Court shall have regard to all the relevant circumstances and in particular—*

*(a) the nature or seriousness of the offence;*

*(b) the character, antecedents, associations and community ties of the accused person;*

*(c) the defendant's record in respect of the fulfillment of obligations under previous grants of bail; and;*

*(d) the strength of the evidence of his having committed the offence;*

*(2) A person who is arrested or charged with any offence shall be granted bail unless the court is satisfied that the person—*

*(a) has previously been granted bail and has failed to surrender to custody and that if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody;*

*(b) should be kept in custody for his own protection.*

43. These provisions have been further underscored in the **Bail and Bond Policy Guidelines** produced by the National Council on the Administration of Justice in March 2015-see in particular Guideline 4.9.

44. In addition to these constitutional, statutory and policy provisions, the principles that a court should consider in determining if and the amount of bail or bond to grant an accused person has been the subject of judicial consideration in many well- reasoned decisions in our courts. These principles have not changed much over the years, and the decision of Chesoni J in **Ng'ang'a v Republic (supra)** cited by Mr. Nyamodi is a good place to start.

45. While the court in that case declined to release the accused on bail, it did enunciate the principles that a court should bear in mind. It stated as follows:

*“Just as finding one accused charged with others jointly guilty or innocent does not implicate or set free the co-accused and is not discriminatory treatment, so is the case with granting or refusing bail to one or more accused persons charged jointly with others some of who may be out on bail. This is so because the facts, circumstances and merit of one co-accused may be such that granting him bail is justified, whereas those of his co-accused may mitigate against bail. Each case must be considered on its own merit, facts and circumstances before the court exercises its discretionary powers of granting or refusing bail. (Emphasis added)*

46. Even as far back as 1985 and in a considerably less liberal political and legal environment, the constitutional basis of the right to bail was recognised. Chesoni J went on to observe as follows:

*“Admittedly, admission to bail is a constitutional right of an accused person if he is not going to be tried reasonably soon, but before that right is granted to the accused there are a number of matters to be considered. Even without the Constitutional provisions (section 72(5)) generally in principle, and, because of the presumption that a person charged with a criminal offence is innocent until his guilt is proved, an accused person who has not been tried should be granted bail, unless it is shown by the prosecution that there are substantial grounds for believing that:*

*(a) the accused will fail to turn up at his trial or to surrender to custody; or*

*(b) the accused may commit further offences; or*

*(c) he will obstruct the course of justice*

*The primary purpose of bail is to secure the accused person's attendance at court to answer the charge at the specified time. I would, therefore, agree with Mr Karanja that the primary consideration before deciding whether or not to grant bail is whether the accused is likely to attend trial. In considering whether or not the accused will attend his trial the following matters must be considered:*

*(a) The nature of the charge or offence and the seriousness of the punishment to be awarded if the applicant is found guilty: Where the charge against the accused is more serious and punishment heavy, there are more probabilities and incentive to abscond, whereas in case of minor offences there may be no such incentive.*

*(b) The strength of the prosecution case. The court should not be willing to remand the accused in custody where the evidence against him is tenuous, even if the charge is serious. On the other hand, where the evidence against the accused is strong, it may be justifiable to remand him in custody.*

*(c) The character and antecedents of the accused. Where the court has knowledge of the accused person's previous behaviour these may be considered, but by themselves they do not form the basis for refusing bail, although coupled with other factors may justify a refusal of bail.*

*(d) Accused's failure to surrender to bail on previous occasion will by itself be a good ground for refusing bail.*

*(e) Interference with prosecution witnesses. Where there is a likelihood of the accused interfering with prosecution witnesses if he is released on bail, bail may be refused, but there must be strong evidence of the likelihood which is not rebutted and it must be such that the court cannot impose conditions to the bail to prevent such interference."*

47. In his decision in **Andrew Young Otieno v Republic [2017] eKLR**, Kimaru J observed as follows:

*"This court agrees with the Applicant that the purpose of imposing bond terms is to secure the attendance of the accused before the court during trial. The terms imposed by the trial court should not be such that it amounts to denial of the constitutional right of the accused to be released on bail pending trial. The trial court must consider the circumstances of each accused when determining the bond terms to be imposed. In the present application, it was clear to this court that the Applicant was unable to raise the bond terms imposed by the trial magistrate. He has been in remand custody for a period of over two years." (Emphasis added)*

48. Lesiit J expressed a similar view in **Josef Kimathi Murumua & 3 Others v Republic [2013] eKLR**. After considering the factors set out in **Ng'ang'a v Republic (supra)** she observed that:

*"...The learned trial magistrate, in exercise of discretion whether or not to grant bail to all the accused person jointly charged in this case, would have been perfectly justified to give varying bond terms to the accused persons depending with the merits, circumstances of their case and the factors unique to each of them. The learned trial court is mandated to consider the bond application by each accused person and to examine each accused person, based on the peculiar facts of each accused person, and the circumstances pertaining to their respective case and also the merits of the application. Having done so, the trial court would then be expected to determine which of the accused person qualify to be granted bond, and which ought not to and give reasons for each decision. To give an example a court would be in order to give a child bond and deny an adult based on the age and unique circumstances of each accused." (Emphasis added)*

49. In **Habumugisha Idephonc vs R (2018) eKLR** the court expressed the view that a court is under a duty to ensure that the conditions attached to an accused person's admission to bail or bond are reasonable and that they are not so stringent as to fetter an accused person's right to bail.

50. In her decision in **ACEC Misc Appn No. 12 of 2018-Ferdinand Odoyo Matano v Republic**, Ong'udi J reviewed the bail terms imposed on the applicants downwards in order to take into account their personal circumstances.

51. I am duly guided by the principles that emerge from the above cases and legal provisions.

52. We have in the applications before me 10 persons charged with various offences under the Anti-corruption and Economic Crimes Act, 2003. Mr. Nyamodi submits that the penalties they would face upon conviction are not very serious, and this is true, at least in so far as the fine and the term of imprisonment is concerned. In its wisdom, Parliament provided that an accused person convicted under section 48(1) of the Anti-corruption and Economic Crimes Act is liable to a fine not exceeding Kshs 1m or imprisonment for 10 years.

53. Let us not, however, delude ourselves. Corruption is a serious offence, even though our legislature has not, as I observed in **ACEC Revision No. 7 of 2019**, provided a penalty that is commensurate with the devastation it causes. The poverty and marginalization of many citizens and communities that some of the applicants before this court cite to justify lower bail terms are directly attributable to the unbridled corruption in our society.

54. Perhaps the best exposition of the nature and consequences of corruption that I have ever heard from a Kenyan was by the then Minister for Justice and Constitutional Affairs, Government of the Republic of Kenya, Hon. Kiraitu Murungi. His speech is to be found at [http://iacconference.org.s3-website.eu-central-1.amazonaws.com/documents/11th\\_iacc\\_plenary\\_When\\_Corruption\\_Is\\_A\\_Crime\\_Against\\_Humanity.doc](http://iacconference.org.s3-website.eu-central-1.amazonaws.com/documents/11th_iacc_plenary_When_Corruption_Is_A_Crime_Against_Humanity.doc) and is also carried in "Justice and Economic Violence in Transition" (*Springer Science & Business Media 2013*) at page 161. While addressing delegates during the opening of the 11<sup>th</sup> International Anti-Corruption Conference on Sunday 25<sup>th</sup> May 2003 in Seoul, South Korea, in 25<sup>th</sup> May 2003, he stated:

***“Where I come from we don’t wait to read about corruption in newspapers or magazines. In my country one does not have to wait until the effects of corruption are relayed by images on television. Where I come from corruption in part of our lives. Before our own eyes we have seen it fill our roads with potholes; deny medicines to our hospitals; literally remove desks from our classrooms. Corruption has undermined our agricultural sector and thereby our attempts to feed ourselves as a nation; corruption has denied fresh water to parched sections of the nation; corruption has systematically eaten away at the very fabric of our society. You will allow us, therefore, to assert before this distinguished gathering that for us corruption is not merely a crime, it is a crime against humanity.”***

55. But, and this is a big but: we have the Constitution which we promulgated in 2010 and in which **“We the people of Kenya”** guaranteed to accused persons certain rights. At Article 50(2) (a), we guaranteed accused persons the right **“to be presumed innocent until the contrary is proved;”** This presumption must carry with it the right not to be subjected to any pre-trial punishment, and to ensure this, we guaranteed to arrested persons at Article 49(1) (h) the right **“to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.”**

56. Given the abhorrence we express with regard to corruption, it is tempting to give in to public opinion and lock away those facing corruption charges for the duration of their trials. Or to give them such stringent bail or bond terms that we ensure that they remain incarcerated for the duration of their trial. However, to do so would be to betray our constitutional duty to afford everyone a fair hearing, and we would have denied them their right to be presumed innocent.

57. We can only ensure respect for the constitutional injunctions at Article 49 and 50(2)(a) of the Constitution by granting accused persons bail which is reasonable and, while taking into account the seriousness of the offence with which they are charged and the strength of the prosecution evidence against them, also takes into account the personal circumstances of the accused person(s).

58. In this case therefore, I take the view that the Chief Magistrate’s Court fell into error when it determined that each of the accused persons should face the same bail terms as the 1<sup>st</sup> accused, their Governor. The court was under a duty to consider each of their applications for bail on their merits, and apply to them the principles set out above, to wit:

- i. Are there compelling reasons to deny the accused person bail?
- ii. Are there substantial grounds shown by the prosecution that the accused person will fail to turn up at his trial?
- iii. Is there an apprehension that the accused person may commit other offences or obstruct the course of justice?

59. As emerges from the decisions set out above, the primary consideration in deciding whether or not to grant bail to an accused person is whether the accused person is likely to attend trial. The court is required to consider;

- i. The nature of the charge or offence and the seriousness of the punishment to be awarded if the applicant is found guilty;
- ii. The strength of the prosecution case;
- iii. The character and antecedents of the accused;
- iv. The likelihood of the accused interfering with prosecution witnesses.

60. More importantly and the consideration that is at the core of the applications before me is the question of how the court should proceed where more than one person are jointly charged with a criminal offence. The principle that emerges from the cases set out above as well as section 123A of the CPC is that each accused person’s case, and each accused person’s entitlement or otherwise to bail, must be considered and examined on its own facts and merits, and the accused person’s personal circumstances taken into account.

61. Thus, contrary to the view taken by the Chief Magistrate’s Court and supported by Counsel for the DPP, there is no requirement for uniformity in the bail or bond terms imposed on persons who are charged with the same offence. Often, as submitted by Counsel for the 4<sup>th</sup> and 10<sup>th</sup> accused persons, to apply such uniformity without regard to the personal circumstances of each of the accused persons is what would amount to discrimination and result in injustice. For instance, the circumstances of the 9<sup>th</sup> applicant, Lilian Balanga, a former Chief Officer, Gender, Culture, and Social Services who is charged with abusing her office to improperly confer a benefit of Kshs 548,870 on the Governor can in no way be compared with that of the Governor. To admit them to bail on the same terms would be to work great injustice to her.

62. I will accordingly revise and set aside the terms imposed by the Chief Magistrate’s Court on the 10 accused persons in this matter. Their respective circumstances are fundamentally different from those of the 1<sup>st</sup> accused, the Governor of the County, whom it is alleged in the charges before the Chief Magistrate’s Court was the primary beneficiary of the alleged corrupt acts.

63. Having considered the personal circumstances of the applicants as placed before me in the applications for review, I make the following orders:

- a. **The 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> 6<sup>th</sup>, 8<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> accused persons are granted a bond of Kshs 5,000,000 with one surety of the same amount or cash bail of Kshs 2,000,000.**

**b. The 4<sup>th</sup> and 7<sup>th</sup> accused persons who are said to be retired and no longer in the service of the County shall be released on a bond of Kshs 1,000,000 with one surety of the same amount or cash bail of Kshs 500,000.**

**c. The 9<sup>th</sup> accused person who is also said to be retired shall be released on a bond of Kshs 500,000 with one surety of the same amount or cash bail of Kshs 200,000.**

**d. The bond approvals shall be done before the Chief Magistrate's Anti-Corruption Court seized of ACEC No. 3 of 2019.**

64. Upon their release from custody on bond, the applicants shall:

**i. Not go to their former offices in Samburu County unless accompanied by a police officer;**

**ii. Not make any contact, directly or indirectly, with any of the staff of the County or any of the prosecution witnesses.**

65. Any applications in respect of the orders made in this ruling shall be made before the trial court.

Orders accordingly.

**Dated Delivered and Signed at Nairobi this 12<sup>th</sup> day of April 2019**

**MUMBI NGUGI**

**JUDGE**