



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

ANTI-CORRUPTION REVISION NO. 30 OF 2019

CONSOLIDATED WITH

(REVISION APPLICATION NO. 29 & 31 OF 2019)

FERDINAND NDUNGU WAITITU BABAYAO.....1ST APPLICANT.
SUSAN WANGARI NDUNGU.....2ND APPLICANT.
LUKA MWANGI WAHINYA alias LUCAS.....3RD APPLICANT.
CHARLES CHEGE MBUTHIA.....4TH APPLICANT.
BETH WANGECHI MBURU.....5TH APPLICANT.
ZACHARIA NJENGA MBUGUA.....6TH APPLICANT.
JOYCE NGINA MUSYOKA.....7TH APPLICANT.
SIMON KABOCHO KANG'ETHE.....8TH APPLICANT.
ANSELM GACHUKIA WANJIKU.....9TH APPLICANT.
SAMUELMUNGAI MUGO.....10TH APPLICANT.
TESTIMONY ENTERPRISES LTD.....11TH APPLICANT.
SAIKA TWO ESTATE DEVELOPERS LIMITED.....12TH APPLICANT.
BIENVENUE DELTA HOTEL.....13TH APPLICANT.

VERSUS

REPUBLICRESPONDENT.

RULING

Background.

1. Ferdinand Ndungu Waititu Babayao, Susan Wangari Ndungu, Luka Mwangi Wahinya Alias Lucas, Charles Chege Mbutia, Beth Wangechi Mburu, Zacharia Njenga Mbugua, Joyce Ngina Musyoka, Simon Kabocho Kang'ethe, Anselm Gachukia Wanjiku., Samuel Mungai Mugo, Testimony Enterprises Ltd, Saika Two Estate Developers Limited and Bienvenue Delta Hotel, hereafter the 1st to 13th Applicants respectively, were charged in Anti-Corruption Court Case Number of 2019.

2. They were charged as follows;

i. The 1st Accused, H.E Governor of Kiambu County Ferdinand Ndung'u Waititu Babayao was charged with three counts. In count I he was charged with conflict of interest contrary to **Section 42(3) as read with Section 48 of the Anti-corruption and Economics Act, 2003**. He was further charged in count II and III with dealing in suspect property contrary to **Section 47(1) as read with section 47(2) (A) and 48 of the Anti-Corruption and Economic Crimes Act, 2003**. In count II he is charged alongside the 12th Accused, Saika Two Estate Developers Ltd. In count III he is charged alongside Susan Wangari Ndung'u T/A Bienvenue Delta Hotel.

ii. In count IV the 3rd Accused Luka Mwangi Waihinya alias Lucas was charged with one count of abuse of office contrary to **Section 46 as read with Section 48 of the Anti-Corruption and Economics Crimes Act, 2003**.

iii. In count V the 6th Accused Zacharia Njenga Mbugua was charged alongside the 7th Accused Joyce Ngina Musyoka, the 8th Accused Simon Kabocho Kang'ethe, the 9th Accused Anselm Gachukia Wanjiku and the 10th Accused Samuel Muigai Mugo with one count of wilful failure to comply with the law relating to procurement contrary to **Section 45(2) (b) as read with Section 48 of the Anti-Corruption and Economic Crimes Act, 2003**.

iv. The 4th Accused was charged alongside the 5th Accused Beth Wangeci Mburu and the 11th Testimony Enterprises Limited with (6) six counts. In counts VI and VII they were charged with counts of engaging in a fraudulent practice in procurement contrary to **section 66(1) as read with section 177 of the Public Procurement and Asset Disposal Act, 2015**.

v. In count VIII they were further charged with one count of fraudulent acquisition of public property contrary to **section 45(a) as read with section 48 of the Anti-Corruption and Economic Crimes Act, 2003**.

vi. In counts IX-XI they are also charged with (3) three counts of money laundering contrary to **Section 3(b) (i) as read with Section 16 of the Proceeds of Crime and Anti- Money laundering Act**.

3. The present application is hinged on the Applicants' dissatisfaction with bail terms imposed by Hon. Mugambi, CM in his ruling delivered on 30th July, 2019.

4. Following their plea, they were each admitted to bail/bond terms as follows: The 1st, 3rd and 4th Applicants were to either pay cash bail of Kshs. 15,000,000/- or bond of Kshs. 30,000,000 with a surety of a similar amount. For the 2nd and 5th Applicants cash bail was set at Kshs. 4,000,000/- or bond of Kshs. 10,000,000/- with a surety of a similar amount. Finally, with regards to the 6th, 7th, 8th, 9th and 10th Applicants their cash bail was set at Kshs. 1,000,000/- or bond of Kshs. 3,000,000/- with a surety of a similar amount. The court also set further conditions that the Applicants had to comply with as part of their admission to bond or bail. I duplicate them as under:

“1. The 1st accused shall not access his office until this criminal case is heard and determined.

2. Equally accused persons who are employees of the county will not access their offices during the pendency of this criminal Case.

3. The rest of the accused are also barred from setting foot in Kiambu County Offices pending full trial.

4. All accused will deposit their travelling documents with the court to minimize the risk of the accused travelling out of this court's jurisdiction without leave of court. For those without passports a confirmation of the fact must be given by the department of immigration.

5. They must not contact witnesses or in any way interfere with exhibit or any evidence.”

5. They were dissatisfied with the decision and have filed the present application urging this court to exercise its supervisory powers as laid out under Article 165(6) of the Constitution and Section 362 of the Criminal Procedure Code. They are uniformly aggrieved at the amount of bail that was set by the trial magistrate and urge this court to revise the same. Further, the 1st Applicant is aggrieved by the term of the bond that limited his access to his office.

6. The 1st to 10th Applicants were represented by learned counsel, Prof. Ojienda, Nelson Havi, Mr. Kiprono, Mr. Oriri and Mr. Kipchumba. The 3rd Applicant was additionally represented by Mr. Joroge. The 4th, 5th and 11th Applicants were also additionally represented by learned counsel, Mr. Swaka and Miss. Kamau. Learned State Counsel, Mr. Muteti, Mr. Owiti, Mr. Akula, Miss. Wangia and Miss. Mwila represented the Respondent. The 3rd Applicant filed ACC Revision application number 29 of 2019 whilst the 4th, 5th and 11th filed ACC Revision application number 31 of 2019 and the rest of the Applicants were in ACC Revision number 30 of 2019. The Applications, by consent of all the parties were consolidated for purposes of this ruling.

7. The Applicants filed written submissions and lists of authorities. In respect to Revision No. 30/2019 the submissions and list of authorities were filed on 1st August, 2019 by the law firm of Prof. Ojienda and Associates. As for the Respondent, it relied on Grounds of Opposition and list of authorities filed on 1st August, 2019 as well as list of documents filed on 5th August, 2019 and Supplementary List of Authorities filed on 2nd August, 2019. In respect of Revision No. 31/2019 learned counsel, Mr. Swaka filed a list of authorities on 2nd August, 2019 and list of documents on 5th August, 2019. In Revision No. 31/2019 the Respondent relied on Grounds of Opposition and a list of authority filed on 1st of August, 2019 In revision 29/2019 learned counsel Mr. Joroge filed list of authorities on 1st August, 2019 while the Respondent relied on Grounds of Opposition and list of authorities also filed on 1st of August 2019.

8. The respective parties were given an opportunity to highlight the written submissions.

Issues for Determination:

9. I have accordingly considered the application, the grounds of opposition, the respective rival submissions and the authorities submitted after which I have deduced that the following issues for determination arise:

a) *Whether this Court has jurisdiction to entertain the application*

b) *Whether the learned trial magistrate erred in imposing a condition to the bail terms that the 1st Applicant does not set foot in his office pending the hearing and determination of the trial.*

c) *Whether the bail terms imposed on the Applicants were harsh and excessive.*

a) *Whether this Court has jurisdiction to entertain the instant application:*

10. This issue arose from the Respondent's submission that the Applicants ought to have approached the court by way of an appeal as opposed to a revision. The Respondent must have been referring to Section 364(5) of the Criminal Procedure Code which provides;

'When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.'

11. It was argued on behalf of the Respondent that the Applicant ought to have moved the court by way of an appeal as opposed to a revision. It is clear that by virtue of Section 364(5), a revision is not available to a party who failed to exercise its right of appeal from a finding, sentence or order of the court, when that right is available.

12. All the Applicants on the other hand submitted to the jurisdiction of this court. They cited Section 347 of the CPC which reads;

“(1) Save as is in this Part provided—

(a) a person convicted on a trial held by a subordinate court of the first or second class may appeal to the High Court; and

(2) An appeal to the High Court may be on a matter of fact as well as on a matter of law.”

13. I am not at all in any difficulty in concluding that this is not a matter in which the Applicants have been convicted. It is neither a matter that has arisen out of a concluded issue. It is an interlocutory issue sought to be determined in the course of the trial. An appeal therefore does not lie. In so holding, I am further persuaded by the holding of Hon. Odunga J. in **Director of Public Prosecutions v. Samuel Kimuchu Gichuru & anor**[2012] eKLR, that;

“... the object of the revisionary jurisdiction of the High Court, in appropriate cases, whether during the pendency of the proceedings in the subordinate court or at the conclusion of the proceedings to correct manifest irregularities or illegalities and give appropriate directions on the manner in which the trial, if still ongoing, should be proceeded with...”

14. In light of the issues raised before this Court, I find that this is an appropriate case for the court to exercise its supervisory jurisdiction.

15. The jurisdiction is conferred upon the court under Section 362 and 364 of the Criminal Procedure Code. Section 362 gives the High Court power to ***'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.'***

16. This provision is buttressed by **Article 165(6)** and **(7)** of the Constitution, which provides:

'(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

17. Article 165 crystallizes the purpose of the revisionary jurisdiction of the High Court as in furtherance of its supervisory jurisdiction over the subordinate courts.

b) Whether the learned trial magistrate erred in imposing a condition to the bail terms that the 1st Applicant does not set foot in his office pending the hearing and determination of the trial:

18. The most contested issue in this application regards the imposition of stringent bail conditions more so, against the 1st Applicant in his capacity as the Governor of the County Government of Kiambu, by barring him from setting foot into the County offices pending the hearing and determination of the trial. I have already set out the manner in which Hon. Mugambi delivered himself.

19. It is important to point out that save for the 1st Applicant the rest of the Applicants did not contest the above condition. Their main issue was with respect to the amount of bail/bond which I will address later in this ruling.

20. Prof. Ojienda, for the 1st Applicant, contended that the trial magistrate erred in setting the bail condition in contravention of Section 62(6) of the Anti-Corruption and Economic Crimes Act (ACECA), Section 33 of the County Governments Act (CGA) and Articles 181 and 182 of the Constitution as it amounts to the removal of the 1st Applicant from his position as Governor of Kiambu County.

21. He submitted that a literal interpretation of Section 62(6) made it clear that the provisions did not apply to the 1st Applicant. He added that it was an error for the trial magistrate to be informed by the decision in **Moses Kasaine Lenolkulal v. Director of Public Prosecution[2019] Eklr (ACC. Rev. Application No. 25. Of 2019)**, in which learned Mumbi Ngugi, J in detail considered the application of the provision, in holding that the 1st Applicant should not set foot in his office until the case is determined.

22. He submitted that the learned judge had earlier considered the provisions of Section 62(6) of ACECA in **Alex Kyalo Mutuku & 7 others v. Ethics and Anti-Corruption Commission & 2 Others[2016] eKLR (HC.Petition No. 258 of 2015)** and held them to be in tandem with the Constitution. For this reason, an application of the decision in the **Lenolkulal** case could not hold. Further, he urged the court to rely on the finding in **Muhammed Abdalla Swazuri & 16 others v. Republic [2018] eKLR** which also found that the Section was not applicable to State Officers, of which the 1st Applicant is one.

23. It is paramount that I first distinguish the two authorities; the Alex Mutuku and Swazuri cases against the instant case. With regards to the **Alex Kyalo Mutuku** case, it is clear that the court did not consider the constitutionality of Sub-Section (6) of Section 62 of ACECA but Sub Sections (1), (2), (3) and (4) of the Section as can be glimpsed from paragraphs 62 and 63 of the judgment.

24. The **Alex Kyalo Mutuku** case was a Petition in which the eight Petitioners had been charged with offences of wilful failure to comply with the law relating to procurement contrary to Section 45(2)(b) as read with Section 48 of ACECA. They were challenging the constitutionality of the decision to suspend them on half pay pending the determination of the trial. All of them were members of the Makueni Tender Committee.

25. Prof. Ojienda in referring to the purported conflicting disposition by learned Mumbi, J. in **HC.Petition NO. 258 of 2015 (Alex kyalo Case)** referred to paragraph 83(ii) which reads:

(ii) The provisions of section 62 of the Anti-Corruption and Economic Crimes Act are not unconstitutional;

26. However, the learned Counsel was mean in reference to this disposition as he failed to refer the court to paragraphs 62 and 63 of the Judgment in that case. The Judge in these paragraphs only made a determination with respect to Section 62(1)-(4) of ACECA. It is important for avoidance of doubt to duplicate what the learned Judge said:

“Section 62(1)–(4) of ACECA, whose constitutionality the petitioners challenge and which are relevant for present purposes, provide as follows:

1. A public officer or state officer who is charged with corruption or economic crime shall be suspended, at half pay, with effect from the date of the charge until the conclusion of the case; provided that the case shall be determined within twenty four months.

2. A suspended public office who is on half pay shall continue to receive the full amount of any allowances.

3. The public officer ceases to be suspended if the proceedings against him are discontinued or if he is acquitted.

4. This section does not derogate from any power or requirement under any law under which the public officer may be suspended without pay or dismissed.

27. Suffice it to state, subsection (6) of Section 62 was not in issue and the Court cannot therefore be said to have made a conflicting interpretation of the provision. This is buttressed by my understanding that the court did not make any determination on the provision and any assertion that the learned Judge later contradicted her earlier decision in the Lenolkulal case are baseless and moot.

28. With regards to the **Muhammed Abdalla Swazuri** case, the court made what is clearly an *obiter* remark that Section 62(6) of the ACECA did not apply to constitutional officers and, *inter alia*, that their removal or suspension from office would only occur under the constitutionally mandated terms. She cited Article 251 of the Constitution as applicable in that case. The Court’s *ratio decidendi* was clearly not concerned with the constitutionality of the order made, rather, on the practicality of implementing it. In the view of Hon. Ong’udi, J, there would be a big conflict of interest in the operation of the order of the learned trial magistrate. She justified this by stating that the Secretary/CEO of EACC which was the investigating agency could be seen to be controlling the affairs at the National Land Commission (NLC) yet both EACC and NLC were independent commissions.

29. Having distinguished these two decisions, I now will consider if the decision of Mumbi, J in the Lenolkulal case is instructive in guiding the court to arrive at its decision. I shall duplicate the relevant excerpts as under;

“29. ..., there is another perspective from which I believe the question of the applicant’s access to his office must be considered, a perspective that looks beyond the interests of the individual holder of the constitutional office and considers the wider public interest.

...

53. It seems to me that the provisions of section 62(6), apart from obfuscating, ..., are contrary to the constitutional requirements of integrity in governance, are against the national values and principles of governance and the principles of leadership and integrity in Chapter Six, and undermine the prosecution of officers in the position of the applicant in this case. In so doing, they entrench corruption and impunity in the land.

...

58. The Governor in this case is not being ‘removed’ from office. He has been charged with an offence under ACECA, and in my view, a proper reading of Section 62 of ACECA requires that he does not continue to perform the functions of the office of the governor while the criminal charges against him are pending. However, if section 62(6) which in my view violates the letter and spirit of the Constitution, particularly Chapter Six on Leadership and Integrity, is to be given an interpretation that protects the applicant’s access to his office, then conditions must be imposed that protect the public interest.

...

59. ...In this case, the applicant is charged with a criminal offence; he has been accused of being in ‘moral ill-health’, if one may term it so. He is alleged to have exhibited moral turpitude that requires that, until his prosecution is complete, his access to the County government offices should be limited...”

30. From the foregoing excerpts, I have understood the judge to be stating that, in as much as State Officers are exempt from suspension from office because the Constitution provides for a mechanism for their removal, that statement in the legislation is against the spirit and letter of Chapter Six of the Constitution.

31. My approach to this interpretation is holistic. This is because I understand Section 62(6) of ACECA to be restating the supremacy of the Constitution. Similar sentiments are restated under Sections 63(4) and 64(2) of ACECA. To that extent, I agree that since the Constitution provides for mechanisms of removal or vacating of such state offices no other law would supersede it.

32. In respect to a governor, the procedure for removal or vacating of office is provided under Article 181 and 182 of the Constitution as read with Section 33 of the County Government Act which state:

“Article181. (1) A county governor may be removed from office on any of the following grounds—

(a) gross violation of this Constitution or any other law;

(b) where there are serious reasons for believing that the county governor has committed a crime under national or international law;

(c) abuse of office or gross misconduct; or

(d) physical or mental incapacity to perform the functions of office of county governor.

(e) Parliament shall enact legislation providing for the procedure of removal of a county governor on any of the grounds mentioned in clause (1).

Article182. (1) The office of the county governor shall become vacant if the holder of the office—

(a) dies;

(b) resigns, in writing, addressed to the speaker of the county assembly;

(c) ceases to be eligible to be elected county governor under Article 180 (2);

(d) is convicted of an offence punishable by imprisonment for at least twelve months; or

(e) is removed from office under this Constitution.

(2) If a vacancy occurs in the office of county governor, the deputy county governor shall assume office as county governor for the remainder of the term of the county governor.

(3) If a person assumes office as county governor under clause (2), the person shall be deemed for the purposes of Article 180 (7)

(a) to have served a full term as county governor if, at the date on which the person assumed office, more than two and a half years remain before the date of the next regularly scheduled election under Article 180 (1); or

(b) not to have served a term of office as county governor, in any other case.

(4) If a vacancy occurs in the office of county governor and that of deputy county governor, or if the deputy county governor is unable to act, the speaker of the county assembly shall act as county governor.

(5) If a vacancy occurs in the circumstances contemplated by clause (4), an election to the office of county governor shall be held within sixty days after the speaker assumes the office of county governor.

(6) A person who assumes the office of county governor under this Article shall, unless otherwise removed from office under this Constitution, hold office until the newly elected county governor assumes office following the next election held under Article 180 (1).

Section 33 of County Government Act No. 17 of 2012:

i. A member of the County Assembly may by notice to the Speaker, supported by at least a third of all the members move a motion for the removal of a Governor under Article 181 of the Constitution.

ii. If a motion under Sub-Section (i) is supported by at least two thirds of all the members of the County Assembly-

a) The Speaker of the County Assembly shall inform the Speaker of the Senate of that resolution within two days; and

b) The Governor shall continue to perform the functions of the office pending the outcome of the proceedings required by this section.

iii. Within seven days after receiving notice of a resolution from the Speaker of the County Assembly-

a) The Speaker of the Senate shall convene a meeting of the Senate to hear the charges against the Governor; and

b) The Senate, by resolution, may appoint a special committee comprising eleven of its members to investigate the matter.

iv. A special committee appointed under Sub-Section 3(b) shall-

a) Investigate the matter; and

b) Report to the Senate within ten days on whether it finds the particulars of the allegations against the Governor to have been substantiated.

v. The Governor shall have the right to appear and be represented before the special committee during its investigations.

vi. If the special committee reports that the particulars of any allegation against the governor:

a) Have not been substantiated, further proceedings shall not be taken under this section in respect of that allegation; or

b) Have been substantiated, the Senate shall, after according the Governor an opportunity to be heard, vote on the impeachment charges.

vii. If a majority of all the members of the Senate votes to uphold any impeachment charge, the Governor shall cease to hold office.

viii. If a vote in the Senate fails to result in the removal of the Governor, the Speaker of the Senate shall notify the Speaker of the concerned County Assembly accordingly and the motion by the Assembly for the removal of the Governor on the same charges may only be re-introduced to the Senate on the expiry of three months from the date of such vote.

ix. The procedure for the removal of the president on grounds of incapacity under Article 144 of the Constitution shall apply, with necessary modification, to the removal of a Governor.

x. A vacancy in the office of the Governor or the Deputy Governor arising under this Section shall be filled in the manner provided for by Article 182 of the Constitution.

accused a conditions was set that they should not set foot into the offices of the County Government of Kiambu whilst the trial is on-going. This court having aligned itself to the supremacy of the Constitution holds that attaching conditions to the grant of bail is not tantamount to a removal of the Governor from office.

34. Therefore, the learned magistrate considered one key factor in granting bail; which is the likelihood of interference with witnesses due to the relationship the accused persons would have with the witnesses. This is buttressed by the further condition barring them from contacting the witnesses. The question that the court registers in mind is why this condition should apply to rest of the accused persons and not the 1st Applicant.

35. The simple rationale is premised on the charges that the accused persons face. Without restating the charges, it is clear that they concern either abuse of office, dealing with property of the County government, engaging in fraudulent procurement practices, fraudulent acquisition of public property or money laundering all revolving around the County Government of Kiambu.

36. In as much as the accused persons remain innocent until otherwise proven, it would make a mockery, not only to the people of the County of Kiambu but to the letter and spirit of the Constitution that persons charged with such weighty offences can be allowed to go back to the office to continue with dealings that they are alleged to have committed against the law. Furthermore, the objects and purpose of ACECA can be glimpsed from its preamble which states that the Act is meant to provide for the prevention, investigation and punishment of corruption, economic crime and related offences and for matters incidental thereto and connected therewith.

37. It is clear that the drafters of the Constitution intended to ensure that corruption did not infiltrated public offices; and in there lies an indication that accountability is a key tenet of leadership and integrity. The 1st Applicant has been charged in court because of the doubt the public has in his integrity. Until such a time that he is vindicated or convicted, he is yet to fulfil his duty to account for the alleged breach of the public trust entrusted in him under Article 73 of the Constitution. And therefore, absurdity would reign in if the court allowed him to go back to the office to continue executing his duties.

38. Another pointer to the foregoing is Chapter Six of the Constitution. Article 73(1) and (2) of the Constitution clearly lay out the responsibilities of leadership and the guiding principles of leadership and integrity which apply to the 1st Applicant as a State Officer. They state:

(1) Authority assigned to a State officer-

(a) is a public trust to be exercised in a manner that-

(i) is consistent with the purposes and objects of this Constitution;

(ii) demonstrates respect for the people;

(iii) brings honour to the nation and dignity to the office; and

(iv) promotes public confidence in the integrity of the office; and

(b) vests in the State officer the responsibility to serve the people, rather than the power to rule them.

(2) The guiding principles of leadership and integrity include—

(a) selection on the basis of personal integrity, competence and suitability, or election in free and fair elections;

(b) objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices;

(c) selfless service based solely on the public interest, demonstrated by—

(i) honesty in the execution of public duties; and with public duties;

(d) accountability to the public for decisions and actions; and

(e) discipline and commitment in service to the people.

39. It is clear then that the 1st Applicant was required to act selflessly in the conduct of his public duty demonstrating objectivity and impartiality in his decision making by ensuring that he is not influenced by nepotism, favouritism, other improper motives or corrupt practices. He was also expected to exercise his authority while paying special cognizance to the fact that he was entrusted with the public trust and he was therefore to demonstrate respect for the people, bring honour to the Nation and dignity to the office while ensuring that the public's confidence in the integrity of the office endured or was promoted.

40. Whilst once again bearing in mind the principle of presumption of innocence until proven guilty, it is clear that the charges currently facing the 1st Applicant are antithetical to the letter and the spirit of the Constitution.

41. No doubt, the Constitution confers upon a trial court or this Court the power to set such conditions as it deems reasonable when admitting an accused person to bail. This resonates with Article 49(1)(h) of the Constitution which states:

“An arrested person has the right –

(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.”

42. A trial court is therefore called upon in granting bond or bail to set reasonable conditions that an accused person must comply with. In this case, the court below issued several conditions, with only one being in contention namely; denying the 1st Applicant access to the Kiambu County Government offices. (*emphasis mine*).

43. The Black’s Law Dictionary, 9th Edition defines “reasonable” as:

“Fair, proper or moderate under the circumstances.”

44. The Judiciary in its **Bail and Bond Policy Guidelines’** general principles state, *inter alia*, that bail or bond conditions should be reasonable given the importance of the presumption of innocence. Further, that the conditions should be appropriate to the offence committed and take into account the personal circumstances of the accused person. Therefore, in each case what is reasonable shall be determined by reference to the facts and circumstances prevailing in the case and the court must ensure that it balances the rights of the accused person, the interest of justice and the rights of the victims. The guidelines further state at paragraph 4.31 that:

“The court may impose any bail conditions it deems fit, including the following:

Reporting requirements (for example, requiring the accused person to report to a police station or court periodically);

Contact restrictions (for example, requiring the accused person to refrain from contacting victims and/or witnesses or otherwise behaving in a manner that would distress them),

Requiring the accused person to vacate his or her residence and reside elsewhere for the duration of the trial,

Requiring the accused person to surrender travel documents such as passports,

Requiring accused persons to submit to home visits

Provided that bail conditions should be reasonable, proportionate to the offence for which bail is granted, appropriate to the risks in relation to which they are imposed, and take into account the individual circumstances of the accused person.”

45. At paragraph 4.9 the Guidelines set out factors to consider when granting bail or bond generally amongst them being the nature of the charges, the likelihood of interfering with the witnesses and the relationship between the accused and potential witnesses particularly where he stands in a position of influence.

46. The Guidelines urge the court to attach suitable bond or bail conditions to ensure that the relationship between the accused and potential witnesses does not undermine the interests of justice.

47. After considering the nature of the charges, the whereabouts of potential witnesses, the source of evidence and the position of influence held by the 1st Applicant, it was reasonable for the trial court to attach the condition that the 1st Applicant will not access the Kiambu County Government offices.

48. In the respect of the 1st Applicant he is placed on such a high pedestal that his office requires him to execute his duties while beyond reproach. The charges facing him are so grave that owing to his position, the weight of the offence and the public interest there is demand that stringent terms of bail be attached. I find no fault in the decision of the learned magistrate in barring the 1st Applicant, alongside the other accused persons from setting foot into the offices of the County Government of Kiambu.

49. I am alive to the fact that the 1st Applicant may have been arrested unexpectedly and may have left behind personal belongings he may require for his personal use. For this purpose only, this court shall accommodate him on a single date he elects to be accompanied by the investigating officer with the authority of the Secretary/CEO EACC to go back to the office. Thereafter, he must keep off the office until the conclusion of the trial.

50. I have borne in mind what impact the absence of the 1st Applicant will have in the running of the County Government of Kiambu. Whereas, this is not a question I was asked to determine I would concur with the observation of my senior sister Mumbi, J. in the Lenolkulal case that the 1st Applicant ought to be considered in “*moral ill health*”. I am also alive to the fact that other counties have suffered similar impacts when their governors have fallen ill and have been absent from office. The course taken by those Counties in such instances should apply to the County of Kiambu.

51. Additionally, I take solace in the fact that there are mechanisms and officers in place, namely; the County Executive Committee and

Deputy Governor who can ably carry out the management and coordination of the functions of the County administration and its departments. They are required to be accountable to the people of Kiambu through the provision of full and regular reports to the County assembly. This mandate is provided under Article 179 of the Constitution. He best that both the 1st Applicant and the prosecution can do is to mobilize all resources and ensure that the trial is expedited.

52. In the premises, I find no irregularity, impropriety, illegality or incorrectness in the order of the learned trial magistrate in directing the 1st Applicant to not set foot in the offices of the County Government of Kiambu whilst the trial is ongoing save for the window accorded by this court to go and collect any personal belongings.

c) Whether the bail terms imposed on the Applicants were harsh and excessive:

53. In his ruling regarding this issue, the learned magistrate delivered himself as under;

“Concerning the amount to be set as security for bail or bond; the court has categorized the accused persons into (3) three groups as follows, in so doing the court has considered their counsels' submissions the number of counts that each accused faces, the personal circumstances of the accused including their wealth and in respect of the 1st Accused the amounts involved, the fact that some accused persons are charged as family, that is, husband and wife and further additional information provided by the court in their submissions.

i. In the first category, I place the 1st Accused and the 4th Accused. The 5th Accused also belongs here but the court has considered the lawyer's submission of ill-health and the fact that she is the spouse to the 4th Accused and on purely humanitarian grounds discretionary moved to the 2nd category. As for the 1st, 3rd and 4th Accused therefore each shall be released upon depositing a cash bail of Kshs. 15 000 000 each in the alternative bond of Ksh 30 000 000 plus a surety of similar amount.

ii. In the second category, the court therefore places the 2nd and 5th Accused who shall pay a cash bail of Kshs 4 000 000 each in the alternative a bond of Kshs 10 000 000 plus a surety of like amount.

iii. As for Accused numbers 6, 7, 8, 9, and 10 the are civil servants who are alleged to have sat in the tendering oversight committee and face count 5 above they shall be released after depositing a cash bail of Kshs 1 000 000 each in the alternative a bond of Kshs 3 000 000 each plus a surety of like amount”

54. Prof. Ojienda submitted that the sum total of the bail required of all Applicants was excessive and amounted to an abuse of the discretion granted to the trial court. He urged the Court to consider the cases of **Republic v. Henry Rotich & others (2019) eKLR (ACC Revision No. 21 of 2019), Muhammed Swazuri & others(Supra) and Republic v. Evans Kidero & others Nairobi ACC Revision No. 22 of 2018** where the amounts which were the subject matter of the cases were much higher than in the present case but the bond terms were either similar or lower than in the present matter.

55. Mr. Joroge submitted on behalf of the 3rd Applicant. He submitted that the trial court acted irregularly by initially omitting him in its ruling before unilaterally placing him in the same category as the 1st and 4th Applicants. Further, that the trial court erred by failing to consider the particular circumstances of his client who was charged in a single count. He relied on **Reuben Marube v. Republic, ACC Revision No. 12 of 2019** to buttress this submission. He submitted that the 3rd Applicant was a civil servant who could not meet the bond terms in question.

56. Mr. Swaka, for the 4th Applicant submitted that the 4th Applicant was also the husband to the 5th Accused person and that their children had been left unattended to. He submitted that the harsh terms were tantamount to denying his client bail. He urged the court to consider that the Applicant still labored under a presumption of innocence. Further, that the bail terms were not commensurate with the subject matter of the charges before the court. He submitted that the 4th Accused person suffered from back and chest pain compounded by high blood pressure.

57. The court was under a duty to consider the grant of bail for each individual accused person, examine their circumstances before setting commensurate bond or bail terms and attaching conditions. It is trite that the setting of bond or bail amounts is an exercise of discretion by the trial court and before interfering with that exercise this court must be cautious as was ably enunciated by Baroness Hale, as she then was, in **Re J (A Child) (Child Returned Abroad: Convention Rights) [2006] UKHL 4, that:**

“If there is indeed a discretion in which several factors are relevant, the evaluation and balancing of those factors is ... a matter for the trial [Magistrate]. Only if his decision is so plainly wrong that he must have given far too much weight to a particular factor is the appellate court entitled to interfere: ... Too ready an interference by the appellate court, ..., risks robbing the trial [Magistrate] of the discretion entrusted to him by law.”

58. Having warned myself, and bearing in mind the presumption of innocence, I find that with regards to the 1st Applicant the amount of Kshs. 15,000,000/ cash bail or bond of 30,000,000/- with a surety of a similar amount is appropriate, more so, in view of my observation regarding the reasons the conditions to the grant of bail were attached.

59. With regards to the 3rd Applicant it is clear as submitted by Mr. Joroge that he was not initially placed in the 1st tranche. He was only grouped after the court deliberated whether to include the 5th Accused in this group. It is also apparent that the 3rd Applicant is charged in one count which is serious. In view therefore, I set aside the order of the trial court requiring him to deposit Kshs. 15 million cash bail or bond of Kshs. 30 million or a surety of a similar amount and substitute the same with a cash bail of Kshs. 2,000,000/- or bond of Kshs.

5,000,000/- with a surety of a similar amount.

60. With regards to the 4th Applicant, I have considered his circumstances. He is charged alongside the 5th Accused as the directors of the 11th Accused Corporation. Both are spouses and the toll of meeting their collective bail or bond terms must be outsized in their circumstances. That being the case it seems only prudent to set similar bond terms. I also revise the terms of bail set by the learned magistrate and substitute them with a cash bail of Kshs. 4,000,000/- or bond of Kshs. 10,000,000/- with a surety of a similar amount.

61. As regards the 2nd, 5th, 6th, 7th, 8th, 9th and 10th Applicants, having in mind the offences charged and their respective circumstances, I find no reason to disturb the bail/bond terms granted.

62. The sum total of my decision is that this application lacks merit. I dismiss it save for the variation of bail terms for the 3rd and 4th Applicants.

DATED AND DELIVED AT NAIROBI THIS 8TH DAY OF AUGUST, 2019

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

- 1. Prof. Ojienda, Mr. Nelson Havi, Kevin Oriri, Kipchumba & Kiprono for the 1st to 10th Applicants.*
- 2. Joroge for the 3rd Applicant.*
- 3. Swaka & M/s Kamau for the 4th, 5th and 11th Applicants.*
- 4. Mr. Muteti & M/s Mwila for the Respondent.*