



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION MILIMANI

ACEC MISC. NO. 33 OF 2019

SAMUEL KIMUTAI KOSKEI.....1ST APPLICANT
DAVID KIPCHUMBA KIMOSOP.....2ND APPLICANT
WILLIAM KIPKEMBOI MAINA.....3RD APPLICANT
PAUL KIPKOECH SEREM.....4TH APPLICANT
FRANCIS CHEPKONGA KIPKECH..... 5TH APPLICANT
DAVID JUMA.....6TH APPLICANT
PATRICK KIPTOO.....7TH APPLICANT
ELIZABETH KEBENEL.....8TH APPLICANT
ESTHER JEPCHIRCHIR KIROR..... 9TH APPLICANT
MOSES KIPCHUMBA.....10TH APPLICANT
NELSON KORIR.....11TH APPLICANT
ISAAC KIIRU.....12TH APPLICANT
PATRICK KIPSANG.....13TH APPLICANT
FREDRICK TOWETT.....14TH APPLICANT
JOTHAM RUTTO.....15TH APPLICANT
CHARITY MUUI..... 16TH APPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS..... RESPONDENT

RULING

Introduction

1. On 23rd July 2019, the applicants herein were together with others arraigned before Nairobi Anti-Corruption Chief Magistrate's Court vide

ACC No. 18/2019 R vs David Kipchumba Kimosop and 21 others to answer to various corruption related charges.

2. Count one, the applicants jointly with six others are charged with conspiracy to defraud contrary to Section 317 of the penal code Cap 63 laws of Kenya. Particulars are that, between the 17th December 2014 and 27th September 2018, conspired jointly with others not before court to unlawfully procure services of the CMC Ravenna ITINERA JV for the development of Kimwarer Multipurpose Dam Project under a purported EPC which scheme was designed to defraud the government of Kenya USD 244,422,163.93.

3. Count Two, the 2nd, 3rd and 4th applicants are jointly charged with engaging in a project without prior planning contrary to Section 45 (2) (C) as read with Section 48 of the Anti-Corruption and Economic Crimes Act No. 3/2003. Particulars are to the effect that, on 19th December 2016 and 23rd November 2018, within the republic of Kenya, being the Managing Director, Head of Supply Chain Management and Manager Engineering Services of the Kerio Valley Development Authority respectively, being persons whose positions concern management of public revenue, engaged in a project for the development of the Kimwarer Multipurpose Dam without prior planning leading to a loss of EU 93,95,74-96.

4. Count 3, the applicants face the charge of wilful failure to comply with applicable procedures and guidelines relating to public procurement contrary to Section 45 (2) (b) as read with Section 48 of the Anti-Corruption and Economic Crimes Act No. 3/2003. Particulars are that, between 19th December 2014 and 5th April 2017, being members of the Tender Committee of the Kerio Valley Development Authority respectively, whose functions concern the management of public revenue failed to comply with Section 29 of the Public Private Partnership Act while procuring an investor to undertake the development in the Kimwarer Multipurpose Dam project.

5. In respect to Count 4, they are jointly charged of similar charges just as count 3 with particulars providing that, between the 19th December 2014 and 5th April 2017 within the republic of Kenya, being the Management Director and the members of the Tender Committee of the Kerio Valley Development Authority respectively, whose functions concern management of public revenue, failed to comply with Section 66 (2) (6) of the Public Procurement and Disposal Act 2005 by failing to conduct the evaluation as set out in the tender document for the development of the Kimwarer Multipurpose Dam project.

6. The 2nd applicant faces count five alone for the offence of abuse of office contrary to Section 46 as read with Section 48 of the Anti-Corruption and Economic Crimes Act No. 3/2003. Particulars thereof states that, on 5th April 2017, being Managing Director Kerio Valley Development Authority, used his office to improperly confer a benefit to CMC Ravenna ITINERA Joint Venture an entity that did not submit a responsive bid.

7. Count six, the 2nd applicant is also charged alone with the offence of abuse of office just like count 5 with particulars providing that, on 5th April 2017, being the managing director Kerio Valley Development Authority, used his office to improperly confer a benefit to CMC Ravenna ITINERA Joint Venture by unlawfully executing a contract No. KVDA/RFP/36/2014-15 for the development of Kimwarer Multipurpose Dam thereby creating an obligation against the government of Kenya to pay a sum of USD 224,426,163.93 which amount is the total contractual sum for the development of Kimwarer Multipurpose Dam.

8. Regarding Count 7, the applicants are jointly charged with the offence of wilful failure to comply with the applicable procedures and guidelines relating to Public Procurement contrary to Section 45 (2) (b) as read with Section 48 of the Anti-Corruption and Economic Crimes Act No. 3 of 2003. Particulars are that, between 19th December 2016 and 5th April 2017, being the Managing Director and the member of the Tender Committee of the Kerio Valley Development Authority respectively, whose functions concern the management of public revenue failed to comply with the law on public procurement to wit Section 66 (2) of the Procurement Act by failing to conduct the evaluation using the procedures set out in the tender document for the development of the Kimwarer Multipurpose dam project.

9. Count 8, the 2nd, 3rd and 4th applicants are facing similar charges just like in count seven save for particulars herein which provides that, on or before December 2014 being the Managing Director, head of Supply Chain Management and Manager Engineering Services of the Kerio Valley Development Authority wilfully failed to comply with the law to wit Section 33 of the Public Private Partnership Act by failing to ensure that a feasibility study was undertaken prior to the initiation of the Kimwarer Dam project.

10. Having returned a plea of not guilty, the court through its ruling dated 23rd July 2019 granted them bail pending trial subject to fulfilling certain conditions as follows:

- a. The 1st to 3rd applicants to deposit a bond of Kshs 50 million with a similar surety or cash bail of Kshs 12 million.**
- b. The 4th to 16th accused applicants to deposit a bond of 5 million shillings or cash bail of 2 million Kenya shillings.**
- c. The applicants to deposit their travel documents in court.**
- d. The applicants be restrained from accessing their work place.**

11. Aggrieved by the bail terms imposed, the applicants moved to this court for revision through a notice of motion dated 24th July 2019 filed pursuant to Articles 49, 50 and 165 of the Constitution; Section 362 and 364 of the CPC seeking orders that:

- a. Spent.**
- b. That this honourable court be pleased to call and examine the record of the criminal proceedings in Milimani ACC No. 18**

of 2019 R vs David Kipchumba Kimosop and 21 others for purposes of satisfying itself as to the reasonability of the ruling and orders of the learned trial magistrate Hon. D. Ogoti, issued on the 23rd July 2019.

c. That a production order do issue for the attendance of the applicants during interpartes hearing of this application.

d. That the applicants' bond/bail terms be reviewed and/or reversed.

e. That the costs of this application be provided for.

12. The application is based on grounds that the stringent bail terms imposed by the trial court were harsh, oppressive and excessive in the circumstances thus curtailing their liberty owing to the financial constraints. That as a result of the financial inability, they were remanded to GK prisons both at Langata and Industrial Area.

13. In submission, Mr. Katwa Kigen teaming up with Mr. Langat, Mr. Kiprono and M/s Ruto, submitted that the ruling delivered under ACC No. 20/2019 after consolidation with ACC No. 18/2019 and 19/2019 for purposes of canvassing bail application did not take into account the financial status of the applicants. In his view, the amount of bail imposed was akin to denying the applicants bail thus offending Article 49(1)(h) of the Constitution.

14. Counsel further submitted that the court did not properly examine the criteria set out in granting bail under the bail and bond policy guidelines. That he did not consider the proper criteria for grant of bail terms inter alia; the applicants are not a flight risk; that their release will not hinder the integrity of the proceedings; the strength of the case; their previous antecedents and, whether there was likelihood of interfering with witnesses.

15. Mr. Kigen contended that it was the duty of the prosecution to show that the applicants are not entitled to reasonable bail. Counsel stated that having released the applicants on bail implies that they are not a flight risk. He opined that in assessing bail terms, the court failed to appreciate that the applicants were innocent until proved guilty. That the honourable magistrate's remarks at page 3 and 5 of his ruling stating that money was lost and that terms commensurate to the amount lost was necessary, amounted to a gross misdirection akin to condemning them before trial.

16. Mr. Kigen faulted the honourable magistrate for stating that corruption related offences have no specific bail and bond policy guidelines to govern assessment of reasonable bail terms. Learned counsel urged the court to consider the fact that the applicants were public servants earning between Kshs.66,000/= and Kshs.223,000/= per month and that by dint of these proceedings, they will be on half salary implying that they will not afford the terms imposed. That they are not likely to jump bail as their jobs will be at stake. He implored the court to reduce their bail terms to cash bail of Kshs.500,000/= or Kshs.2,000,000/= bond with surety.

17. Mr. Kigen invited the court to refer to a list of authorities attached inter alia **Jayendra Khimji Malde and 2 others v Republic (2011) eKLR, Reuben Marumben Lemunyete vs R (2019) eKLR, Rodgers Nzioka and 10 others vs R (2018) eKLR, R vs Richard David Alden(2016) eKLR (2016) eKLR and R vs Godfrey Madegwa and 6 others (2016) eKLR** where both courts emphasized on the need to release an accused on reasonable bail terms and that the objective of release of an accused is to ensure attendance.

18. In response, Mr. Owiti for the state strongly opposed the application stating that no basis has been laid to warrant review of the impugned orders. He submitted that there was no proof of any illegality, impropriety or incorrect act committed nor irregularity of proceedings as contemplated under Sections 362 and 364 of the CPC. Mr. Owiti contended that assessment of bail terms is purely a matter of discretion for the trial court to which superior courts should sparingly interfere with.

19. He asserted that the terms imposed were commensurate to the seriousness of the offence based on the amount lost. Lastly, counsel submitted that bail terms are not based on the accused person's affordability.

Determination

20. I have considered the application herein and submissions by both counsel. The application is anchored under Article 165 (6) & (7) of the Constitution and Section 362 and 364 of the CPC. Article 165 (6) confers the High Court with 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. Sub-Article 7 further provides that for 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.

21. However, in so far as criminal proceedings are concerned, the High Court's mandate under Article 165 (6) and (7) is operationalized under Section 362 of the CPC which provides that:

“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”.

Section 364 of the CPC further reinforces the High Court's revisionary powers by providing 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) ...

22. The gist of the application herein is not about the denial of bail but rather the imposition of what Mr. Kigen Katwa referred to as harsh, oppressive and excessive conditions attached thereto. I am alive to the fact that imposition of bail terms as it were is purely a matter of discretion bestowed upon a trial court. Such discretion however should be exercised reasonably and judicially taking into account the circumstances of each case.

23. Therefore, for the High Court to exercise its revisionary powers, it is incumbent upon the applicant to prove that indeed taking into consideration the nature of the case and all relevant factors put together, the trial court committed an error by applying a wrong principle or consideration thus arriving at an incorrect, illegal or improper decision or order (**See R vs Jagani and another (2001) eKLR 5090** and **Joses Kimathi Murumua and 3 others vs R (2013) eKLR**).

24. The right to be admitted to bail pending trial is a constitutional imperative underpinned under Article 49 (1) (h) of the Constitution which provides that an accused person has 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. The release of an arrested person or accused on bail pending trial is informed from the view point that an accused person is presumed innocent until proved guilty. This is further fortified under Article 50 (2) of the Constitution which underpins the presumption of innocence until the contrary is proved as a key component to the right to fair hearing.

25. Whereas the constitution recognizes the right to bail, the same is subject to clearly well laid down criteria. When determining what terms of bail to impose when releasing an accused person on bail, courts are duty bound to seek guidance from the criteria set out under Section 123A of the CPC and the judiciary home grown bail and bond policy guidelines produced by the National Council on the Administration of Justice sometime in March 2015.

26. Under Section 123 of the CPC, an accused is entitled to bail pending trial and that the amount of bail fixed shall be with due regard to the circumstances of the case and shall not be excessive. In determining what reasonable bond to grant, Section 123 A of the CPC provides factors to be taken into consideration as:

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 fulfilment of obligations under previous grants of bail; and

d. the strength of the evidence of his having committed the offence.

Additionally, a person who has previously been released on bail and had failed to turn up or whose security will be at stake if released, will not be entitled to be released on bail. Similar guidelines are replicated in the bail and bond policy guidelines at paragraph 4.9.

27. From the above provisions, bail is not a privilege but a constitutional and statutory right but subject to lawful conditions. The court is obligated to exercise its mind independently and without succumbing to any external pressure, influence, direction or public opinion in assessing suitable bail terms without unnecessarily curtailing the right to bail.

28. It is trite that the main objective in releasing an accused person on bail is to secure his or her attendance in court so as to participate in the trial as and when required without compromising one's liberty. Therefore, once a court is satisfied that an accused is not a flight risk, the terms of bail should not be too harsh nor excessive such that it amounts to denying the very person the right to bail pending trial. In the case of **R vs Godfrey Madegwa & 6 others (2016)** the court had this to say:

“the primary purpose for bail is to secure the accused person's attendance to court to answer the charge at the specified time. I would therefore agree with Mr. Karanja that the primary consideration before determining whether or not to give bail is whether the accused is likely to attend trial”.

29. To impose stringent bail terms that an accused person will not afford will be akin to taking away his right to bail through the back door. In the case of **Reuben Marumben Lemunyete vs R (2019) eKLR** the court had this to say:

“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 to denied them the right to be presumed innocent”.

30. Were the applicants granted harsh, oppressive and excessive bail terms? As stated above, the 1st to 3rd applicants (accused) were ordered to deposit 50 million bond with one surety or 12 million cash bail whereas the 4th to 16th accused persons were released on cash bail of 2 million or bond with surety of Kshs.5 million. Are the terms imposed unreasonable in the circumstances? What is reasonable? According to the prosecution the terms are reasonable. Equally, to the trial court the terms are reasonable and commensurate to the seriousness of the offence in terms of the benefit conferred.

31. The word reasonable is relative. The act of interpretation and application will vary from judge to judge or magistrate to magistrate. Even when handling a common case, each will arrive at a different assessment of bail terms. However, the disparity should not be so wide so as to cast some doubt as to the credibility of such assessment. It is a delicate act to balance freedom on bail as aright and at the same time ensure confidence in the criminal justice system by not releasing accused persons on extremely unreasonable low bail terms or none at all especially where the charges such as the ones the applicants are facing are serious.

32. The word reasonable is defined in the 10th edition of the Black Law Dictionary as: 1. Fair, proper, or moderate under the circumstances; sensible; 2. According to reason. 3. having the faculty of reason 4. Human. Therefore, the assessment of bail terms and condition to be imposed is not measured with exactitude. There is no scientific method of ascertaining accuracy in terms of reasonableness. To that extent, what is reasonable will vary depending on the prevailing circumstances and the merits of each case.

33. According to Section 123 and 123A of the CPC as read together with the bail and bond policy guidelines, the release of each accused person on bail depends on the circumstances of each case and the nature of the charges preferred. Where the charge against any accused person is serious and the punishment heavy, the courts will assume that there are more possibilities and incentives for the accused person to abscond.

34. It therefore follows that even when accused persons are charged together, facing various counts, the seriousness of the charges they are facing could be different hence the need for varying bail terms. That does not amount to discrimination nor preferential treatment. **See Ng'ang'a vs Republic (1985) eKLR.**

35. Having granted bail, the court was convinced that the applicants were not a flight risk hence there was no compelling reason to deny them bail. With that in mind, the other factors come to play. I have taken note of the fact that all the applicants are Kerio Valley Development Authority employees which is a semi autonomous public body. Their salaries according to the attached payslips range from Kshs.66,000 to 223,000/= per month. Upon being charged they will ultimately be subjected to interdiction hence half pay. That therefore means that their financial means will be compromised hence a challenge to meet the bail conditions.

36. Taking judicial notice of the status of our fragile and poor economy, it would be hard to imagine how many people own property worthy shs 50million so as to be able to raise security of the amount imposed. Obviously, an accused person granted such bail terms is most likely to remain in custody pending trial hence technically denying him bail. One of the factors the court ought to have considered is that the applicants are persons in gainful employment to enhance a likelihood that they will attend trial.

37. Indeed, I take judicial notice that employment opportunities in Kenya are rare hence the very ground that the applicants have a reason not to abscond for the sake of their jobs. Contrary to the trial magistrate's observation that anti corruption cases do not have specific guidelines to govern assessment of bail terms, the bail and bond policy guidelines applies to all criminal cases regardless of the statute under which the charge is brought. One such consideration under the bail and bond policy guidelines is whether an accused is in gainful employment.

38. Although the trial magistrate extensively agonized on what should be the correct terms to impose after having analysed various high court decisions on the same subject, it is my finding that a bond of Kshs 50 million is definitely on the higher side and reasonably out of reach to a majority of Kenyans thus indirectly denying the 1st, 2nd, and 3rd applicants bail. It is my finding that the trial Magistrate incorrectly directed his mind strictly to the value of the money allegedly lost without taking into account the practicality in execution of such bail terms in the prevailing Kenyan economy. In **High Court Misc. Rev. No. 7/19 Nairobi Moses Kassaine Lenokul v R**, the High Court reduced a bond of 150 million to Kshs 30 milion and cash bail of 100m to 10m.

39. Taking into account the circumstances of this case and considering that the 1st to 3rd applicants are employees of a public body who are not likely to abscond and further taking into account that they are presumed innocent until proved guilty, I will reduce the bond with surety from Kshs 50 million to 20million with one surety of same amount or Cash bail of Ksh 6 million.

40. Without losing sight of the fact that the scales of justice must well be balanced without necessarily tilting to the applicant's side, I am persuaded to hold that the bail terms of ksh 5milion with surety or cash bail of 2milion imposed against the 4th to 16th applicants is not excessive in the circumstances considering the seriousness of the offence where billions of Kenya Shillings was allegedly lost through dubious transactions.

41. It is no wonder that from the original court record some have already redeemed their release by paying cash bail or through depositing securities such as titles and others are in the process. Inability to pay should not be an automatic ground to interfere with a properly exercised discretion by a trial court. If all poor people who commit serious crimes were to be released on what in their opinion is affordable terms, it will amount to a travesty of justice against the victims of crime(complainants) who may stand to suffer should the accused persons decide to abscond. Courts should therefore act with circumspection when dealing with revision applications of this nature bearing in mind that courts serve society with divergent interest in the outcome of a criminal trial.

42. For the above given reasons, the application for revision is allowed with orders as follows:

- a. That the 1st, 2nd and 3rd applicants shall be released on a bond of Kshs.20million with one surety of same amount or cash bail of 6 million in place of Kshs 50 million or cash bail of Kshs12 million.
- b. That the 4th – 16th applicants shall remain on the bond terms imposed by the trial court.
- c. That bond approvals be done by the Chief Magistrate Anti-Corruption Court under the relevant court file.
- d. That the rest of the terms imposed by the trial court shall remain.
- e. Any applications in respect of the orders made in this ruling be made before the trial court.
- f. Original court file be returned to the trial court.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 1ST DAY OF AUGUST, 2019.

J.N. ONYIEGO

JUDGE