



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

ACEC REVISION NO. 49 OF 2019

AND

ACEC REVISION NO. 50 OF 2019 (CONSOLIDATED)

(From the ruling of honourable D.N.Ogoti Chief Magistrate in ACCC No. 28/2018 delivered on 23rd October 2019)

CHARLES KARISA MWADUNA.....1ST APPLICANT

EDWARD MULEWA MWACHINGA.....2ND APPLICANT

STEPHEN NDUNGU KINUTHIA.....3RD APPLICANT

DESMOND IRUNGU KINUTHIA.....4TH APPLICANT

NELSON KARANJA KINUTHIA.....5TH APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. On 22nd October 2019, Stephen Ndungu Kinuthia (*Accused 1*), Annette Mwangi (*Accused 2*), Patrick Shem Kamau (*Accused 3*), Ephantus Kairu Kahwae (*Accused 4*), Sylvester Kiptoo Kiplagat (*Accused 5*), Charles Githinji Gichobi (*Accused 6*), Charles Karisa Mwaduna (*Accused 7*), Edward Mulewa Mwachinga (*Accused 8*), Charles Mbugua Njuguna (*Accused 9*), Desmond Irungu Kinuthia (*Accused 10*), Nelson Karanja Kinuthia (*Accused 11*), Florence Waithira Kinuthia (*Accused 12*), Jane Wangui Kinuthia (*Accused 13*), Charmine Kinuthia (*Accused 14*), Osi Kenya Limited (*Accused 15*), MARS Tecnology Limited (*Accused 16*), Value TEQ Trading Limited (*Accused 17*), Finsoft TCS Limited (*Accused 18*), Nanazi Investment Limited (*Accused 19*), Kamira International Limited (*Accused 20*), Kenya Milk Farmers Investment Company Limited (*Accused 21*) and Enkei Holdings Limited (*Accused 22*) were arraigned before Nairobi Chief Magistrate's Court vide ACCC No. 28 of 2019 jointly facing several corruption related charges.

2. The accused persons variously faced several charges ranging from Conspiracy to commit an offence of corruption under Section 47A(3) as read with Section 48 of the Anti-Corruption and Economic Crimes Act (ACECA), Deceiving principal contrary to Section 41(2) as read with Section 48 of the Anti-Corruption and Economic Crimes Act (ACECA), Unlawful acquisition of public property contrary to Section 45(1)(A) as read with Section 48 of the Anti-Corruption and Economic Crimes Act 2003, Dealing with suspect property contrary to Section 47(2)(a) as read with Section 48 of the Anti-Corruption and Economic Crimes Act and, money laundering contrary to Section 3 as read with Section 16 of the Proceeds of Crime and Anti-money Laundering Act.

3. Upon returning a plea of not guilty, the court released them on various bail terms as follows:

(1) Accused 1 – Cash bail of 10 million with the alternative of 30 million bond with one surety.

(2) Accused 9, 10, 11, 14 and 22 – Ksh 5 million cash bail or an alternative of bond of Ksh 15 million with one surety.

(3) Accused 12, 13, 19 and 21 a bond of 9 million with one surety or cash bail of Kshs 3 million.

(4) **Accused 6, 7, 8, 15, 16, 17, 4, 5, 3** cash bail of 2 million or a bond of Ksh 5 million with one surety.

(5) **Accused 2 and 18** cash bail of 1 million or a bond of 3 million with one surety.

4. Aggrieved by the said bail terms which were described as unlawful, unjustified, improper, punitive, oppressive and harsh, the 7th and 8th accused persons through the firm of Okoth and Company Advocates wrote a letter dated 23rd October 2019 addressed to the Deputy Registrar seeking revision of the same downwards. They averred that the bail terms should be in tandem with the principles set out in the **Anti-Corruption and Economic Crimes Act Revision 37 and 38 of 2019, Vincent Makonjio & 2 others V R [2019] eKLR.**

5. He further sought revision on the same grounds on behalf of Mworira Advocates representing Accused 1,10,11,18 and 22, and, on behalf of Maina and Nyamu Advocates representing accused 3,4,5, and13.

6. On 25th October 2019, vide Revision No. 50 of 2019, Stephen Kinuthia Ndung'u, Desmond Irungu Kinuthia and Nelson Karanja Kinuthia *Accused 1, 10 and 11 respectively in ACC No. 28 of 2019*, also moved this court vide a notice of motion dated 25th October 2019 seeking revision of the bail terms imposed against them in the said ACC No. 28 of 2019 arguing that they were excessive and punitive. They urged the court to preferably have the same reduced to 1 million bond with one surety or cash bail of 100,000 to 500,000.

7. The application is premised upon grounds set out on the face of it and an affidavit sworn on 25th October 2019 by Stephen Ndungu stating that the 1st applicant is a father to the 2nd and 3rd applicants who are charged together with others in ACCC No. 28 of 2019. That it is impossible for one family to raise a total of 20 million cash bail or 60 million bond with three sureties.

8. They contended that the trial court took into account extraneous factors in awarding the excessive bail terms. That the key consideration in granting suitable bail terms is the assurance that the accused is not a flight risk. They averred that the bail terms set were harsh and punitive in the circumstances.

9. Upon the two applications being served on the respondent, the respondent filed grounds of opposition on 4th November 2019 arguing that:

(a) the revision application was prematurely filed as no review application had been filed before the trial court.

(b) there is no proof that the magistrate did not exercise his judicial discretion fairly, justly, objectively, rationally and legally in the face of the issues raised by the respondent.

(c) that the applicants have not demonstrated that the bail terms were unreasonable, unjust and exorbitant and in contravention of Article 49 of the Constitution.

(d)that the applicants have not demonstrated any evidence of financial incapacity or specific circumstances or difficulty to comply with the bail terms.

(e) that the applicant has not placed any material documenting an impropriety, illegality, irrationality by the trial court to warrant this courts intervention.

10. When the two applications came up for hearing on 4th November 2019, both parties agreed on consolidating Revision No. 49 of 2019 in respect of Charles Karuga Mwaduna and Edward Mulewa Mwachinga and Revision No. 50 of 2019 in relation to Stephen Ndungu Kinuthia, Desmond Irungu Kinuthia and Nelson Karanja Kinuthia. After consolidating the two, the court directed that Revision NO. 49 of 2019 be the lead file. For ease of reference, the applicants shall be referred to as Charles Karuga Mwaduna, Edward Mulewa Mwachinga, Stephen Ndungu Kinuthia, Desmond Irungu Kinuthia and Nelson Karanja Kinuthia as the 1st, 2nd, 3rd, 4th and 5th applicants respectively.

11. During the hearing, both counsel made oral submissions. Mr. Okoth relying on the content contained in the letter seeking revision submitted that the applicants are presumed innocent until proven guilty and that they should not be subjected to pre-trial punishment as they are not a flight risk. He submitted that the 9th accused was a lawyer whose involvement in the contract giving rise to the criminal charges against him was purely a professional undertaking hence should not suffer the harsh conditions imposed.

12. Counsel further submitted that the offences the applicants were facing were misdemeanours hence not serious to warrant the terms imposed. He urged that bail terms should not be pegged on the unproven value of the amount stated in the charge sheet. He further submitted that, although the court had granted the applicants bail, the same was taken away by imposing excessive terms. He referred the court to various authorities supporting the above submissions.

13. Mr. Waweru for the 1st, 10th and 11th Accused persons (3rd, 4th and 5th applicants) reiterated the contents contained in the affidavit in support of the application. He associated himself with the submissions of Mr. Okoth. He further stated that the 11th accused is suffering from T.B. hence the need to have him released on affordable terms. He stated that the applicants are not a flight risk and therefore should be enabled to enjoy their liberty while attending court from home.

14. M/s Mwachiro for the 11th and 3rd applicants associated herself with the submissions of her colleagues.

15. Mr. Akula appearing for the state relied on the grounds of opposition filed in response to the applications and various authorities. He submitted that the terms imposed were not illegal, unreasonable and improper. He asserted that the 9th accused was not an applicant to the

revision applications and therefore improper for Mr. Okoth to have argued the application on his behalf.

16. Counsel submitted that the word reasonable is relative. That the bail terms imposed were commensurate to the seriousness of the offences committed. In his view, the bail terms were spread accordingly depending on the nature of the charges and the penalty associated to it. Counsel referred the court to the decisions on bail terms in the following authorities; Moses Kasine Leonolkulal vs Republic [2019] eKLR where the court reviewed cash bail and bond terms from 100 million cash bail and 150 million bond with surety to 10 million and 30 million respectively, Muhammad Abdalla Swazuri & 23 others v Republic [2019] eKLR where the court reviewed bail terms from 12 million cash bail and 30 million bond with surety to 7 million and 15 million respectively and, Ferdinand Ndungu Waititu Babayao & 12 Others v Republic [2019] eKLR in which the court refused to revise bail terms to not less 15 million cash bail and over 30 million bond with a surety.

Analysis and determination

17. I have considered the original lower court record, consolidated applications herein and the responses thereto. I have also considered oral submissions by both counsel and the authorities cited thereof. The only issues for determination are; whether the terms imposed by the trial court are incorrect, illegal or improper and, whether this court has jurisdiction to grant the orders sought.

18. In their response to the application in Revision No. 50 of 2019, the respondent stated in the first ground of opposition that this application is prematurely filed as the applicants ought to have filed a review application before the trial court first before moving to the High Court.

19. This court's jurisdiction has been summoned courtesy of Article 165(6) and (7) of the Constitution and Section 362 of the CPC.

Article 165(6) provides thus –

“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.”

20. Further, sub-article 7 thus state that –

“For the purposes of clause (6), the High Court may call for the review 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.”

18. Jurisdiction is further actualized under Section 362 of the CPC in circumstances requiring revision of subordinate courts' orders or decisions. That Section mandates the High Court to call for and examine the record of 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 the proceedings.

19. The applicants are arguing that the terms of bail imposed were improper, excessive, unreasonable and punitive in the circumstances. This court is duty bound to interrogate whether the lower court applied correct principles in arriving at the terms imposed so as to determine whether they are unreasonable, harsh or improper in the circumstances.

20. It is therefore within this court's constitutional power that it calls for the lower court record to ascertain the alleged impropriety in accordance with Section 362 of the CPC and by extension Article 165(6) and (7) (See George Aladwa Omwera v R [2016] eKLR. This position is further fortified with numerous revisionary orders issued by the High Court in similar instances among them; Moses Kasine Leonolkulal vs Republic [supra] and Ferdinand Ndungu Waititu Babayao & 12 Others v Republic [supra] quoted by Mr. Akula counsel appearing for the State.

21. Guided by the above provisions and case law, it is my finding that this court has jurisdiction to entertain the applications and that there is no mandatory requirement for one to go for review before the trial court first. That is not to say that the applicants could not seek review before the lower court which has powers to review its bail terms and conditions. Either remedy is available to the affected party.

22. The gravamen in the instant application is not the denial of bail but rather the imposition of harsh terms of bail thus taking away the right to bail through the back door. Under Article 49(1)(h) of the Constitution, an accused person is entitled to be released on reasonable bail terms pending trial.

23. This right is pegged on the assumption that an accused person is innocent until proven guilty. On the other hand, the right to bail is not absolute. Further, the release of an accused person to bail can be conditional or unconditional. where conditions for release are attached, it is within the trial court's discretion to determine the appropriate, fair and just terms. (See Nganga v. R (1988) KLR 45). However, the terms imposed should not be so exorbitant as to make it impossible for an accused to secure his release. It must not appear like giving by one hand and taking away by the other.

24. It is the applicant's argument that the bail terms imposed are punitive and not reasonable. Reading the trial court's ruling on release of bail terms, the court did address itself to the relevant factors for consideration before releasing an accused person on bail and on what terms. The court was alive to the fact that the accused person is presumed innocent until proven guilty and that the key consideration is the accused's attendance before court pending trial.

25. However, a quick look at the lower court record shows that accused 2, 3, 4, 5, 6, 7, 9, 10 and 11 have already deposited the necessary

cash bail.

This is an indication that the bail terms were not harsh and therefore they cannot claim that they were given unreasonable bail terms that were unaffordable. They cannot seek revision over what they have already honoured by depositing the necessary amount.

26. In the circumstances, accused 7 (*1st applicant*) one Charles Mbugua Njuguna, accused 10 (*3rd applicant*) Desmond Irungu Kinuthia, accused 11 (*5th Applicant*) one Nelson Karanja Kinuthia cannot claim a denial of their right to be released on bail when they are indeed enjoying their freedom meaning that the bail terms granted were affordable (*See Evans Odhiambo Kidero v R (2019) eKLR*). There was no evidence to prove that the money deposited was obtained through great difficulties or borrowing.

26. For those reasons, the ground raised by the 1st, 4th and 5th applicants cannot stand and the same is disallowed. This position shall apply to accused 2, 3, 4, 5, 6 and 9 all of whom have secured their release. Unfortunately, Mr. Okoth argued this application irregularly on behalf of the 9th accused who is not an applicant and has since been released. I will not make any positive orders affecting him under this file.

27. Regarding accused 8 (*2nd applicant*) who was released on cash bail of 2 million or a bond with surety of 5 million, he is charged with four counts among them, conspiracy to commit an offence where over 100 million was allegedly lost and, unlawfully receiving 7,900,000/=. Although misdemeanours, the mandatory penalty which is double the amount lost and or benefited does call for reasonable terms which in my view 2 million cash bail or 5 million bond with one surety is not unreasonable.

28. Concerning the 3rd applicant who is also a father to the 4th and 5th applicants, he was released on a bond of 30 million or cash bail of 10 million. The reason given as to why he was released on the said terms, was because he was appearing in most of the counts. The applicant is faced with a unique situation in that he is charged with his sons thus making it practically challenging for one family to raise over 20 million cash bail or sureties worth 60 million. One of the considerations to be taken into account before releasing an accused on certain bail terms under Section 123 and 123A of the CPC and the 2015 Bond Policy Guidelines is the nature or seriousness of the offence.

29. Cumulatively, the 1st accused (*3rd applicant*) is charged with 10 counts out of 13 counts. If he is to be found guilty, the mandatory sentence will run to millions of shillings and a number of years imprisonment in case they are to run consecutively.

30. In my view, the court did address itself correctly as to the principles governing grant of bail on merit. However, considering the unique circumstances surrounding this case and guided by the various authorities quoted among them **Muhammad Abdalla Swazuri & 23 others v R (Supra)** where the court reduced cash bail from 30 million bond with surety or cash bail of 12 million to 15 million bond with surety or 7 million cash bail, I am inclined to find that the cash bail of 10 million or 30 million with surety of similar amount is on the higher side.

31. I am alive to the reality that Kenya is not a super economy. To raise that kind of money is not easy. A court should not assess bail terms on the presumption that the accused indeed did steal the money stated in the charge sheet and therefore should get part of the loot to pay cash bail.

32. On the other, an accused person should not expect the court to peg bail terms based on his or her poverty levels. It is about balancing between what the law requires and what is reasonable in the circumstances. Accordingly, I will reduce the cash bail from 10 million to 7 million or bond of 15 million with one surety down from 30 million bond with surety.

33. As to the rest of the applicants, I do not find any impropriety nor illegality in the terms of bail imposed considering the nature of the offences some of which are attracting upto 14yrs imprisonment term. For those reasons, the applications herein in respect of all the applicants are disallowed save for the 3rd applicant (*1st accused*) whose bail terms shall be and are hereby reviewed to read that, he shall be released on a cash bail of 7 million or in the alternative 15 million bond with one surety in place of 10 million cash bail or 30 million with one surety imposed by the trial court. The original file to be released to the lower court for the trial to continue.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 22ND DAY OF NOVEMBER 2019.

J. N. ONYIEGO

JUDGE