REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

ACEC MISC. APPLICATION NO. 12 OF 2018 AS

CONSOLIDATED WITH ACEC MISC. APPLICATIONS NOS. 13 of 2018, 14 of 2018, 15 of 2018, 17 of 2018, 18 of 2018 and 19 of 2018

RODGERS NZIOKA ..... 1ST APPLICANT

RICHARD ETHAN NDUBAI ..... 2ND APPLICANT

STEPHEN MUCHAI RIUNGU ..... 3RD APPLICANT

LUCY WAMBUI NGIRITA ..... 4TH APPLICANT

JEREMIAH GICHINI ..... 5TH APPLICANT

CATHERINE MWAI ..... 6TH APPLICANT

PHYLIS NJERI NGIRITA ..... 7TH APPLICANT

ANNE WAMBERE ..... 8TH APPLICANT

JAMAL DUBA GALGALO ..... 9TH APPLICANT

TABITHA NYAMBURA NDUNGU ..... 10TH APPLICANT

CHRISTOPHER SIMBAUI MALALA ..... 11TH APPLICANT

VERSUS

REPUBLIC ..... RESPONDENT

R U L I N G

1. The applicants are through their various applications seeking an order of bail/bond pending the hearing of Nairobi Chief Magistrate's Anti corruption cases nos. 8 of 2018-17/of 2018. The applicants filed their applications vide ACEC Misc. applications Nos. 12, 13, 14 ,15 ,17, 18 & 19 of 2018. It was agreed by Counsels appearing for both the applicants and respondent that all these applications be collapsed and heard as one vide ACEC. Misc Application no 12 of 2018. The proceedings in application no 12 of 2018 are also to be adopted in all the other files.

2. The application is supported by the affidavits of Kibagendi Assa Nyakundi, Lilian Mbogo Omollo, Dennis Juma, Jackson Wekesa Abala, Keziah Wanjogu Mwangi, Evans Wafula Kundu, Julius Airo, Simon Kanyi Kiiru & Don Mwaniki Kariungi, who are some of the accused persons in the Anti-corruption matters before the Milimani Chief Magistrate's Court as cited above.

3. The application is grounded on various provisions of the Constitution and Criminal Procedure Code. The main prayer is for all the accused persons in Nairobi Chief Magistrate's Anti Corruption cases nos. 8 of 18, 9 of 18, 10 of 18, 11 of 18, 12 of 18, 13 of 18, 14 of 18, 15 of 18, 16 of 18 & 17 of 18 to be admitted to bail pending the said trials.

4. The respondents through the Director of Public Prosecutions (DPP) filed a replying affidavit through I.P Paul Waweru No 236117. Notices

of preliminary objection dated 11th June 2018 were also filed by the DPP. They seek the striking out of various affidavits.

THE APPLICANTS' CASE

5. Mr Nyakundi for the applicants submitted that under section 123(3) of the Constitution, the high court in its original jurisdiction can grant bond even without an application. He referred to several provisions of the Constitution on which the application was based. Counsel submitted that the Constitution only mentions compelling reasons, as the only consideration to be satisfied in terms of granting bail/bond.

6. In response to the preliminary objection raised on the advocate having sworn an affidavit he stated that there is no requirement for an accused person to file an affidavit in such an application. He urged that it is the DPP who has to swear an affidavit where there is a claim of compelling reasons for denial of bail.

7. He contended that an affidavit can be sworn by an advocate as long as he gives the source of the information. To buttress this point he referred to the following cases:

(i) Kamlesh M.D. Pattni vs Nassir Ali & 2 Others Civil Application no 354 of 2004 [2005] eKLR

(ii) Regina W.M. Gitau vs Bonface Nthenge High Court Civil Appeal no 327/12.

He added that what has been stated by the advocates was not contentious nor disputed. He said it was a fact that bail had been applied for and denied among other averments.

8. Counsel submitted that bail is a fundamental constitutional right and in any event all charges are bailable. He further argued that in India some statutes deny parties bail but that was not the case in Kenya, as the Kenya Constitution provides for it.

9. Finally he submitted that there were no clear compelling reasons given for the denial of bail in this case when cases with more serious charges have the accused in them released on bail.

10. Mr Migos Ogumba submitted that the basis of the application is Article 50(1) of the Constitution. That the applicants' liberty should not be curtailed without any good reasons. He cited to the case of **R V Danford K. Mwangi Nyeri High Court Criminal Case No. 8 of 2016** to support this point. Referring to article 259 of the Constitution he argued that the issue of seriousness of charges is not ground for denial of bail. He added that the right to bail and fair trial is a fundamental right, and should not be denied unless for very good reasons.

11. He submitted that there must be proof of any allegations being made. He gave an example of the applicant in **Misc Application No. 13/18 (2nd accused) Richard Ethan Ndubai**, where it is alleged that he will interfere with witnesses. On this he referred to the case of **Christopher Ndarathi Murungaru vs KACC & Anor [2006] eKLR,** saying due process must be followed in any such matter and one cannot rely on mere allegations.

12. In reference to article 160(1) of the Constitution Counsel submitted that in spite of the pressure that may be there, due process must be adhered to as there was nothing special about these cases. He cited the **Engineer Kamau** case which, he said upheld the supremacy of the Constitution.

13. In respect to the replying affidavit of I.P. Waweru counsel submitted that the deponent did not state what he had been authorized to do in terms of sections 23 & 24 of ACECA as this is an anti-corruption matter. He asked that the affidavit be expunged from the record. He took a swipe at the letter by the DPP to the Hon. C.J dated 24th May 2018 and annexed to the replying affidavit. He argued that the letter appeared to direct the court on how to handle the cases of corruption which was not acceptable.

14. Mr Wandugi submitted that the application concerned the rights of about forty persons who were entitled to bail under article 49 of the Constitution. He said I.P Waweru's replying affidavit gave no ground for denial of bail. Counsel went through the said affidavit paragraph by paragraph saying some paragraphs made no sense. He argued that any objection to release on bail must be above a balance of probabilities. Referring to paragraph 10 of the replying affidavit he said the bail/bond policy is not law.

15. He went on to argue that despite desiring a speedy trial he did not think that, that was a good ground for denying one bail. He wondered why the DPP's letter was annexed to the replying affidavit. Referring to the case of **R vs Danson Mgunya & Anor High Court Criminal Case No 26 of 2000 (Mombasa)** he said this court should not consider extraneous matters as the right to bail has a direct effect on fair trial.

16. He also cited the case of **George Anyona & 3 Others vs Republic High Court Nrb Misc. Criminal Application no 358 of 1990** urging that the court should lean towards granting than denying bail. On seriousness or gravity of a charge in the grant of bail and conditions thereof he referred to the following cases:

(i) R V Thomas Muthui Nzii High Court Nairobi Criminal Case

No. 13 of 2010 and

(ii) Njehu Gatabaki v Republic High Court Criminal

Application No. 43 of 1993.

Counsel submitted that the issue of interference with witnesses was considered in the **Gatabaki** case. Finally he urged the court to grant the applicants bail.

17. Mr Kang'ahi submitted on the authorities submitted by the respondent, which he said were mainly from the Indian jurisprudence. He urged that the Indian courts have made those decisions because the Law is there in statute. He added that the law in India categorized these offences into bailable and non bailable offences but Kenya under Article 49(h) of the Constitution offered bail in all offences.

18. In reference to the case of **Nimmagadda Prasad vs Central Bureau of Investigations Criminal Appeal No 728 of 2013 Supreme Court of India** cited by the respondent, Counsel submitted that the said case touched entirely on an economic crime. That the court made an order that the applicant could renew the application once certain documents had been filed. He added that in India they had a pretrial preceding an actual trial and section 437 Criminal Procedure Code of India has a rider superseding section 162 of the said code and there is a window for grant of bail, in non bailable offences.

19. Counsel pointed out that the cases cited by the respondent are on unbailable offences and cannot be compared to the scenario prevailing in Kenya. A speedy trial he said does not to take over the right to bail.

20. Mr J.M. Njengo submitted that Kenya had a more progressive jurisprudence on bail than India. He argued that there were no compelling reasons for denial of bail in this matter. He asked the court in granting bond to consider reasonable terms since some of the applicants were junior staff at the NYS. He also contended that too many files had been opened instead of one and asked the court to have the bail orders apply to all the files.

RESPONDENT'S CASE

21. Mr Ondimu in opposing the application urged the court to look at all the material including annextures in the various applications. He referred to the considerations in this nature of application as shown in the bail/bond guidelines, section 123 Criminal Procedure Code and numerous authorities. On seriousness of the charge he referred to annexture CNS 2 in ACEC Misc Application No. 19/18 which is C.I. Muia's affidavit. He further referred to the following cases:

(i) R vs Milton Kabulit & 6 Others [2011] eKLR

(ii) Obey Christopher & 2 Others vs Uganda Misc Application no 045, 046 & 047 of 2015 High Court (This he said was very similar to the present case in Kenya)

(iii) Nimmagadda Prasad (supra)

22. He cited the issue of national security as one of the considerations and urged the court to take note of the prevailing circumstances. On the strength of the prosecution case he submitted that the respondent had laid out what each of the applicants had done. Referring to the **Milton Kabulit** case he submitted that presumption of innocence did not stop the court from looking at the material before it.

23. Counsel referred to the replying affidavits in Misc. applications Nos. 12/18, 13/18, 14/18, 15/18, 17/18 & 18/18 submitting that they had shown that there was a likelihood of interference with witnesses. He asked the court to consider the relationship of the applicants and the witnesses. He urged that all these factors had a cumulative effect on flight risk. That under para 4:26A of the bail bond policy guidelines the proof is on a balance of probabilities. He asked the court to consider articles 10, and 159 of the Constitution.

24. Counsel referred to the DPP's letter and denied that it had anything to do with interference as it was in line with section 4(4) ACECA that deals with expeditious disposal of cases. He further argued that the police have powers to investigate and there was nothing wrong with I.P Waweru's affidavit.

25. In reference to the preliminary objections raised by the respondent he

referred to Rule 8 of the advocates (practice) Rules & two decisions.

(i) Francis Kimutai Bii vs Kaisugu (Kenya) Ltd [2016] eKLR

(ii) Agricultural Development Corporation vs Container Freighters Co. Ltd [1992] eKLR

26. Mr Makori in reference to the preliminary objection submitted that as per the **Kamlesh M.D. Pattni case** (supra) there was no reason why the advocate had to swear the affidavit yet the clients were available. He contended that the **Chris Murungaru** (supra) case involved an application for stay of proceedings and had nothing to do with bail/bond. The **Mgunya case** (supra) involved an application for bail which had been denied under the old Constitution. It was his submission that the standard of proof does not require the court to be satisfied that the consequences of absconding or interference with witnesses will occur if bail is granted. That the court has to merely be satisfied that there are substantial grounds for believing their occurrence.

27. Mr Makori went further to submit that in case of economic crimes the assurances of court attendance should weigh less than their interference with the cause of justice, since the stakes are high. He referred to the **Obey Christopher** case (supra).

THE APPICANT'S REPLY

28. In reply, Mr Nyakundi submitted that the undertaking to conduct the cases expeditiously, the DPP's letter, and para 17 of the replying affidavit tell a lot. He also pointed out that the applicants were charged vide ten (10) files and there was no way they could be assured of an expeditious trial. Furthermore they did not even have witness statements to assist them know the strength of the prosecution case and so it was not known what the depth of the compelling reasons was. Further that at this stage it was the duty of the prosecution to avail evidence of the character of the applicants and not the other way round.

DETERMINATION

29. I have considered the application, affidavits (both supporting and replying), submissions, and the authorities cited by Counsel. The issue for determination is whether this court should admit the applicants plus all the other accused persons in Nairobi Chief Magistrate's Anti corruption cases Nos. 8/18-17/18 to bail pending the hearing and determination of the said cases. The applicants and others are facing various charges under the Anti Corruption & Economic Crimes Act (ACECA) and the Penal Code. They have therefore applied for bail before this court.

30. They appeared before the Chief Magistrate's Anti Corruption Court and their pleas were taken on 28th -29th May 2018 which is 23 days ago. Through their Counsels applications for bond were made and the Chief Magistrate Hon. Ogoti in the Ruling dated 5th June 2018 declined to have them released on bail/bond. That is the much I can state of what transpired since the matter before me is not an appeal from the said ruling and/or a revision of the same. The applicants have moved this court in its original jurisdiction under section 123(3) Criminal Procedure Code for admission of the applicants and others on bail.

31. The respondent has raised issue with a number of affidavits sworn by advocates and parties where they have delved into matters that are contentious before the Chief Magistrate's court. As has been stated in a number of authorities cited by the respondents and an advocate may only swear to matters wholly within his knowledge and even when giving the source they should not be matters where he may be called upon to testify. Of great importance in this case, as I have stated above, is that this is not an appeal and/or a revision. Any affidavit bent on citing the merits and demerits of the Ruling by Mr. Ogoti Chief Magistrate is out of place.

32. I have read through the affidavits in the seven(7) miscellaneous applications herein. I find the following affidavits to be attacking the said ruling and I hereby expunge the offending paragraphs from the said affidavits namely:

MISC NO 12/18

(i) Lilian M. Omolo – Paragraphs 8-16, 19 & 23

(ii) Kibagendi Assa – Paragraphs 5.

(iii) Kezia Wanjogu – Paragraphs 7 & 8

(iv) Evans Wafula – Paragraphs 8 & 9

(v) Julius Airo – Paragraphs 16 & 21

(vi) Simon Kanyi - Paragraphs 10-13

MISC. NO 15/18

(i) Luis Wahome Paras 5 & 6

(ii) Kirimi David Paras 9,14 15 & 18

The rest of the paragraphs remain intact and in support of the application. The preliminary objection therefore partially succeeds.

33. The applicants have made this application under various provisions of the law. Article 49 of the Constitution provides for the rights of arrested persons. Article 49(1) provides:

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.

34. Under the Criminal Procedure Code section 123 provides:

(1) When a person, other than a person accused of murder, treason, robbery with violence, attempted robbery with violence and any drug 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

Section 123 A

(1) Subject to Article 49(1)(h) of the Constitution and notwithstanding section123, 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.

Section 124

Before a person is released on bail or on his own recognizance, a bond for such sum as the court or police officer thinks sufficient shall be executed by that person, and, when he is released on bail, by one or more sufficient sureties, conditioned that the person shall attend at the time and place mentioned in the bond and shall continue so to attend until otherwise directed by the court or police officer.

35 A reading of Article 49(1)(h) of the Constitution clearly provides for the right to bail for accused persons on reasonable conditions from whichever angle one looks at it. Can this right be limited? The answer is YES, and its found in the same article 49(1)(h)

"……..Unless there are compelling reasons not to be released"

36 In this case the DPP has objected to the applicant's admission to bail. He

therefore bears the burden of satisfying the Court of the compelling reasons that make the respondent interfere with the applicants right to bail as provided for under the Constitution. The respondent relied on the replying affidavit by I.P. Waweru and an affidavit of C.I. Muia marked **(CNS 2**) in Misc, Application No 19 of 2018. I have not traced the said affidavit in any of the seven (7) files as an annexure by the respondent. This affidavit has however been filed by Richard Ethan Ndubai as annexture REN 2 in Misc. Application No 13 of 2018.

37. The reasons cited by the respondent for objecting to the release of the applicants on bail are the following:

(i) Seriousness of the charges

(ii) National security

(iii) Character & antecedents of the applicants

(iv) Likelihood of interference with witnesses.

38. It is true the charges facing the applicants are very serious, and the penalties in the event of a conviction are very stiff. The position in law is that one is **presumed** innocent until proved guilty. Article 50(2) of the Constitution provides:

"(2) Every accused person has the right to a fair trial, which includes the right—

(a) to be presumed innocent until the contrary is proved;

(c) to have adequate time and facilities to prepare a defence;

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that

evidence;

39. At this point in time the court cannot evaluate any evidence to determine the strength of the prosecution case. Doing so would be prejudicial to the applicants and a violation of their right to a fair trial, under (article 50 (1) of the Constitution.

40 Interference with witnesses if proved is a compelling reason which would result in denial of bail until the witnesses have testified/or until the case is finalized. The court would require material evidence placed before it in respect to such interference for a determination to be made on it.

My sister R. Korir J in the case of **R V Dwight Sagray & 4 Others [2013] eKLR** had this to say on the subject which I agree with:

> **"It has been submitted by the prosecution that the 1st accused person and indeed all the accused are likely to interfere with prosecution witnesses. For the 1st accused, his position of influence within the Venezuelan Embassy has been cited. As I have held before, interference with prosecution witnesses is in my view a compelling reason not to admit an accused person to bail as such interference goes to the root of the trial and is an affront to the administration of justice. For the prosecution to succeed in persuading the court on this criteria however, it must place material before the court which demonstrates actual or perceived interference. It must show the court for example the existence of a threat or threats to witnesses; direct or indirect incriminating communication between the accused and witnesses; close familial relationship between the accused and witnesses among others**.
>
> **I agree with the holding in Panju vs Republic [1973] E.A. 284, where the court in dismissing the prosecutor's fear of interference with witnesses stated that before any one can say there would be interference with vital witnesses, at least some facts should be led to the court, otherwise it is asking courts to speculate"**
>
> **For the 1st accused, it is feared that the witnesses are his former junior colleagues a work. However, it has been shown to this court by the prosecution that the accused has already be relieved of his duties and stripped of his diplomatic status. His position of influence is therefore not easily discernible."**

41. There is no material placed before this court to show that the applicants have interfered, or attempted to interfere with the witnesses who are their juniors or workmates. All that is said is that the witnesses worked with the applicants and are their juniors. Is this sufficient reason to give a blanket denial of bond to the applicants? I am afraid not.

42. The issue of character and antecedents appears to have been tied together with the interference with witnesses vide the submissions.

No bad character or antecedents of the applicants have been alluded to by the respondent. The applicants can't talk about their character and antecedents unless provoked to.

43. The next issue to determine is whether the applicants are a threat to national security and a flight risk. The respondent relied heavily on the Indian authorities to state their case. However before those authorities can be applied, there must be a factual basis for it. I have considered the material in paragraphs 44-54 of **C.I. Muia's** affidavit.

44. I find it so general and does not state in what way these applicants are a threat to national security. He should have stated clearly what they have done or are about to do, that affects national security, or if they are an impediment to the arrest of the other suspects in the matter. He has not stated so and the court will not speculate.

45. An assurance has been given to this court by the prosecution through Mr. Ondimu & I.P Waweru that it is ready to have the cases against the applicants and others heard expeditiously in line with section 4 (4) of the ACECA. They are ready to sit even after working hours. That is very good and I hope when they say they are ready they have complied with article 50(2)(c)(j) of the Constitution so that both the prosecution and defence are on the same platform.

46. Is readiness by the prosecution in itself reason for denial of bail? This assurance can only make sense where one has been denied bail. Otherwise the prosecution, the defence and the court have all a noble duty to expeditiously dispose of matters pending in court.

47. As I stated earlier it was the respondent's duty to lay a factual basis for denial of bail to the applicants. The Constitution of Kenya 2010 is the mother of all our Laws. It has spoken through Article 49(1) (h) on the issue of bail/bond and when such bond may be denied.

48. Article 160 of the Constitution provides:

> **"160. (1) In the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.**

A lot has been said about the letter by the DPP to the Hon. C.J. I don't think the DPP was giving any directions to the courts but just expressing the role his office will play in ensuring that the matters are handled expeditiously. The rest is for the court to conduct the proceedings in accordance with the Constitution, the Law and the Oath of office. The court is at liberty to borrow from other jurisdictions as long as it does not violate the Constitution of Kenya and the applicable law.

49. It is not disputed that some of the applicants and accused in the related matters are senior officers in the public service, while others are not. It is also not disputed that the applicants and their co-accused are facing serious charges involving billions of shillings; the fact is that the case is yet to be heard for anyone to know who is guilty and who is not. The court as an arbiter should and should be seen to take a neutral stand in this matter until the opportune time when it renders its determination after hearing all the evidence.

50. All in all I find that the respondent has not satisfied this court that the applicants and their co-accused should not be admitted to bail. Even as I grant bail I am alive to the seriousness of the charges the applicants and co-accused are facing. I also note that the total number of the applicants and co accused is about forty one and they range from senior government officers to junior officers in the Ministry and various departments. All these factors must be taken into account so that the terms and conditions of the bail/bond cut across the spectrum.

51. I therefore allow the application and grant bail/bond to the applicants and all their co-accused on the following conditions:

(i) Each to execute a bond of Kshs 5 Million plus a surety of Kshs 2 Million to be approved by any of the Chief Magistrates of the Anti Corruption Court. The approval will be done in ACC No 8 of 2018 and will apply to all other files.

(ii) Each to deposit in court a cash bail of Kshs 1 Million.

(iii) They should deposit their Kenyan passports and any other travel documents with the court.

52. Once released on bond the applicants and co accused shall:

(i) Report to the DCI's offices Gigiri (an officer to be assigned this duty at the said office) once every week until further orders by the trial court.

(ii) Not to go to their former offices unless accompanied by a Police officer.

(iii) Not to make contact, whether directly or otherwise howsoever, with any of the staff and/or witnesses to be called by the prosecution.

(iv) Not to leave the jurisdiction of the Nairobi Chief Magistrate's Anti Corruption court without prior orders of that court.

(v) To attend court for mentions and hearings whenever called upon to.

(vi) Any application in respect of these orders shall be made before the trial court once the hearing takes off.

Orders accordingly.

Dated signed and delivered this 19th day of June 2018 in open court at Nairobi.

…….

HEDWIG I. ONG'UDI

JUDGE