REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION MILIMANI

ACEC CR. APPEAL NO. 9 OF 2018 AS CONSOLIDATED

WITH ACEC CR. APPEALS NOS. 10/2018, 11/2018 AND 12/2018

JOHN GAKUO.....1ST APPLICANT

ALEXANDER MUSANGA MUSEE.....2ND APPLICANT

SAMMY KIPNGETICH KIRUI.....3RD APPLICANT

MARY NGECHI NGETHE.....4TH APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Application for Bail Pending the hearing and determination of this Appeal

from the Conviction and Sentence of the Appellants by the Honourable D.N. Ogoti),

made and/or delivered on the 15th day of May 2018 at Nairobi)

RULING

1. On 29th April 2010, the applicants herein were arraigned before Milimani Chief magistrate's Anti Corruption Court vide Anti-Corruption Case No. 20/2010 facing various charges relating to corruption allegedly committed while discharging their official duties culminating to their conviction and sentence which now forms the basis of their applications and appeals herein.

2. The first applicant/appellant was charged with the offence 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 No. 3/2003 (Count 2). Alternatively, he was charged with the offence of wilful neglect to perform official duty contrary to Section 28 as read with Section 36 of the Penal Code.

3. The second applicant together with the fourth applicant faced the charge of knowingly giving a misleading document to principal contrary to Section 41(2) as read with Section 48 of the Anti-Corruption and Economic Crimes Act No. 3/2003 (Count 3). However, separately, the 4th applicant was charged with the offence of knowingly giving a false document to principal contrary to Section 41(2) as read with Section 48 of Anti-Corruption and Economic Crimes Act No. 3/2003 (Count 4). She also faced an alternative count of uttering a false document contrary to Section 353 of the penal code.

4. Concerning the 3rd applicant, he was charged with 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 of 2013 (Count I)). He also faced an alternative count of wilful neglect to perform official duty contrary to Section 128 as read with Section 36 of the penal code.

5. Upon conclusion of the trial, the trial magistrate Hon. D. Ogoti, found the applicants guilty of the substantive charges and convicted them accordingly on 15th May 2018. Consequently, the 3rd applicant and 1st applicant facing Count 1 and 2 respectively were sentenced to serve a period of 3 years imprisonment and in addition pay a fine of Kshs1 million. The 2nd and 4th applicants, who were facing count 3, were

sentenced to a period of 3 years imprisonment each. Further, the 4th applicant was also sentenced to serve 3 years imprisonment in respect to count 4 to run concurrently with the sentence in count 3.

6. Aggrieved with the conviction and sentence meted out, the applicants approached this court vide various applications under certificate of urgency seeking an order to be released on bail/bond pending hearing and determination of their appeals.

7. By consent of all counsels, the applications filed vide ACEC CR. appeal Nos. 9/18, 10/18, 11/18 and 12/18 were on 5th July 2018 collapsed and consolidated into one file with ACEC Cr. Appeal No. 9/18 as the lead file.

8. The applicants' applications for bail pending appeal were brought pursuant to Sections 356 and 357 of the Criminal Procedure Code citing common ground that the appeals have overwhelming chances of success; that the hearing of the main appeal is likely to take long before determination hence a likelihood of serving sentence and; that there are special and exceptional circumstances to warrant grant of the prayers sought.

9. In response, the respondent filed 13 grounds of opposition on 4th July 2018 asserting that the appeals do not have overwhelming chances of success as the conviction and sentence were lawful based on water tight evidence. Secondly, that the hearing of the main appeal is not likely to delay and that there were no special or exceptional circumstances to warrant the orders sought.

1st Applicant's Case

10. Mr. Nyakundi appearing for the first applicant made reference to the averments contained in the affidavit in support of the notice of motion dated 15th May 2018 arguing that the conviction and sentence of his client was based on patently flawed laws, and in ignorance of the clear provisions of the law in particular Section 27(3) of the Public Procurement and Disposal Act 2005 as read together with Regulations 7, 10, 11, 16 and 36. That the ingredients of the offence were not proved to the required degree thus rendering the conviction a nullity. To buttress his argument, Mr. Nyakundi made reference to **Misc. Cr. Appeal No. 445, 448 and 452 of 2012 Rebecca M. Nabutola vs Republic ...(2012) eKLR** :

11. Learned counsel contended that the 1st applicant then serving as Town Clerk Nairobi City Council had no legal authority to stop a procurement and or tendering process which had gone through requisite stages. Mr. Nyakundi opined that a person in authority cannot be penalized for making a bad decision. Learned counsel urged the court to find that the 1st applicant is hypertensive hence requiring medical facilities outside prisons. That the applicant aged 60 years is suffering from high blood pressure which has seen him in and out of hospital. That he has a clean record with no previous conviction and that he is not a flight risk. He crowned all these as exceptional circumstances to warrant release on bail.

2nd Applicant's Case

12. Mr. Kariba counsel for the 2nd applicant equally relied and associated himself with the submissions of Assa Nyakundi and the affidavit in support of the notice of motion dated 17th May 2018 in which the 2nd applicant averred that his case has overwhelming chances of success and that the hearing and determination of appeal is likely to take long. Reliance in his submissions was begged on the case of **Peter Hinga Ngatho vs Republic (2015)eKLR and Rebecca M. Nabutola vs Republic (2015) Eklr** among others. Counsel submitted that the 2nd applicant was only a member of evaluation committee which is a technical outfit whose role was to open and verify whether the tender documents were in order. Mr. Kariba urged the court to find that the 2nd applicant was not a member of the tender committee hence did not participate in the award of the tender.

13. The second applicant wondered why some evaluation committee members like PW2, PW3 and PW4 were left although they all visited the site of the land in question and made scores yet the magistrate held that they did not participate contrary to the Def. Exh. No.1 being the minutes signed by members including PW2, PW3 and PW4.

3rd Applicant's Case

14. Counsel for the 3rd applicant Mr. Rugo also associated himself with the submissions of his colleagues to the extent that his client's appeal has overwhelming chances of success. Mr. Rugo submitted that his client was convicted on the basis that there was no contract between Henry Kilonzi (PW6) the land owner and City Council of Nairobi. Counsel argued that the trial court did not evaluate the evidence properly contrary to the principles laid down in the case of **Okethi Okale & Others vs R (1965) EA 555, and Gathara vs R (2005) 2 KLR 58 and Livingstone v Uganda (1972) EA** in which the court held that:

> **"A judgment must set out the point or points for determination which must cover essential ingredients of the offence. Intent is an essential ingredient of the offence".**

Learned counsel faulted the magistrate for relying on the opinion of a grave digger expressing an opinion on the suitability of the land to arrive at the conclusion that the 3rd applicant was guilty of abuse of office and wilful neglect of public duty. That pursuant to Section 5 (2) of the Public Procurement Act 2005, an accounting officer cannot interfere with the procurement process.

4th Applicant's Case

15. Submitting on behalf of the 4th applicant, Mr.Mogikoyo and Nderitu also adopted submissions made by their colleagues as well as the

grounds and averments contained in the affidavit in support of the application dated 14th May 2018. Mr. Mogikoyo took issue with the prosecution's evidence, contention and reliance by the trial court that the 4th applicant had given misleading documents and in particular minutes of the evaluation committee dated 10th November 2008. He urged the court to find that the learned magistrate failed to properly evaluate the evidence before arriving at the conclusion that it was the 4th applicant who misled the tender committee yet minutes were signed by all committee members. That the principal who was misled a Mr. DR. Nguku was not call as a witness

16. Learned counsel urged the court to consider and find that the appeal has overwhelming chances of success and that there are special circumstances to warrant release on appeal. He referred the court to the case of **Jivraj Shah vs Repulic (1986) KLR and the case of Simon Mwangi Kirika vs Republic Cr. Appeal No. NAI 3 of 2006 (UR 2/2006)** in which the principles for consideration before granting bail pending appeal were highlighted as:

(1) Existence of exceptional or unusual circumstances.

(2) If it appears from the totality of the circumstances that the appeal is likely to be successful on account of some substantial law.

(3) That the sentence or substantial part would have been served by the time the appeal is heard.

Respondent's Case

17. Learned Counsel urged the court to consider that the applicant is suffering from an ailment which can be managed while at home. He further stated that the applicant's son is sickly and therefore requires close supervision hence exceptional circumstances to warrant release on bail.

18. In reply, the learned state counsel M/S Aluda vehemently opposed the application contending that the appeal does not exhibit any overwhelming chances of success, that there are no exceptional circumstances to warrant release on bail and lastly, that the appeal itself is due for hearing hence no likelihood of substantively serving sentence before determination of the same. To fortify her submission, learned counsel relied on the authority in the case of **Conceilia Ondiek vs Republic (2016) e KLR**. Regarding the 1st and 3rd applicant, the learned state counsel stated that they were accounting officers whose attention had been drawn to an internal memo confirming that the land that was the subject of procurement was not suitable for the intended purpose (public cemetery) but instead they went ahead and authorized payment thus wilful neglect of public duty.

19. Regarding the 2nd applicant, M/S Aluda alleged that he forged evaluation committee minutes purporting that other members had signed thus illegally confirming the suitability of the subject land for a public cemetery which was not true. As to the 4th applicant, counsel submitted that he forged evaluation report in the name of anon existing person pretending to be a valuer. That some of the stolen money was traced to 2nd and 4th applicants' accounts. Lastly, the learned state counsel urged the court to disregard old age and sickness as exceptional circumstances to warrant bail since there are sufficient medical services in prison.

Analysis and Determination

20. Having gone through the grounds of appeal laid out on the applicants' /appellants' respective petitions of appeal dated 15th May 2018, 16th May 2018, 15th May 2018 but amended on 21st June 2018, and 17th May 2018 and further having considered the application together with the supporting affidavits plus submissions by both counsels, issues that fall for determination are:

(a) Whether the appeals have overwhelming chances of success;

(b) Whether there is likelihood of serving sentence in full or substantive part of it before their appeals are heard and determined;

(c) Whether there are any unusual or exceptional circumstances to warrant grant of the orders sought.

21. The law governing release of an applicant/ appellant on bail pending appeal is well settled within the Kenyan legal jurisprudence and even from comparative international best practices especially those from within the common wealth countries. In the case of **Dominic Karanja vs Republic (1986) KLR 612** the court of appeal set out the guiding principles for grant of bail pending appeal as follows:

(a) The most important issue was that if the appeal had such overwhelming chances of success, there is no justification for depriving the applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances.

(b) The previous good character of the applicant, if any, facing the family were not exceptional or unusual factors. Ill health perse would also not constitute exceptional circumstances where there existed medical facilities for prisoners.

(c) A Solemn assertion by an applicant that he will not abscond if released, even if it is supported by sureties, is not sufficient ground for releasing a convicted person on bail pending appeal.

(d) Upon considering the relevant materials in this case, there was no overwhelming chance of appeal being successful.

These principles are replicated in the case of **Jivraj vs Republic (Supra).**

22. Similar guidance can be derived from the decision of the Indian Supreme Court in the case of **Krishnan vs the People (SC2 19 of 2011 (2011) ZMSC 17 (21 Oct 2011)** where the court took into consideration the existence of overwhelming chances of success, exceptional circumstances and likelihood of serving sentence before appeal is heard as grounds before granting bail. The court further observed that:

> **"the fact that one's client did not breach bail conditions imposed by the Lower Court is not an exceptional circumstance which can persuade us to admit the appellant to bail pending appeal" .**

23. Grant of bail whether pending trial or appeal is a fundamental Constittutional right bordering on individual liberty hence should not be taken away arbitrarily. However, unlike bail pending trial to which the need for the prosecution to prove whether there are compelling reasons to deny an accused bail pursuant to Article 49 (1)(h) of the Constitution on the assumption that accused is deemed to be innocent until proved guilty, the game and terrain is purely different in the case of bail pending appeal. In the case of bail pending trial, individual liberty rights are more pronounced while under bail pending appeal, the same is curtailed or limited to the extent that one is no longer innocent but a convict hence the court must use amore magnified lens to see beyond individual liberty. The privilege of innocence is no longer available to a convicted person.

24. For the court to exercise its unfettered discretion favourably, it is incumbent upon the applicant/ appellant to discharge the noble and onerous duty placed upon him by satisfying the conditions set out in the cases quoted above **as well as Bail and Bond Policy guidelines at Page 27, Paragraph 430.** Further reference can be made to the case of **Rebecca Nabutola vs Republic (2012) eKLR** where it was held that it is incumbent upon the appellant to prove existence of overwhelming chances of success, likelihood of serving sentence and that there are exceptional circumstances to warrant the orders.

25. In addressing each ground separately, I wish to start with the ground on whether the applicants are likely to serve full or substantial sentence before the main appeal is heard. This is ground is ultimately not available considering that the applicants were convicted and sentenced on 15th May 2018 and the hearing of substantive appeals is scheduled for 31st July 2018 the same day this ruling is scheduled for delivery. The element of inordinate delay in hearing the appeal is out of question given the speed with which the record of appeal was prepared thus earning judiciary credit for expeditious delivery of Justice which is rare in some instances.

26. The second principle is that of existence of special or unusual or exceptional circumstances. The 1st applicant alleged that he is aged 60yrs old and suffering from high blood pressure and hypertension thus requiring medical attention outside prisons owing to lack of sufficient medical facilities in the prison where he is being held. No medical records were attached to support that claim. As to the 2nd applicant, he pleaded his previous clean criminal record and that he did not abscond while on bail pending trial as exceptional circumstances.

27. Having a clean criminal record which does no longer exist upon conviction and having faithfully attended court during trial is not an exceptional circumstance to warrant release on bail. Those are normal routine conditions attached to release on bail in respect to a person already innocent and not proved guilty pending trial. The rules of the game are different. I do not find that to be an unusual circumstance. As to the 3rd applicant, he also pleaded existence of special circumstances based on poor health ranging from hypertension and anxiety neurosis. He attached a medical note from Dr. K. Toroitich confirming that he has been under his medical attention suffering from hypertension, ulcers and leg edema. A medical report from prisons attached to the supplementary affidavit confirmed the same but showed records of treatment received.

28. It has not been established or proved that the ailment is not manageable within the hospital facility. In any event, nothing stops prisons doctors from making a referral to hospitals like Kenyatta if the situation demands. The same position applies to the 4th applicant who also claimed that she was suffering from high blood pressure and is also having a son who is epileptic and suffering from autism. Although morally persuasive, Personal and family related challenges may not override the interest of justice. In the case of **Ademba vs Republic (1983) KLR 442, the court held that**; "**even though the appellant showed serious family and personal difficulties, in view of the unlikelihood of success in this appeal, the application could not succeed"** . As regards age, in this case 60 years for the 1st applicant, that perse is not an exceptional circumstance since at that age people can still be active in life including working in civil service unless the sickness is age related which is not in this case.

29. Does the appeal have overwhelming chances of success? This is the most critical requirement to which the court must be careful in handling lest it slips into delving into the merits of the case. The nature of the offences committed, the weight of the evidence adduced against the defence raised leaves no doubt in my mind that the issues in question will require thorough evaluation and consideration upon appeal to make a concrete decision as to whether the offences were proved beyond reasonable doubt.

30. Whereas it is the applicant who is obligated to address and convince the court that the conviction was wrong (see **Isaac Tulicha vs Republic Court of appeal Nairobi Cr. Appeal No. 16/2010**), it is also the duty of the court not to venture into the merits of the case otherwise it will jeopardise the outcome (**see Concelia Aoko Ondiek and another vs Republic (supra).** Suffice to say that, I have carefully gone through the lower court proceedings, grounds of appeal in respect of each appellant, and oral submissions by counsels for the applicants and respondent and I am not persuaded sufficiently to apportion with certainty or exactitude that the applicants' appeals primafacie have high chances of success.

31. I am alive to the fact that having overwhelming chances of success is not an assurance to an acquittal or vice versa. Depending on how the appeal is subsequently argued and upon careful perusal of record of appeal plus the exhibits thereto, the court will be able to arrive at a more informed and balanced decision on whether the convictions were proper or not based on the parameters of proof beyond reasonable doubt.

32. Accordingly, the applications herein for bail pending appeal are declined and the applicants/appellants shall remain in custody until their appeals are heard and determined.

Order accordingly

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31ST DAY OF JULY 2018.

J.N. ONYIEGO (JUDGE)

In the presence of:

Mr. Nyakundi.....Counsel for the 1st applicant

Mr. Kariba.....Counsel for 2nd applicant

Mr. Rugo.....Counsel for the 3rd applicant

Mr. Mogikoyo and Nderitu.....Counsels for the 4th applicant

Edwin.....Court Assistant