



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI CORRUPTION AND ECONOMIC CRIMES DIVISION

MISC. CRIMINAL REVISION NO 20 OF 2020

GICHE LTD.....1ST APPLICANT

JOSEPH CHEGE GIKONYO.....2ND APPLICANT

LUCY KANGAI STEPHEN.....3RD APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....1ST RESPONDENT

THE CHIEF MAGISTRATE COURT

ANTI-CORRUPTION COURT MILIMANI LAW COURTS.....2ND RESPONDENT

(Being an application for revision of the orders issued on 30th June, 2020)

by Hon. Lawrence Mugambi (CM) in Milimani Anti-Corruption Case No. 13 of 2020)

RULING ON REVISION

1. The 2nd and 3rd applicants are husband and wife and the directors of the 1st applicant. They have been jointly charged in Anti-Corruption Case No. 13 of 2020 before the Anti-Corruption Court, Milimani Law Courts on charges related to alleged failure to pay taxes contrary to section 45 (1) (d) of the Anti-Corruption and Economic Crimes Act, 2003 (ACECA).
2. They pleaded not guilty to the charge and were released on a cash bail of Kshs. five million (5,000,000) each or a bond of Kshs. ten million (Kshs 10,000,000.00) with one surety each. The court also ordered that the 2nd and 3rd applicants deposit their passports in court.
3. The applicants are aggrieved by the orders issued by the trial court and have filed the present application to seek revision of the said orders. The application is brought under the provisions of Articles 165(6) and (7) of the Constitution, section 362 of the Criminal Procedure Code and all other enabling provisions of the Law. It is supported by an affidavit sworn by the 2nd applicant, a further affidavit also sworn by the 2nd applicant, and is based on the grounds set out on the face of the application.
4. The applicants ask the court to call for the file of the subordinate court and to set aside, vacate, quash and or vary the orders given on 30th June, 2020. They also ask the court to issue an order releasing them on their personal bond or on reasonable cash bail on terms that this court may determine.
5. The facts leading up to this application and the grounds on which it is based as they emerge from the application and the affidavits in support are that the 2nd applicant is a public officer who has been in the employment of the Kenya Revenue Authority (KRA) since 1991. In 2016, the Ethics and Anti-Corruption Commission (EACC) started an investigation into his personal affairs. The investigations culminated in EACC filing Misc. Civil Application No. 98 of 2016 – EACC v Joseph Chege Gikonyo & another to freeze several landed properties and bank accounts belonging to the 1st and 2nd applicants.
6. The 1st and 2nd applicants then filed an application seeking to discharge the freezing orders and the court granted the orders on 9th

September 2016 and made a finding that the 1st and 2nd applicants had explained the manner in which they had acquired their properties. The applicants state that thereafter, sometime in 2018, EACC lodged ACECA No. 14 of 2018 against the applicants alleging that all their assets amounted to unexplained assets. The applicants lodged a preliminary objection and in a ruling dated 23rd November 2018, the court struck out the properties which it found the applicants had explained the manner of acquisition.

7. By a letter dated 19th April 2016, the EACC wrote to the KRA asking it to investigate the applicants' tax affairs. KRA then write to the applicants informing them of its intention to bring to tax certain amounts it had found had not been brought to tax. It then issued tax assessments which included principal tax, penalties and interest amounting to Kshs 38,694,692. The applicants state that they decided to comply with the tax assessment and have, since 2016, made payments in excess of Kshs 20 million to the KRA.

8. On 29th June 2020, EACC officers and several police officers arrested the 2nd and 3rd applicants in their premises in Mombasa and drove them to Nairobi. They were informed that they would be charged with tax related offences. On 30th June 2020, they were charged before the Anti-Corruption Court with a single count of failure to pay taxes amounting to Kshs 38,694,692 contrary to section 45 (1) (d) of the ACECA. They were granted bail and alternative bond terms that are the subject of the present application.

9. The applicants argue that the cash bail of Kshs. 5,000,000 for each of them is unreasonable and completely out of their reach. They further argue that the imposition of a cash bail of Kshs 5,000,000 for each accused persons, which amounts to Kshs 15,00,000 to secure their release on a collective charge of Kshs. 38 million is excessive, illogical, absurd and amounts to unfair and unreasonable administrative action in line with the Wednesbury unreasonableness principles. They contend that in contravention of the bail and bond policy, the trial magistrate did not give any cogent reasons for imposing such harsh, punitive and excessive amounts for cash bail.

10. It is their case that there was no evidence that they are a flight risk. They allege that the trial court allowed the prosecution's unreasonable and baseless application to have the 2nd and 3rd applicants deposit their passports with the court, yet, in their view, there is no justification in an open and democratic society to have passports deposited in court unless there is clear and cogent evidence that the accused persons are a flight risk or risk leaving the country in order to defeat the ends of justice.

11. The applicants further allege that the trial court ignored their pleas that the matter before him was a tax issue in which taxes in excess of Kshs 20 million had already been paid. It is also their case that the court also ignored the express provisions of section 80 (1) of the Tax Procedures Act, 2015 which provides that a person cannot be subjected to both imposition of a penalty and the prosecution of an offence in respect of the same act or omission in relation to a tax law. The applicants argue that it is unreasonable for the EACC and the DPP to institute criminal charges in respect of a matter in which the EACC instigated the tax assessment, caused the applicants to pay significant amounts in tax, and then turn around four years later and charge them with a criminal offence.

12. The applicants accuse the trial magistrate of discriminating against them in violation of their right under Article 27(1) of the Constitution. They cite cases in which the court has given lenient and reasonable bail terms to suspects charged with more serious offences relating to the law on procurement. They also allege violation of their right to be presumed innocent guaranteed under Article 50 (2) (a) of the Constitution as well as their right to liberty and freedom of movement as they stand to suffer pre-trial incarceration and detention.

13. The applicants further argue that the trial court ignored the primary factor to be considered when granting bail, which is whether the applicants will appear for their trial if granted bail. They assert that they are not a flight risk, that the 2nd applicant is a civil servant with a family and permanent abode in Kenya and had always presented himself to the EACC during the course of its investigations since 2016. They state that the 2nd applicant suffers from diabetes and high blood pressure and in light of the COVID-19 pandemic, he is vulnerable and his incarceration in prison will prejudice his health.

14. With regard to their capacity to meet the bond terms, the applicants have filed an affidavit of means sworn by the 2nd applicant. They state that the 2nd applicant has been on suspension since 2016 as a result of the investigations and subsequent proceedings instituted by the EACC. He has been earning a reduced net salary of approximately Kshs 120,000, which fluctuates from month to month from the KRA's calculations. It is their case that the cash bail of Kshs 5,000,000 is completely beyond his means as a public officer on suspension. They state that the 2nd applicant has some rental income but the total amount of Kshs 15,000,000 is completely beyond his means. He has not been able to raise this amount despite having tried to reach out to friends since his arrest and incarceration. The 3rd applicant has no independent means of income and depends on the 2nd applicant for her livelihood.

15. The applicants further state that the 2nd applicant has used most of the income from his rental properties to pay the tax assessment issued by KRA, which is the subject of the proceedings before the trial court in ACC No. 13 of 2020. He has residences in Mombasa and Nairobi, which are known to EACC, and he is therefore not a flight risk. He has also presented himself to EACC in the course of its investigations since 2016, and has no intention of absconding.

16. The applicants rely on the Judiciary Bail and Bond Policy and the case of **Silas Masinde Simiyu v Republic Misc. Criminal Application No. 410 of 2019** and **Republic v Kokonya Muhssin (2013)eKLR** in support of their application and urge the court to grant the orders sought in their application.

17. The 1st respondent (the DPP) opposes the application and has filed grounds of opposition dated 6th July 2020 as well as a list and bundle of authorities. The DPP argues, first, that the applicants have not discharged their burden to demonstrate that the bond terms issued were unreasonable, unjust, exorbitant and in contravention of Article 49 of the Constitution. The DPP states that the bail terms meet the threshold set out under Article 49 and there is therefore no need for intervention by this court. There is also no demonstration that the court did not exercise its judicial discretion fairly, and the applicants have failed to discharge the burden imposed on them of demonstrating that the bail terms are unreasonable.

18. It is the DPP's case that the applicants have demonstrated in their affidavits that they are persons of means and have not presented any evidence to the contrary to warrant a review of the cash bail imposed on them. They have also not demonstrated the efforts made to meet the bail terms and the challenges encountered in raising the bail,

The Submissions

19. In the submissions made on behalf of the applicants, it was argued that the trial court did not consider the primary purpose of granting bail to an accused person, which is to secure the attendance of the accused person during trial. The applicants relied on the decisions in **Reuben Marumben Lemunyete v Republic [2019] eKLR** in which the court considered the competing constitutional requirements and the accused person's right to be presumed innocent under Article 50(2) and his right to be released on bail. The applicants submitted that the trial court had displaced the accused persons' right to be presumed innocent and had also failed to consider the circumstances of the case. Though the applicants had placed the tax demand from KRA before the trial court, which had been issued on the instigation of the EACC, the court had not considered it. It was their submission that more than Kshs 20 million of the taxes that form the basis of the applicants' prosecution have been paid as evidenced by receipts from KRA.

20. The applicants further submitted that one of the principles to be considered is the strength of the prosecution case. They contended that under section 81 of the Tax Procedures Act 2015, it is categorically stated that a person shall not be subject to both a penalty and a prosecution on the same facts. They assert that the figure in the charge sheet in their case is the same figure as in the tax demand, and the tax demand contains the imposition of a penalty, which is admitted in the charge sheet.

21. The applicants submitted that they have demonstrated how the EACC has been after them, citing the civil suits and freezing of their assets. They reiterated that they are not a flight risk and asked the court to review their bail terms.

22. In submissions in reply, the 1st respondent argued that this court would exercise its revision *inter alia* when the decision of the subordinate court is illegal, improper, erroneous or had glaring omissions. In the DPP's view, this is not the case in the present matter. While the court has the discretion to exercise powers of revision, it must exercise its discretion in a very limited capacity where it is established that the lower court made a grossly erroneous decisions. In the respondent's view, the court's decision in this case was correct.

23. The 1st respondent submitted that the applicants face a charge of failing to pay taxes amounting to slightly over Kshs 38 million, which, by their Counsel's admission, they have admitted that they not only failed to pay but they have also paid over Kshs 20 million. It was not correct therefore that the trial court failed to consider the strength of the prosecution case. Further, there is no bar to prosecution for failing to pay taxes. The 1st respondent referred to the case of **Ferdinand Ndungu Waititu Babayao & 12 others v Republic [2019] eKLR** to demonstrate that the amount of bail in this case was not unreasonable. Reference was also made to the case of **Muhammad Abdalla Swazuri & 23 others v Republic [2019] eKLR** and the amount of the bail granted to the accused in that case for the submission that the amount of bail granted in this case is not excessive.

24. It is also the 1st respondent's submission that while the 2nd applicant states that he is a civil servant on interdiction, he is not charged in his private capacity but as a director of a company which has admitted to owing taxes of Kshs 20 million. The respondent distinguished the case of **Silas Masinde Simiyu v R** (supra) relied on by the applicants on the basis that the fine to be imposed was Kshs 4 million which is why the court revised the bail downwards. In this case, the fine that may be imposed on the applicants is likely to be 78 million.

25. The applicants submitted in response that they had not admitted having failed to pay taxes, and that paying the taxes demanded did not amount to an admission of failure to pay taxes. They further submitted that the KRA tax demand does not have a single allegation that the applicants failed to pay taxes and are liable to prosecution. With regard to the decision in the **Ferdinand Waititu** (supra) case relied on by the 1st respondent, it was their submission that the Governor had been charged with mainstream corruption offence with more than 6 counts, while their case was a purely tax issue which had been criminalized. It was also their submission that there is nowhere in the bail and bond policy where it is stated that one must look at the amount in the charge sheet to peg the bail upon.

Determination

26. I have considered the submissions of the parties and the decisions that they rely on in support of their respective cases. In my view, the sole issue for determination in this matter is whether this court should review and vary the bail terms imposed on the applicants by the trial court. Other matters argued before me, such as whether or not the applicants had, by paying a sizeable proportion of the tax demanded from them, admitted a failure to pay tax are not for consideration by this court.

27. In considering this issue, I bear in mind the provisions of Article 49 1(h) which guarantees to all accused persons the right to be released on bail on reasonable terms unless there are compelling reasons, to be supplied by the state, why they should not be admitted to bail.

28. The statutory provisions with respect to bail are set out in section 123 and 123A of the Criminal Procedure Code. Section 123 provides that:

When a person... 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.

29. At section 23A, the CPC states as follows:

(1) Subject to Article 49(1)(h) of the Constitution and notwithstanding section 123, 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.

30. These statutory provisions are also reflected in the **Bail and Bond Policy Guidelines** produced by the National Council on the Administration of Justice in March 2015, in particular Guideline 4.9.

31. Judicial precedents on the issue have also underscored the right of an accused person, who also has the right to be presumed innocent guaranteed under Article 50(2)(a) of the Constitution, to be released on reasonable bail terms- see **Andrew Young Otieno v Republic [2017] eKLR** and **Joses Kimathi Murumua & 3 Others v Republic [2013] eKLR**.

32. In **Reuben Marumben Lemunyete v Republic** cited by the applicants, I considered the constitutional and statutory provisions regarding bail and observed as follows:

“57. We can only ensure respect for the constitutional injunctions at Article 49 and 50(2)(a) of the Constitution by granting accused persons bail which is reasonable and, while taking into account the seriousness of the offence with which they are charged and the strength of the prosecution evidence against them, also takes into account the personal circumstances of the accused person(s).

33. The applicants complain that the cash bail of Kshs 5,000,000 imposed on them is excessive and beyond their reach, amounting as it does to Kshs 15,000,000. However, it is not clear from the ruling of the trial court whether the bail imposed on the applicants also applied to the 1st applicant, which is a limited liability company whose directors are the 2nd and 3rd applicants. The applicants seem to think that it does, hence their argument that the total amount of bail of kshs 15,000,000 is beyond their reach. In my view, however, it does not, and the bail amount was in respect of the 2nd and 3rd applicants, who were also directed to deposit their passports in court.

34. The applicants are husband and wife, while the 1st applicant is a limited liability company in which they are, from the limited information before me, the shareholders and, presumably, the directors. They have been in custody since their arrest on 29th June 2020. They are charged with an offence relating to failure to pay taxes. It is not disputed by the 1st respondent that they have, in the period since the tax demand was made on them, paid Kshs 20 million out of the 38 million or so demanded of them. There is no indication that they are a flight risk- the DPP did not place any material before me to show that they are likely to abscond from the jurisdiction of this court. In any event, one of the conditions imposed on them by the trial court was to deposit their passports in court. I note that this condition has also been challenged in the present application, but it is not a condition I am inclined to interfere with. As I observed in **Muhammad Abdalla Swazuri & 23 others v Republic [2019] eKLR**:

“36. While this court did not categorise the accused in groups or term the basis of the categorisation as ‘subject matter’, there is an underlying thread that the higher the amount of funds that a person is charged with misappropriating the more severe the bail or bond terms ought to be. I believe that there is a reasonable rationale for this, which emerges from a consideration of the grant of bail in other offences. While both a person charged with affray or simple assault and a person charged with murder have a constitutional right to bail, no-one would argue that the same terms should apply to them.

37. This, in my view, is in accord with the consideration of the seriousness of the charge, the likelihood of interfering with witnesses, and the likelihood of absconding and not appearing for trial. I believe this is also why additional conditions such as depositing travel documents in court, not contacting prosecution witnesses and not returning to the office where the offence was alleged to have been committed are imposed on persons charged with anti-corruption and economic crimes. One cannot rule out the possibility that where one faces several charges of corruption involving vast sums of public funds, there is a greater incentive to abscond trial.

35. In my view, given the charge that the applicants face, the bail terms of kshs 5,000,000 each or a bond of Kshs 10 million with one surety

of the same amount was excessive in the circumstances of the case.

36. In reaching this conclusion, I also take into consideration the environment which the country, and indeed the world, is grappling with. The entire world is in the throes of an unprecedented pandemic, the Covid 19 virus, with no cure or vaccine. The economic circumstances of many have been impacted negatively to a very large extent.

37. Further, the court takes judicial notice of the fact that in the early days of the pandemic, the judiciary released persons convicted of minor offences or with limited terms remaining on their sentences, with a view to reducing the population of those in prison or remand. The 2nd and 3rd applicants in this case are yet to be convicted. The 2nd applicant has also placed before the court his personal circumstances with regard to his health, and his apprehension that further incarceration in the midst of the Covid 19 pandemic will be detrimental to his health.

38. Taking the constitutional and statutory factors into consideration as well as the personal circumstances of the applicants, I am satisfied that the interests of justice demand a review of the bail terms imposed on them. I accordingly set aside the orders of the trial court with respect to the amount of bail and direct that the 2nd and 3rd applicants shall be released on a cash bail of Kshs 1,000,000 each or a bond of Kshs 2,000,000 with one surety of the same amount. The condition with respect to the deposit of passports shall remain in force.

Dated Delivered and Signed at Nairobi this 10th day of July 2020

MUMBI NGUGI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this ruling has been delivered to the parties electronically with their consent.

MUMBI NGUGI

JUDGE