REPUPLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL REVISION CASE NO. 545 of 2020

LESIIT, J

HARISH MAWJEE.....1ST APPLICANT

BHAVIN DEVJI.....2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an application for review of bail ruling from ruling of the Chief Magistrate's Court at Milimani (Hon. C. Muthoni - SRM) Criminal case No. 1947 of 2020 dated 10th July, 2020)

RULING ON BAIL REVISION

1. The Applicants **HARISH MAWJEE** and **BHAVIN DEVJI** have, by way of a letter dated 12th July 2020 sent through email sought for a review of their bail terms made by Hon. Muthoni, SRM. The email does not disclose in which case the review is requested, however in his submissions on behalf of both Applicants, the 1st Applicant made it clear that it was in respect of **Milimani Criminal Case Number 1947 of 2020**.

2. The 1st Applicant stated that they were given unreasonable bond terms and that they were not able to post those terms without the help of friends and loans. He also stated that he needed to have the review so that he gets a refund to enable him hire lawyers for the case. He said that both he and his co-Applicant, who happens to be his father, have underlying conditions which the court ignored when it gave the bond terms as a result of which both of them spent some days in custody before posting bail.

3. Mr. Momanyi, learned Prosecution Counsel opposed the application on two grounds. One, that the case for which the application is pegged will be consolidated with another, and that therefore the bond terms will be re-visited, and two, that the case under consideration will be withdrawn. The Applicant denied that the case in question in this application had been withdrawn as alleged and further submitted that they will be opposing consolidation with other cases.

4. What is before the court is an application for review of bond terms by the learned trial Milimani CM's Criminal Case No. 1947 of 2020. It took time for this court to access the file. It was important that the court sees the file as the Applicants did not in their application specify what the bond terms were. It was my view that the court could not make a comprehensive decision without it. I have since gotten the file.

5. The bond terms were given by the trial court on the same date as the plea in that case, that is on 10th July, 2020. The Applicants were given two options upon which they could be released, one, post bond in the sum of Kshs. 500, 000/- with one surety of like sum each; or, two, in the alternative, deposit of cash bail in the sum of Kshs. 300,000/- and a contact person each.

6. The Applicants are challenging the reasonableness of the terms given by the trail court for their release. They have also made it clear that they were able to post the bail and to be released from custody in the case under review. They made it clear that all they now wanted was a refund of part of the amount deposited with the court to secure their release.

7. There are certain overarching principles that govern the administration of bail and bond by Courts. First of all, courts have sole discretion to give determinate bond terms and they can impose a combination of terms including supervision of accused released on bail if found necessary. Secondly, bond terms should not be arbitrary, but the court must consider the relevant factors affecting issuance of bond including penalty of offence and the accused ability to meet the bond terms. Thirdly, the bond terms should not be excessive or unreasonable. Fourthly, an accused has right to seek review of bond terms from trial court or high court or appeal. The issue is when an accused can enjoy bail review?

8. On the issue of terms of release on bail **Section 124** of the **Criminal Procedure Code** provides as follows:

> "B**efore 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 at the time and place mentioned in the bond and shall continue so to attend until otherwise directed by the court or police officer.**"

9. The Bail and Policy Guidelines were developed to give guidance in decisions making on bail in line with the constitutional provisions. The guidelines recognized the need for a balanced approach in preserving the public interest and the right of an accused person to fair trial. On guiding courts in determining reasonable bail terms, the guidelines provided that bail or bond amounts should not be excessive, they should not be far greater than was necessary to guarantee that the accused person would appear for his or her trial, amounts should not be so low that the accused person would be enticed into forfeiting the bail or bond amount and fleeing. Bail or bond conditions should be appropriate to the offence committed and take into account the personal circumstances of the accused person. What was reasonable would be determined by reference to the facts and circumstances prevailing in each case.

10. The circumstances of the accused also ought to have a bearing on the bail terms set. It serves no purpose to recognize the right of an accused person to be released on bail, and in the same breath impose terms that are beyond the ability of the accused; which would in effect amount to taking away that right. That was why it is within the liberty of the court to seek information to assist in making informed decisions. (See **Hassan Abdulhafedh Zubeidi & others v Rep., Nairobi**, **Misc. Cr. App No 453 of 2015)**

11. It is settled that an accused can apply for review of bond terms given by the trial court. The application should be made before the trial court which granted the bond. If, however the accused is still aggrieved by the decision of the trial court, he can still approach the higher court for relief. In the instant case, the Applicants have come directly to this court (higher court) before requesting the same of the trial court. The only issue in this case is that the Applicants have approached this court after posting bail, and after their release from custody on the same bond terms now being challenged in this court. The question is whether their application can be allowed?

12. In **Ferdinard Matano & 8 others v Rep. ACEC Miscellaneous Application No. 12 of 2018** the court observed:

> **"It was now a month since the Ruling of June 19, 2018 when the Applicants were granted bond. They were still in prison due to their inability to raise the bail/bond terms. It was not clear what efforts they were to exhibit more than their presence behind bars. Secondly they had displayed their pay slips which the respondent stated was not conclusive proof of one's financial capability.**
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> **The respondent had not produced before the Court the slightest evidence to counter those pay slips. It was expected that the respondent would have produced before it evidence showing that the applicants had moveable and immoveable properties and even cash in bank accounts to disapprove their reliance on pay slips.**
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> **Having considered the nature of the charges facing the applicants, their financial capability (drawn from their pay slips, and letters of employment) the applicants had convinced the Court of the need to review the bail/bond terms imposed on them on June 19, 2018."**

13. In **Kirit Bhangwanda Kanabar v DPP & another, Misc. Crim. Appl. No. 29 of 2018,** the court discussed what should guide the court in determining the quantum of bond terms, as a way of gauging what would be reasonable bond terms, and observed:

> **"The seriousness of the offence should not be seen from an eye of the quantum or liquidated amount stated to be defrauded or stolen but the nature and gravity of the offence should be in line with prescribed penal provisions and probable sentence on conviction. It was important to distinguish between the nature of the offence as a category and the seriousness of it as attached by the legislature in its various cluster of punishment in default.**
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> **Given the framework, the automatic trigger on the cash bail being based on a particular percentage or ratio of the alleged amount in the offence charged to was a fallacy not attributable to any rationale or legal craft. In other words, exercise of discretion in determining bail terms should apply the fundamental rights to ensure fairness, access, justice, consistency, predictability, speedy trials and due process of the law. That was because the framers of the Constitution forged a new path under article 49 (h) which mirrored the rule against the use of excessive bail. Setting bail amounts at ratios that were unaffordable contravened equal protection and due process rights of an accused person**
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> **There was no inquiry carried out to satisfy the Court that the accused person had the ability to deposit the cash bail or recognizance of a surety of ten (10) million in lieu of cash"**

14. The court in **Moses Kasaine Lenolkulal v Republic [2019] eKLR, Anti-Corruption and Economic Crimes Revision 7 of 2019,** discussed what amounts to reasonable bond terms to ensure the attendance of the accused person for his trial, and observed as follows:

> **"Parliament did not seem to treat corruption offences with the seriousness they deserved- the penal consequences for the offences which the applicant faced were a fine not exceeding Kshs 1,000,000 or a term of imprisonment for ten years or both. The saving grace could be found in section 48(2) which provided for a mandatory fine. Parliament urgently needed to look at the provisions of ACECA if any inroads against corruption were to be made in the country.**
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> **At any rate, given the nature and circumstances of the case and the penalty provided in law, the bond terms imposed on the applicant were excessive, and could well amount to a denial of bail."**

15. In all the cases I have quoted, the accused persons applied for review of bond terms after they were unable to meet the terms set for their release. None of them approached the court after they had successfully posted bail. That makes good sense because a review should be sought only where the Applicant is unable to meet the terms. **Bail Review** should be defined to mean "***a process of re-examination of bond terms accorded to an accused person who has been unable to post bail before the same court.***" Those are not my words but those of the defunct Bail and Bond Implementation Committee which they recommended to be inserted in a proposed Revision of the Bail and Bond Policy Guidelines.

16. The application for review of bond terms should only be made where an accused person is unable to benefit from the imposed conditions. Their continued incarceration in custody despite being granted bail will be considered as a good ground to prove his inability to meet the bond terms. To hold otherwise will be a serious error. It is likely to open a Pandora's that could lead to numerous applications for bail terms review. Such applications can easily overwhelm the courts, leading to unnecessary engagement of courts with interlocutory applications, especially when they are made without good reason considering that the Applicant would already have enjoyed their right to be released on bail.

17. I have said enough in this application. **It is my view that the application has no merit as the Applicants are both out on bond. The application is dismissed with no orders as to costs.**

READ SIGNED AND DELIVERED THROUGH TEAMS THIS 9TH DAY OF NOVEMBER, 2020.

LESIIT, J.

JUDGE

In the presence of

Mr. Kinyua……Court Assistant

Applicants in person……Present

Mr. Mutuma……..…….. For the State

LESIIT, J.

Judge

November 9th, 2020