



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

ACEC REVISION NO. 7 OF 2019

MOSES KASAINI LENOLKULALAPPLICANT

VERSUS

REPUBLICRESPONDENT

RULING ON REVISION

1. The applicant, Moses Kasaine Lenolkulal is charged in ACC No. 3 of 2019 with four counts under the **Anti-corruption and Economic Crimes Act (ACECA)**. In the first count, the applicant is charged with 13 others with the offence of conspiracy to commit an offence of corruption contrary to section 47A (3) as read with section 48(1) of ACECA. Count II charges the applicant with the offence of abuse of office contrary to section 46 as read with section 48(1) of ACECA.
2. At count III, the applicant is charged with the offence of conflict of interest contrary to section 42(3) as read with section 48(1) of ACECA. Finally, at count IV, the applicant is charged with the offence of unlawful acquisition of public property contrary to section 45(1)(a) as read with section 48(1) of ACECA. These offences are alleged to have been committed between 27th March 2013 and 25th March 2019 during which period the applicant was the Governor of Samburu County.
3. The applicant appeared before the Chief Magistrate's Court on 2nd April 2019 and denied all the charges against him. He thereafter made an application to be released on bail pending trial.
4. While the office of the DPP did not oppose the application for bail, it urged the court to impose stringent bail terms noting that the offences charged were committed by the applicant in his capacity as the Governor of Samburu County. In the event that the court did not impose terms that would render it impossible for the applicant to continue rendering services as Governor, justice would be compromised. The DPP requested the court to consider the provisions of section 65(1) of ACECA and order that the applicant keeps away from the County offices where the majority of witnesses are working.
5. The DPP also urged the court to consider the provisions of Chapter 6 of the Constitution, particularly Article 75 dealing with the conduct of state officers, noting that this was a peculiar case in which the applicant was trading with his own government. The DPP further asked the court to make an order that the Director of IFMIS bars the access of the 13 accused persons to IFMIS.
6. In his ruling dated 2nd April 2019, the Chief Magistrate, Hon. Ogoti ordered as follows:
 - i. That since the Samburu County offices is where the crime took place, it is a scene of crime. The Governor is hereby prohibited to access those offices till the application to be directed to be filed is heard and determined.**
 - ii. Since it is public money that is involved, the Director of IFMIS is directed not to allow the 13 accused persons i.e from 1-13 access to the Government of Samburu accounts till the application to be filed is heard and determined.**
 - iii. The DPP to file a formal application and have it served on the accused persons.**
7. The court also ordered that the applicant be released on a bond of Kshs 150 million with one surety of a similar amount or a cash bail of Kshs 100 million.
8. The applicant is aggrieved by the orders of the court and has lodged a request for revision by way of a letter from his Advocates, V.A. Nyamodi & Co. Advocates, which is undated but was received in court on 2nd April 2019.

9. Mr. Nyamodi, Learned Counsel for the applicant, urges the court to revise the terms of bond issued by the court which are completely outrageous and unprecedented. It is also his argument that they go against the bail and bond policy which requires that bail and bond terms should not be excessive and should not be greater than is necessary to ensure that the accused person attends court. It is asserted on behalf of the applicant that as Governor, he is not a flight risk and will attend court.

10. I note that the trial court gave directions for a formal application to be made with respect to the request from the DPP that the Governor is denied access to Samburu County offices; that the court issues orders that render it impossible for him to discharge the functions of Governor of Samburu County, and that the Director of IFMIS bars the applicant and his co-accused access to the IFMIS platform. It appears, however, that the Court did issue these orders on an interim basis.

11. I further note that Mr. Nyamodi has not, rightly so in my view, made any representations in this application for revision with respect to the above orders. I will therefore confine myself in this ruling to the application for revision of the bail terms imposed on the applicant by the trial court.

12. The considerations that should guide a court in determining whether or not to admit a person to bail or bond are set out in the Bail and Bond Policy Guidelines, 2015. In her decision in **Republic v Frederick Leliman & Others Criminal Case No. 57 of 2016**, Lesiit J observed as follows with respect to the application of these Guidelines:

“60. Under the Bail and Bond Policy Guidelines, (BBIC) the courts have a duty to balance the rights of an accused person and the interest of justice. As much as the courts are expected to preserve the liberty of an accused person, public interest must also be taken into account. The State has a duty to preserve public safety between the time of arrest and the trial of the accused, and to protect the integrity of the criminal justice system. (See BBIC).

61. Undermining the criminal justice system includes instances where there is a likelihood that witnesses may be interfered with or intimidated; the likelihood that accused may interfere with the evidence; or may endanger an individual or individuals or the public at large; likelihood the accused may commit other offences. In this instances where such interferences may occur the court has to determine whether the integrity of the criminal process and the evidence may be preserved by attaching stringent terms to the bond or bail terms; or whether they may not be guaranteed in which case the court may find that it is necessary to subject the accused to pre-trial detention.

13. In this case, the applicant is charged with various corruption-related offences committed within and in his capacity as Governor of Samburu County. These are serious offences, particularly given the devastation that corruption wreaks on our society and the well-being of citizens. However, and regrettably so, Parliament does not seem to treat corruption offences with the seriousness they deserve- the penal consequences for the offences which the applicant faces are a fine not exceeding Kshs 1,000,000 or a term of imprisonment for ten years or both. The saving grace may be found in section 48(2) which provides for a mandatory fine. Parliament urgently needs to look at the provisions of ACECA if any inroads against corruption are to be made in this country.

14. At any rate, given the nature and circumstances of this case and the penalty provided in law, it is my view that the bond terms imposed on the applicant are excessive, and may well amount to a denial of bail. It has not been demonstrated that he is a flight risk, and I note that the Prosecution did not oppose his application for bail. The applicant has also been barred from accessing County offices, so the apprehension that he may interfere with witnesses is not a consideration.

15. I accordingly vary the said terms as follows:

i. The applicant may be released on a bond of Kenya shillings thirty million (Kshs 30,000,000) and one surety of a similar amount.

ii. In the alternative, the applicant may be released on a cash bail of Kenya Shillings Ten Million (Kshs 10,000,000).

16. The remaining orders of the trial court shall stay in force pending hearing and determination of the application by the DPP as directed by the trial court.

17. Orders accordingly.

Dated and Signed at Nairobi this 3rd day of April 2019

MUMBI NGUGI

JUDGE