



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

ACEC REVISION NO 14 OF 2019

(CONSOLIDATED WITH ACEC REVISION NO 15, 16, 17, 19, 20 & 21 of 2019)

1. MANASSEH KARANJA KEPHA.....1ST APPLICANT
2. PETERSON ANDREW NJERU.....2ND APPLICANT
3. PHILOMENA KAVINYA NZUKI ALIAS P.K. NZUKI.....3RD APPLICANT
4. JAMES MIMI MBUGUA ALIAS J MBUGUA.....4TH APPLICANT
5. NG'ANG'A MUNGAI NG'ANG'A.....5TH APPLICANT
6. ALICE NJERI MUNDIA.....6TH APPLICANT
7. EKEYA ALUMASI GHONZOUR.....7TH APPLICANT
8. CHARITY MURINGO NDIRITU.....8TH APPLICANT
9. ELIZABETH WANJIRU NDIRITU.....9TH APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. Before me are nine applications numbering revision Nos.14-22 filed by Manasseh Karanja Kefa, Peterson Andrew Njiru, Philomena Kavinya Nzuki, James Mimi Mbugua, Ng'anga mungai Ng'anga, Alice Njeri Mundia, Ekeya Alumasi Ghonzour, Charity Muringo Nderitu and Elizabeth Wanjiru Nderitu who for purposes of ease reference shall be referred to as the 1st to 9th applicants respectively. The applicants sought revision of the orders of the Chief Magistrate's Court with respect to bail terms granted to them in Nairobi Chief Magistrate's Court Anti-Corruption and Economic Crimes Case No 8 of 2019- Republic v Evans Odhiambo Kidero and 15 Others. Save for revision application No. 14/2019 which was filed by way of a substantive application pursuant to sections 123 (2) &(3), 362 ,364 (1)(b), 366 of the CPC and article 49(1)(h) of the constitution, the rest of the applications were brought vide a letter for revision addressed to the Judge. With the consent of Counsel for the parties, the applications were consolidated and heard together, with ACEC Revision No. 14 of 2019 as the lead file. However, before hearing commenced, the applications in relation to the 5th, 7th and 9th applicants were withdrawn hence the hearing proceeded only with the remaining applicants (1st, 2nd, 3rd, 4th, 6th and 8th applicants).

2. The Applicants together with others were arraigned before the chief magistrate's court Nairobi on 29th April 2019 facing various corruption related charges which they denied and a plea of not guilty entered and the matter set to commence trial. They were however released on various bond and cash bail terms which they are seeking to be revised on grounds that they are harsh and excessive in the circumstances.

3. ACEC Revision No. 14 of 2019 was brought on behalf of Manasseh Karanja Kefa the 1st applicant who is also the 5th accused person before the Chief Magistrate's court. He is charged with two counts (counts 16 and 17). In respect to count 16, he is charged with the offence of conspiracy to commit an act of corruption contrary to section 47A (3) as read with section 48(1) of the Anti- Corruption and Economic Crimes Act 2003 (hereafter ACECA). Particulars of the offence in this count are that between the 3rd and 7th June 2011 in Nairobi City

County within Nairobi County in the Republic of Kenya jointly conspired to commit an offence of corruption namely defrauding the City Council of Nairobi of the sum of Kshs. 10,000,000.

4. Count 17, he was charged of abuse of office contrary to section 46 as read with section 48 of the Anti-Corruption and Economic Crimes Act (ACECA). Particulars are that on 3rd day of June 2011 within the city council of Nairobi being an accountant of the city council of Nairobi used his office to improperly confer a benefit to Steven Kariuki Mburu (deceased) trading as Wachira, Mburu, Mwangi and co. Advocates to wit Kshs 10, 000,000. The trial court granted him a cash bail of Kshs 5,000,000 or a bond of Kshs. 12,000,000.

5. ACEC Revision No. 15 of 2019 was brought on behalf of Peterson Andrew Njiru the 2nd applicant also the 9th accused person before the Chief Magistrates court. He is charged with two counts (counts 16 & 18). On count 16 he was jointly charged with 3 others with the offence of conspiracy to commit an act of corruption contrary to section 47A (3) as read with section 48(1) of the Anti- Corruption and Economic Crimes Act 2003 (hereafter ACECA). The particulars of the offence in this count are that between the 3rd and 7th June 2011 in Nairobi City County within Nairobi County in the Republic of Kenya jointly conspired to commit an offence of corruption namely defrauding the City Council of Nairobi of the sum of Kshs. 10,000,000.

6. With regard to count 18, he was charged with abuse of office contrary to section 46 as read with section 48 of the Anti-Corruption and Economic Crimes Act (ACECA). Particulars are that on 3rd day of June 2011 within the city council of Nairobi being an accountant of the city council of Nairobi used his office to improperly confer a benefit to Steven Kariuki Mburu (deceased) trading as Wachira, Mburu, Mwangi and co. Advocates to wit Kshs 10, 000,000. The trial court granted him a cash bail of Kshs.4 million or a bond of Kshs. 10,000,000.

7. ACEC Revision No. 16 of 2019 relates to Philomena Kavinya Nzuki alias P.K Nzuki the 3rd applicant also the 6th accused person before the Chief Magistrate's Court. She is facing two counts namely; counts 1 & 6. In relation to count 1, she is jointly charged with 9 others for the offence of conspiracy to commit an act of corruption contrary to section 47A (3) as read with section 48(1) of the Anti- Corruption and Economic Crimes Act 2003 (hereafter ACECA). The particulars of the charge are that between 2nd January and 14th January 2014 within the republic of Kenya jointly with others not before the court conspired to commit an offence of corruption namely to defraud the Nairobi City County Kshs.58, 000,000.

8. The 3rd applicant is also facing an additional count (count 6) for Abuse of Office contrary to section 46 as read with section 48 of the Anti-Corruption and Economic Crimes Act. The particulars of the charge are that on the 6th day of January 2014, in Nairobi City County within the Republic of Kenya being an accountant at the Nairobi City County, used her office to improperly confer a benefit to Steven Kariuki(deceased) trading as Wachira, Mburu, Mwangi & Company Advocates with Kshs. 58,000,000 by unlawfully processing the said payment. The trial court granted her a cash bail of Kshs.8,000,000 in default a bond of Kshs. 20,000,000.

9. ACEC Revision No. 17 of 2019 is brought by the 4th applicant who is also the 11th accused person before the Chief Magistrate's court. He is facing two counts namely; counts 1 and 7. The charge and particulars in respect to county 1 is similar to the one preferred against the 3rd applicant already stated herein above.

10. Concerning count 7, he is facing the charge of Abuse of Office contrary to section 46 as read with section 48 of the Anti-Corruption and Economic Crimes Act (count 7). The particulars of the charge are that on the 6th day of January 2014, in Nairobi City County within the Republic of Kenya being an accountant at the Nairobi City County, used his office to improperly confer a benefit to Steven Kariuki(deceased) trading as Wachira, Mburu, Mwangi & Company Advocates to wit Kshs. 58,000,000 by unlawfully approving the said payment. The trial court granted him a cash bail of Kshs.8,000,000 or a bond of Kshs. 20,000,000.

11. Touching on Revision no 19, the same is brought on behalf of Alice Njeri Mundia the 6th applicant also the 10th accused person before the magistrates court who is facing counts 1 and 3. The charge with regard to 1 and its particulars have already be stated herein above. Concerning count 3 she was charged with abuse of office contrary to section 46 as read with section 48 of the Anti-Corruption and Economic Crimes Act. The particulars of the charge are that on the 6th day of January 2014, in Nairobi City County within the Republic of Kenya being an accountant at the Nairobi City County, used her office to improperly confer a benefit to Steven Kariuki(deceased) trading as Wachira, Mburu, Mwangi & Company Advocates to wit Kshs. 58,000,000 by unlawfully processing the said payment. The trial court granted her a cash bail of Kshs.8,000,000 or a bond of Kshs.20,000,00/=.

12. ACEC Revision No.21 of 2019 is brought on behalf of the 8th applicant also the 8th accused person before the Chief Magistrate's court (counts 16 and 19). She is jointly charged with 3 others with the offence of conspiracy to commit an act of corruption contrary to section 47A (3) as read with section 48(1) of the Anti- Corruption and Economic Crimes Act 2003 (hereafter ACECA). The particulars of the offence in this count (count 16) are that between the 3rd and 7th June 2011 in Nairobi City County within Nairobi County in the Republic of Kenya jointly conspired to commit an offence of corruption namely defrauding the City Council of Nairobi of the sum of Kshs. 10,000,000.

13. She is facing an additional count of Abuse of Office contrary to section 46 as read with section 48 of the Anti-Corruption and Economic Crimes Act (count 19). The particulars of the charge are that on the 7th day of June, 2011, in Nairobi City County within the Republic of Kenya being an internal auditor at the Nairobi City County, used her office to improperly confer a benefit to Steven Kariuki Mburu (deceased) trading as Wachira, Mburu, Mwangi & Company Advocates to wit Kshs. 10,000,000 by unlawfully processing this payment. The trial court granted her cash bail of Kshs. 8,000,000 in default be released on a bond of Kshs. 20,000,000.

Hearing

14. During the hearing, Mr. Gatumuta counsel for the 1st applicant reiterated averments contained in the affidavit in support of the application sworn by the applicant on 2nd May 2019. Learned counsel argued that the applicant is a citizen of Kenya with a fixed abode and is therefore not a flight risk. That being a public servant employed by the City Council of Nairobi, raising cash bail of Kshs. 4,000,000 or

bond of Kshs. 10,000,000 is unimaginable and unaffordable. That since the start of investigations, the 1st applicant has co-operated with the investigators. That the cardinal pillar of bail /bond is to ensure attendance of the accused person and that the terms of cash bail and bond are excessive, exorbitant, unjust and well beyond the applicant's means, his relatives and his friends.

15. Counsel relied on Article 49 of the Constitution and section 123(2 &3) of the Criminal Procedure Code and various judicial precedents to urge the court to *inter alia* set aside the bail terms imposed by the trial court and to grant bail terms that are in tandem with the applicant's means. To buttress his submissions counsel referred the court to the case of **Andrew Young Otieno vs R(2017) eKLR** where an accused person charged with robbery with violence was ordered to be released on a bond of 5 million with one surety of same amount or a cash bail of 2 million was reduced to a bond of 1million or cash bail of Kshs.2000, 000. The court in that case amplified the objective of release of an accused person on bail subject to his attendance in court while trial is on going and that the accused is presumed innocent until proved guilty. Counsel further referred the court to two more cases where bail terms granted by lower courts were reduced on the same principle for being excessive inter alia, **Stephen Githinji Karanja vs R (2018) eKLR** and **Moses Kasaine Lenolkulal vs R in H. C Anti Corruption And Economic Division ACAC Revision no 7 of 2019.**

16. Mr. Madowo appearing for the 2nd applicant, Mr. Theuri for the 3rd applicant, Mr. Odhiambo for the 4th and 8th applicants and Mr. Mburu for the 6th applicant associated themselves with the submissions of Mr. Gatumuta. It is their common submission that the bail terms set by the trial court were manifestly harsh, excessive, unreasonable and unethical to the cardinal utility of bail. Counsel further stated that the applicants are Kenyan citizens with families residing and working for gain in Nairobi. That they have no other abode or residence outside of the Court's jurisdiction and do not intend to abscond trial in any event.

17. Counsel further submitted that the Applicants are public servants, have worked for the county of Nairobi for over 10 years, they are of modest means and rely solely on their salaries of about Kshs.100,000 to earn a living. That by dint of section 62(1) ACECA the Applicants' salary were effectively from 29th April 2019 reduced by 50% and this will by no doubt worsen their financial position and aggravate their ability to meet the aforesaid excessive bail/bond terms.

18. They also cited Article 49(1)(h) of the Constitution which entitles the applicants to be released on bond or bail on reasonable condition, pending a charge or trial unless there are compelling reasons not to be released. It was thus counsel's submissions that the bail and bond terms of the applicants be reduced to Kshs. 500,000 cash bail or in the alternative a bond of Kshs.1,000,000 with or without surety of similar amount.

19. The Director of Public Prosecution on their part through Mrs. Aluda opposed the application relying on grounds of opposition filed on 7th May 2019 arguing that bail is not absolute hence it is subject to certain limitations such as the gravity of the offence which in this case is the huge amount of money involved. To support her position, counsel referred the court to the case of **R vs Milton Kabulit & 6 others (2011) eKLR** and **Watiro vs R (1991) 220** where the court stated that bail is not an inalienable right.

20. M/s Aluda opined that in granting bail the court must be guided by certain guidelines among them, public interest, seriousness of the offence, interference with witnesses and past conduct. Counsel argued that the bail terms granted are commensurate with the offence committed hence should not be interfered with.

Determination

21. I have considered the application herein, oral submissions by counsel plus authorities quoted. This court's authority has been summoned pursuant to Articles 49(h) and 165(6) &(7) of the Constitution and sections 123, 362 and 364 of the CPC.

22. Under section 362 of the Criminal Procedure Code (CPC), the High Court has jurisdiction to revise decisions of subordinate courts in the following terms:

The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.

23. With respect to the exercise of the powers of revision by the High Court, section 364 of the CPC provides that:

(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—

(a)...

(b) in the case of any other order other than an order of acquittal, alter or reverse the order.

(c);

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence.

24. The constitutional provisions with respect to bail are given statutory effect in section 123 and 123A of the Criminal Procedure Code. Section 123 provides that:

When a person, other than a person accused of murder, treason, robbery with violence, attempted robbery with violence and any 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.

25. Section 123A CPC states as follows:

Exception to right to bail

(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.

26. These provisions have been further underscored in the **Bail and Bond Policy Guidelines** produced by the National Council on the Administration of Justice in March 2015-see in particular Guideline 4.9.

27. In addition to these constitutional, statutory and policy provisions, the principles that a court should consider in determining if and the amount of bail or bond to grant an accused person has been the subject of judicial consideration in many well- reasoned decisions in our courts. These principles have not changed much over the years, and the decision of Chesoni J in **Ng'ang'a v Republic (1985) eKLR** is a classic example.

28. While the court in that case declined to release the accused on bail, it did enunciate the principles that a court should bear in mind. It stated as follows:

“Just as finding one accused charged with others jointly guilty or innocent does not implicate or set free the co-accused and is not discriminatory treatment, so is the case with granting or refusing bail to one or more accused persons charged jointly with others some of who may be out on bail. This is so because the facts, circumstances and merit of one co-accused may be such that granting him bail is justified, whereas those of his co-accused may mitigate against bail. Each case must be considered on its own merit, facts and circumstances before the court exercises its discretionary powers of granting or refusing bail. (Emphasis added)

29. Even as far back as 1985 and in a considerably less liberal political and legal environment, the constitutional basis of the right to bail was recognised. Chesoni J went on to observe as follows:

“Admittedly, admission to bail is a constitutional right of an accused person if he is not going to be tried reasonably soon, but before that right is granted to the accused there are a number of matters to be considered. Even without the Constitutional provisions (section 72(5)) generally in principle, and, because of the presumption that a person charged with a criminal offence is innocent until his guilt is proved, an accused person who has not been tried should be granted bail, unless it is shown by the prosecution that there are substantial grounds for believing that:

(a) the accused will fail to turn up at his trial or to surrender to custody; or

(b) the accused may commit further offences; or

(c) he will obstruct the course of justice

The primary purpose of bail is to secure the accused person's attendance at court to answer the charge at the specified time. I would, therefore, agree with Mr. Karanja that the primary consideration before deciding whether or not to grant bail is whether the accused is likely to attend trial. In considering whether or not the accused will attend his trial the following matters must be considered:

(a) The nature of the charge or offence and the seriousness of the punishment to be awarded if the applicant is found guilty: Where the charge against the accused is more serious and punishment heavy, there are more probabilities and incentive to abscond, whereas in case of minor offences there may be no such incentive.

(b) The strength of the prosecution case. The court should not be willing to remand the accused in custody where the evidence against him is tenuous, even if the charge is serious. On the other hand, where the evidence against the accused is strong, it may be justifiable to remand him in custody.

(c) The character and antecedents of the accused. Where the court has knowledge of the accused person's previous behaviour these may be considered, but by themselves they do not form the basis for refusing bail, although coupled with other factors may justify a refusal of bail.

(d) Accused's failure to surrender to bail on previous occasion will by itself be a good ground for refusing bail.

(e) Interference with prosecution witnesses. Where there is a likelihood of the accused interfering with prosecution witnesses if he is released on bail, bail may be refused, but there must be strong evidence of the likelihood which is not rebutted and it must be such that the court cannot impose conditions to the bail to prevent such interference."

30. In his decision in **Andrew Young Otieno v Republic [2017] eKLR**, Kimaru J observed as follows:

"This court agrees with the Applicant that the purpose of imposing bond terms is to secure the attendance of the accused before the court during trial. The terms imposed by the trial court should not be such that it amounts to denial of the constitutional right of the accused to be released on bail pending trial. The trial court must consider the circumstances of each accused when determining the bond terms to be imposed. In the present application, it was clear to this court that the Applicant was unable to raise the bond terms imposed by the trial magistrate. He has been in remand custody for a period of over two years." (Emphasis added).

31. Lesiit J expressed a similar view in **Joses Kimathi Murumua & 3 Others v Republic [2013] eKLR**. After considering the factors set out in **Ng'ang'a v Republic (supra)** she observed that:

"...The learned trial magistrate, in exercise of discretion whether or not to grant bail to all the accused person jointly charged in this case, would have been perfectly justified to give varying bond terms to the accused persons depending with the merits, circumstances of their case and the factors unique to each of them. The learned trial court is mandated to consider the bond application by each accused person and to examine each accused person, based on the peculiar facts of each accused person, and the circumstances pertaining to their respective case and also the merits of the application. Having done so, the trial court would then be expected to determine which of the accused person qualify to be granted bond, and which ought not to and give reasons for each decision. To give an example a court would be in order to give a child bond and deny an adult based on the age and unique circumstances of each accused." (Emphasis added).

32. In her decision in **ACEC Misc Appn. No. 12 of 2018-Ferdinand Odoyo Matano v Republic**, Ong'udi J reviewed the bail terms imposed on the applicants downwards in order to take into account their personal circumstances.

33. The applicants herein have been granted bail pursuant to Article 49 (1)(h) of the constitution and section 123 of the CPC. The issue of likelihood of interfering with witnesses or security of the accused does not arise. What is in contention is not about release of the applicants on bail but rather the terms imposed are not reasonable in the circumstances of this case. There is no doubt that Article 49 (1)(h) guarantees to all accused persons the right to be released on bail pending trial unless there are compelling reasons. In the instant case there were no compelling reasons given to deny the applicants' right of being released on bail.

34. Article 49 (1)(h) must be read alongside Article 50(2) with respect to the rights of an accused person to a fair hearing. One of the core components of the right to a fair hearing is the right to be presumed innocent until proven guilty and therefore not to be subjected to harsh bail terms that will negate the every essence of that principle. If the bail terms imposed are such that it is impossible to be released on bail, then it will be tantamount to denying one the right to being released on bail pending trial hence curtailing fair trial and individual liberties thus facilitating pre trial punishment on an accused person much in advance before due process. The primacy of the principle of being presumed innocent until proved guilty should however be balanced alongside other factors as enshrined in bail terms policy guidelines and other legal instruments without compromising the interest of the complainant being a victim of the offence complained of.

35. We can only ensure respect for the constitutional dictates 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 take into account the personal circumstances of the accused person(s).

36. In this case, the trial court was under a duty to consider each of their applications for bail on their merits, and apply to them the principles set out above among them likely hood that accused is likely not to turn up.

37. There is no doubt that the key consideration in granting bail is the fact that an accused person if released will turn up for trial. All the

applicants are employees of the Nairobi city County. They are public servants earning a modesty salary of about Kshs 100, 000 now reduced into half pursuant to section 62 of ACECA. By all standards they are not likely to raise the kind of bail terms imposed. In my opinion, they are likely to suffer pre trial punishment before the trial commences. Their employment is a factor the court can not ignore to influence terms of bail to impose. The likelihood of not absconding is highly mitigated by virtue of wanting to preserve their jobs. In any event, when the applicants were summoned during investigations, they were cooperative and never ran away. Their previous conduct is therefore positive hence a ground to consider in assessing bail terms.

38. More importantly and the consideration that is at the core of the applications before me is the question of how the court should proceed where more than one person are jointly charged with a criminal offence. The principle that emerges from the cases set out above as well as section 123A of the CPC is that each accused person's case, and each accused person's entitlement or otherwise to bail, must be considered and examined on its own facts and merits, and the accused person's personal circumstances taken into account.

39. For the above reasons stated, it is my finding that the trial court's bail terms imposed are on the higher side considering circumstances under which the offences were committed in the course of performing their official duty. I will accordingly revise and set aside the terms imposed by the Chief Magistrate's Court on the six applicants in this matter with orders as follows:

- a. That the 1st applicant (5th accused), 2nd applicant (9th accused) and 8th applicant (8th accused) bail terms are hereby reduced to a bond of Kshs.3,000,000 with one surety of the same amount each or cash bail of Kshs 1,500,000.**
- b. That the 3rd, 4th and 6th applicant (6th 11th and 13th accused persons respectively) shall have their bail terms reduced and be released on a bond of Kshs 6,000,000 with one surety of the same amount each or cash bail of Kshs 2,000,000.**
- c. That the bond approvals shall be done before the Chief Magistrate's Anti-Corruption Court seized of ACEC No. 8 of 2019.**
- d. The rest of the terms imposed by the trial court shall remain in force.**

Orders accordingly.

DATED DELIVERED AND SIGNED AT NAIROBI THIS 14TH DAY OF MAY, 2019

J.N. ONYIEGO

JUDGE