



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION MILIMANI

ACEC REVISION NO. 37 AND 38 OF 2019 (CONSOLIDATED)

VINCENT MAKONJIO.....1ST APPLICANT

LYDIA OWINO.....2ND APPLICANT

DENNIS SEBASTIAN MULAA.....3RD APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The applicants herein together with others were on 9th September 2019 jointly charged with various offences before the Milimani Chief Magistrate's Court in ACC No. 26/2019. In particular, the applicants were charged with the offence of conspiracy to defraud contrary to Section 317 of the penal code (count I). Particulars are that, between 12th January 2013 and 2nd May 2018 within the Republic of Kenya, being the Managing Director, Board of Directors of the Lake Basin Development Authority, the consultants and Main Contractor conspired to defraud the Lake Basin Development Authority of Kshs.667,275,202/= in respect of tender for construction, development and financing of retail mall at Kanyakwar, Kisumu known as the Lake Basin Development Authority, Lower Kanyakwar Phase 1 project.

2. Regarding Count 2, Dennis Sebastian Mulaa (3rd applicant) together with 16 others 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 2003. Particulars are that, between 1st December 2014 and 19th December 2014 in Kisumu County Within the Republic of Kenya being members of the Lake Basin Development Authority Board of Directors and Managing Director respectively, jointly and wilfully failed to comply with the law relating to procurement to wit Section 47 (a) of the Public Procurement and Disposal Act 2005 and regulation 10 (m) of the Public Procurement and Disposal Regulations, 2006 by irregularly approving the variation of the contract for the Lake Basin Development Authority, Lower Kanyakwar Phase 1 Project.

3. Touching on count 3, the 3rd applicant (Dennis Sebastian) was again charged together with 16 others with the offence of abuse of office contrary to Section 46 as read with Section 48 of the Anti-Corruption and Economic Crimes Act 2003. Particulars reads that, between 18th and 19th December 2014, in Kisumu County within the Republic of Kenya being members of the Lake Basin Development Authority Board of Directors jointly improperly conferred a benefit of Kshs.1,300,000,000 to Erdermann property Ltd by irregularly approving the variation of the contract for the Lake Basin Development Authority, Lower Kanyakwar Phase 1 from Kshs2,.451,035,64/= to Kshs 3,751,035,643.

4. The 1st and 2nd applicants were jointly with three others charged with 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 2003 (Count 20). Particulars states that, between 12th January 2013 and 10th May 2016, being the proprietors of quantec consultancy, Directors of Feradon Associates and Symbion Kenya Ltd Consultants for Lake Basin Development Authority in respect of the Lake Basin Development Authority, Lower Kanyakwar Phase 1 Project, wilfully failed to ensure that the said project was carried out in accordance with the Public Procurement and Disposal Act 2005 and the Public Procurement and Disposal Regulations, 2006 as required by Section 27 (4)and 47 of the Public Procurement and Disposal Act 2005.

5. The 1st applicant was separately charged with deceiving principal contrary to Section 41 (1) as read with Section 48 of the Anti-Corruption and Economic Crimes Act No. 3/2003. Particulars are that on 23rd June 2016 within Kisumu County in the Republic of Kenya being the Mechanical Engineer respectively for Feradon Associates gave a misleading statement to the principal, Lake Basin Development Authority by submitting final accounts of Kshs.152,562,145.36 which was over and above the actual value of the mechanical works done in respect of the Lake Basin Development Authority, lower Kanyakwar Phase 1 project to the detriment of the said principal.

6. The 2nd applicant, was also separately charged with deceiving principal contrary to Section 41 (1) as read with Section 48 of the Anti-Corruption and Economic Crimes Act No. 3 of 2003 (Count 24). Particulars are that, on 21st June 2016 Kisumu County in the Republic of Kenya, being the Electrical Engineer for Feradon Associates, gave a misleading statement to the principal, Lake Basin Authority by submitting final accounts of Kshs 441,990,535.27 which was over and above the actual value of the electrical works done in respect of the Lake Basin Authority, Lower Kanyakwar Phase 1 project to the detriment of the 2nd principal.

7. Upon entering a plea of not guilty, the court granted the applicants bail subject to fulfilling certain conditions. Dennis Sebastian Mula (3rd applicant) was directed to deposit cash bail of 6 million or in the alternative execute a bond of 20 million with one surety of same amount. Aggrieved with the said bail terms which he termed as unreasonable and excessive, he wrote to the High Court a letter dated 13th September 2019 and filed on 16th September 2019 seeking review of the bail terms.

8. Consequently, revision file No. 38/19 was opened and orders for service of the application upon the DPP made and interpartes hearing scheduled for 19th September 2019.

9. Similarly, Vincent Makonjio Ogenge (1st applicant) and Lydia Owino (3rd applicant) also moved this court through a notice of motion dated 10th September 2019 and filed on 23rd October 2019 vide Rev. Case No. 37/19 seeking orders reviewing downwards the bail terms of Kshs.10,000,000 million cash bail or bond with surety of 30 million imposed by the lower court to a cash bail of 1 million or bond with surety of 2 million. The matter was certified urgent and interpartes fixed for 19th July 2019.

10. On 23rd September 2019, Rev. file No. 37/19 and 38/19 were consolidated with the consent of both parties. The two then proceeded under file No. 37/19 as the lead file with Vincent Makonjio Ogenge as the 1st applicant, Lydia Owino the 2nd applicant and Dennis Sebastian Mula as the 3rd applicant. During the hearing, counsel submitted orally arguing that the bail terms imposed were improper, incorrect and illegal hence the prayer for revision under Article 165 (6) and (7) of the Constitution and Sections 362 and 364 of the CPC.

Submissions by the 1st and 2nd Applicants

11. Mr. Okoth appearing for the 1st and 2nd applicants reiterated averments contained in the affidavit in support of the application deponed on 10th September 2019 by Lydia Owino with the authority of the 1st applicant. Counsel submitted that the terms of bail imposed were unreasonable and excessive in the circumstances. He further submitted that the terms imposed negated the letter and spirit of Article 49(1)(h) of the Constitution which guarantees release of an accused person on reasonable bail pending trial.

12. Counsel contended that, unless reviewed to reasonable terms preferably Kshs 1 million cash bail or Kshs2 million bond with surety, the applicants will most likely serve pre-trial sentence thus taking away their right of being presumed innocent until proven guilty.

13. Submitting that the applicants are not a flight risk and that they are breadwinners to their respective families, Mr. Okoth urged the court to review the terms imposed. Further, counsel informed the court that the second applicant was sick and needed special medical attention which was not available in the prison's medical facility.

Submissions by the 3rd Applicant

14. Mr. Wambui S. holding brief for Mr. Akenga for the 3rd applicant, basically associated himself with the sentiments and submissions expressed by the 1st and 2nd applicants. He urged the court to find that the 3rd applicant is a senior citizen who is aged 71 years and therefore susceptible to illness hence likely to suffer while in custody.

15. Learned counsel termed the terms imposed as punitive and that superior courts have in several occasions reduced excessive bail terms to reasonable terms. To buttress this position, Mr. Wambui referred the court to the case of **Moses Kasaine Lenolkulal vs R ACEC Revision No. 7/19 where the court** reviewed bond terms from 150 million with surety to Kshs 30,000,000/= and cash bail of Kshs10 million down from Kshs 50 million.

Submissions by Respondent

16. Mr. Kihara appearing for the state opposed the application arguing that the terms imposed were reasonable owing to the seriousness of the offences preferred. Counsel submitted that tax payers lost over Kshs1.3 million after the contract was illegally varied from Kshs 2.4 million to Kshs3.7 million and public interest demand that the terms imposed are justified.

Analysis and Determination

17. I have considered the application herein and oral submissions by both counsel. The application is brought under Article 165 (6) and (7) of the Constitution and Section 362 and 364 of the Criminal Procedure Code. Under Article 165 (6) of the Constitution, the High Court is clothed with supervisory jurisdiction to oversee judicial operations of the subordinate courts and over any person, body or authority exercising judicial or quasi-judicial function. Sub Article 7 goes further to provide that, in exercise of its supervisory role, the High Court may call for record of any proceedings before any subordinate court or person, body or authority referred in Clause 6 and may make any order or give any direction it considers appropriate and ensure the fair administration of justice.

18. In execution of the above stated jurisdiction, Section 362 of the Criminal Procedure Code is the operative provision in so far as criminal proceedings are concerned. Under this provision, the High Court can call for and examine any criminal proceedings before any subordinate

court for the purpose of satisfying itself as to the correctness, illegality or propriety of any finding, sentence, order recorded, or passed, and as to the regularity of any proceedings of any such subordinate court.

19. The crux of the application herein is not about the denial of bail to the applicants but rather the imposition of excessive bail terms. It is not lost in my mind that bail is a constitutional right guaranteed under Article 49 (1) (h) of the Constitution. I am also alive to the fact that, once bail is granted, the imposition of bail terms is purely a matter of discretion exercisable by the trial court in a fair and judicious manner.

20. For the court to interfere with such discretionary power, the applicant (accused) must satisfy the superior court that the presiding judicial officer or judge did act in excess of his mandate or in applying a wrong principle thereby acting incorrectly, illegally, abused his or her discretion or acted unreasonably by giving unreasonable bail terms thus technically denying an accused person his inalienable right to liberty. **(See Jose Kimathi Murumua and 3 others vs R (2013) eKLR).**

21. Article 49 (1) (h) of the Constitution provides that an accused person has the right to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released. This right is further solidified with Article 50(2) which underscores the inalienable right of being presumed innocent until the contrary is proved.

22. From the two cited Articles, it is clear that any act or order which tends to curtail enjoyment of any constitutional right prescribed in the supreme law (constitution) must be corrected or set aside for the sake of attaining substantive justice. In the case of **R vs Nuseiba Mohamed Haji Osman (2018) eKLR** the court had this to say:

“Denial of a constitutional right is not a matter to be treated lightly and therefore any claims made against an accused person aimed at curtailing the constitutional right to liberty must not be made on speculation or conjecture”.

23. The primary purpose of granting bail to an accused person is to secure attendance as and when required during the trial. It is not a right to be withheld whimsically through the back door be it denial generally or wide imposition of unreasonable or excessive bail terms. **(See R vs Godfrey Madegwa and 6 others (2016) eKLR)** where the court stated that:

“The primary purpose for bail is to secure the accused person’s attendance to court to answer the charge at the specified time. I would therefore agree with Mr. Karanja that the primary consideration before determining whether or not to give bail is whether the accused is likely to attend trial”.

24. Were the applicants granted unreasonable or excessive bail terms? The criteria or guidelines set to determine which bail terms to impose upon granting an accused bail can be found in Section 123 and 123A of the Criminal Procedure Code and the bond and bail terms policy guidelines. Among the key factors to be taken into consideration as provided under Section 123A of the Criminal Procedure Code are:

(a) The nature of the 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 fulfilment of obligations under previous grants of bail; and

(d) The strength of the evidence of his having committed the offence.

25. Having acknowledged that bail is a constitutional right and not a privilege to be withheld or restricted without any justifiable cause, it is incumbent upon this court to assess the reasonableness of the impugned terms. Having granted bail, the court was satisfied that there were no compelling reasons to deny the applicants bail. In particular, the court was satisfied that the applicants were not a flight risk.

26. Are the terms imposed unreasonable? According to the applicants, the terms are excessive and that they cannot afford. On the other hand, the respondent is arguing that considering the seriousness of the offence, the bond terms are reasonable. It was Mr. Kihara’s submission that the offences relating to corruption are such serious crimes which the courts should take as serious offences.

27. It is not denied that the first count on conspiracy to defraud is a misdemeanour and the other counts are Punishable with a fine of 1 million in default 10 years imprisonment and a mandatory fine of double the amount lost or benefited. At this stage the amount purportedly lost is an allegation yet to be proved. To determine the seriousness of an offence based on the value of the subject property involved will, if strictly applied, deny entirely a majority of the accused persons the right to bail.

28. When granting bail, a court should not lose sight of the economic status of our country. Courts should take into consideration the prevailing economic situation and the practicality of some bail terms. Which offence between murder and corruption is more serious than the other? Obviously, murder is more serious than the corruption related offences considering the severity of the penalty it attracts which stretches up to a death penalty. In the case of **Michael Juma Oyamo and another v Republic (2019) eKLR** the court of appeal gave a cash bail of 1million or a bond of 2million with one surety in relation to a murder case which in my opinion is more serious than ordinary criminal offences such as conspiracy to defraud or corruption.

29. Without losing sight of the need to protect society from the evil of corruption, in all fairness, courts should act without succumbing to undue pressure from the public or other external forces. In the same vein, courts should protect society against the evils of corruption and at the same time promote people’s confidence by not giving extremely lenient bail terms. It is all about the delicate act of balancing justice so that nobody takes advantage of the other.

30. If one was to be asked to pay 20 million cash bail or 30 million bond with surety which is far beyond the ability of majority of the Kenyan people, Article 49 (1) (h) will not serve any meaningful purpose. The applicants are still innocent until proved guilty. They should be given an opportunity to attend court from outside the prisons' facility which is not meant for the innocent but people already proved guilty.

31. Although this country has suffered perennial and endemic cases of corruption, the opportunity to punish is not at the pre-trial stage but after the trial. To grant bail terms that are beyond reach will be tantamount to withholding that right. With our fragile economy, one must face reality that bail terms should strictly not be pegged on the amount displayed in the charge sheet alone as the sole determining factor. Some amount appearing in the charge sheet could be contested, exaggerated or incorrect thus pegging bail terms on the amount claimed to have been stolen or lost will plunge majority of innocent people into pre-trial punishment.

32. As long as an accused is not a flight risk, he should be given reasonable bail terms to facilitate release so as to attend the trial while free. Further conditions like depositing of travel documents and regular reporting to the investigative agencies can as well serve the purpose. It was on this ground that Hon. Justice Mumbi found a bond of 150 million with surety or cash bail of 50 million unreasonable and had it reduced to 10 million cash bail in default a bond of 30 million with one surety in the case of **Moses Kasaine Lenolkulal vs R ACEC Revision No. 7/2019.**

33. In my view, release of the 1st and 2nd applicants on a bond of 30 million with one surety or cash bail of 10 million is excessive in the circumstances. Equally, the release of the 3rd applicant on a bond of 20 million with one surety of same amount or cash bail of 6 million is excessive.

34. Accordingly, I do hereby vary the said terms as follows:

(i) That the 1st and 2nd applicants be released on a bond of Kshs. 15million with one surety of similar amount or deposit a cash bail of Kshs. 5million

(ii) That the 3rd applicant be released on a bond of Kshs10million with one surety of similar amount or deposit a cash bail of Kshs. 4 million

(iii) The rest of the conditions imposed by the trial court shall remain in force.

(iv) The chief Magistrate's court to undertake the surety approval process

(v) That the original lower court file be returned to the trial court

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 1ST DAY OF OCTOBER, 2019.

J.N. ONYIEGO

JUDGE