



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION
ACEC REVISION 44 OF 2019
AS CONSOLIDATED WITH
ACEC REVISION NOS 47 AND 48 OF 2019

WILLIAM BILL OMODING.....1ST APPLICANT
FREDRICK ONYANGO CHERE.....2ND APPLICANT
ALEX JIMMY MUKABWA.....3RD APPLICANT

VERSUS

THE REPUBLIC

THROUGH DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

(From the Ruling of D. Ogoti (C.M.) in CMC Anti-Corruption Case No. 25 & 26 of 2019 delivered on 9th September, 2019)

RULING

1. This is a ruling arising from the ruling of the Chief Magistrate Hon. D. Ogoti delivered on 9th September 2019 in respect of ACC No. 25 of 2019 and 26 of 2019 consolidated in which he granted various bail terms to the respective accused persons who now seek revision of the same on grounds that the terms imposed were harsh, punitive and excessive in the circumstances. Before me are three consolidated revision applications seeking revision of the said ruling and or orders. By consent, ACEC Revision No. 44 of 2019, 47 of 2019 and 48 of 2019 were on 5th November 2019 consolidated with Revision No. 44 of 2019 treated as the lead file.

2. ACEC Revision No. 44 of 2019 with William Bill Omoding herein referred to as the 1st applicant and Revision No. 47 of 2019 in respect of Fredrick Onyango Chere herein referred to as the 2nd Applicant arose out of ACC No. 26 of 2019 (R v. Aguko and 25 others) in which they were jointly charged with others with various offences relating to corruption. Regarding Revision No. 48 Alex Jimmy herein referred to as the 3rd applicant, it arose out of ACC No. 25 of 2019 (R V. Aguko & 25 others) wherein he was charged together with others for various offences relating to corruption.

3. The two Anti-Corruption cases (ACC 25 & 26 of 2019) being related and having been presented in court the same day, the court consolidated them for purposes of delivering a ruling on bail application. On 9th September 2019, the court granted the 1st Applicant (William Bill Omoding) cash bail of 6 million or a bond of 20 million with one surety of similar amount, the 2nd applicant (Fredrick Onyango Chere) a cash bail of Ksh 5 million or a bond of Ksh 10 million with one surety of same amount and, Alex James Mukabwa a cash bail of 6 million or a bond of Ksh 20 million with one surety.

4. Aggrieved by the said ruling and terms of bail, the 1st applicant moved this court vide a request for review application dated 26th September 2019 but filed in court on 1st October 2019 seeking revision of the bail terms imposed terming the same as oppressive, harsh and unreasonable. The applicant asserted that the court's determination was against the well settled principles upon which an accused person may be released on bail/bond as provided in the case of **Ramadhan Idd Ramadhan and others vs. Republic [2019]eKLR**. He termed the terms imposed as unlawful, unconstitutional, oppressive and unfair. That it did not uphold the constitutional understanding that an accused person is presumed innocent until proved guilty. The application was supported by an affidavit sworn on 26th September 2019 by the applicant thus reiterating the grounds in support of the application.

5. On the other hand, Fredrick Onyango Chere the 2nd applicant (Rev. No. 47 of 2019) moved to this court with a request for review dated 22nd October 2019 and filed the same day citing similar grounds as stated by the 1st applicant. The application was supported by an affidavit sworn on the 22nd October 2019. He claimed that the terms of bail imposed were excessive and oppressive hence unconstitutional.
6. Touching on the 3rd applicant Alex Jimmy Mukabwa (Rev. No. 48 of 2019), he equally approached this court with a request for review dated and filed on the 22nd October 2019 citing similar grounds as stated in ACEC Revision Nos. 44 and 47 of 2019.
7. During the hearing, Mr. Amollo appearing for the three applicants reiterated the grounds for revision stated on the face of the application and averments contained in the affidavits in support of their respective applications. Mr. Amollo submitted that, although the applicants have already been released with the 1st applicant depositing 6 million cash bail and the 2nd and 3rd applicants depositing security, it is still necessary to review the bail terms. Counsel submitted that the 1st applicant has borrowed from friends and a shylock thus attracting high interest rates which will make it impossible to repay thus exposing the 1st applicant into economic hardship and unnecessary burden.
8. Counsel further submitted that the applicants were not a flight risk and that they were presumed innocent until proved guilty. That the primary consideration in releasing an accused person on bail is the attendance in Court. In support of this proposition, counsel made reference to the case of **Ramadhan Idd Ramadhan and 5 others (supra)**.
9. Mr. Amollo stated that the 1st applicant is a retired banker who would have to sell his property to be able to raise the cash bail imposed at 6 million. That none of the applicants was accused of receiving any money or bribe. He opined that the second applicant is an employee of the Lake Basin Authority and he cannot run away from employment. That to order him not to report his place of work while on contract will be tantamount to terminating his contract thus denying him his source of livelihood.
10. Learned counsel contended that there was no evidence that the applicant's going to his place of work will amount to interference of witnesses.
11. In response, Mr. Kihara opposed the applications stating that the amount of bail terms imposed were reasonable considering that the amount of money lost was about 4.3 billion. That in determining the bail terms imposed, the court must take into account the nature of the offence and the quantum or value of the subject matter the accused is charged with.
12. Making reference to the authority cited by the applicant in the case of **Ramadhan Idd Ramadhan**, Mr. Kihara distinguished the same stating that in that case, the accused were still in custody while in this case the applicants have already met the conditions imposed.
13. Touching on the order barring Mr. Fredrick Onyango not to visit his place of work, Mr. Kihara submitted that a court order should not be construed to mean termination of employment. That most of the witnesses are still working in the Lake Basin authority hence the likelihood of interfering with them.
14. In his rejoinder, Mr. Amollo submitted that nobody prayed for Mr. Onyango not to visit his place of work and that the Lake Basin Offices had not been declared a crime scene.

Analysis and determination

15. I have considered the applications herein, affidavits in support and submissions by both counsel. Issues that crystallize are:

(a) Whether the terms of bail imposed by the trial court are illegal, improper and unconstitutional.

(b) Whether the orders barring the second applicant from visiting his work place were oppressive.

16. This court has been called upon to determine whether there was an error, impropriety or illegality in the orders of the trial court made on 9th September 2019 in respect to ACC Nos. 25 of 2019 and 26 of 2019 in which the applicants were released on bail terms viewed to be oppressive, harsh and unconstitutional.

17. The applicants herein invoked this court's jurisdiction pursuant to Article 165(6) and (7) of the Constitution and Section 362 of the CPC. Article 165(6) confers supervisory jurisdiction by the High Court over subordinate courts and over any person, body or authority exercising Judicial or quasi judicial function but not over a superior court. Clause 7 goes further to provide that the High Court can call for the record of any proceedings before any subordinate court or person, body or authority referred to in Clause 6 and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

18. Section 362 of the CPC is the operational section which also provides that the High Court may call for and examine the records 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.

19. In the instant case, the applicants are not claiming a denial of being released on bail but rather the excessive conditions of bail terms imposed. That although already released, they still feel the effect that they were subjected to unreasonable treatment leading to the 1st applicant borrowing funds from friends and shylocks to deposit as cash bail thus attracting huge penalties and interest.

20. The law underpinning release of an accused person on bail is contained in Article 49(1)(h) of the Constitution and Section 123 and 123A of the CPC. Article 49(1)(h) provides that:

“An arrested person has the right to be released on a bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.”

21. Were the accused released on unreasonable bail terms? What is reasonable? According to the Black Law Dictionary 10th Edition the word ‘reasonable’ means:

“1. Fair, proper, or moderate under the circumstances:

2. According to reason; plausible.”

22. It is therefore incumbent upon this court to determine in the circumstances of this case, whether the court properly addressed its mind to the relevant provisions and other factors required in assessing appropriate terms of bail. Some of these factors for consideration can be found in Section 123A of the CPC which provides that in making a decision on bail terms, the court shall have regard to the relevant circumstances in particular – nature or seriousness of the offence; character, and antecedents, associations, and community ties of the accused person; and past records in fulfillment of obligations under previous grants of bail.

23. Before the High Court interferes with and revises a lower court decision it must be satisfied that the lower court must have operated on wrong legal principles or standards thus occasioning an injustice to the applicants. (See **Republic vs. Mohammed Abdalla Swazuri and 16 others [2019] eKLR** where the Court stated:

“Although clothed with these immense powers, the High Court is also subject to the observance of certain legal parameters which guide the process of revision. In other words before discharging such function the High Court must be satisfied that the subordinate court must have acted on a wrong principle in arriving at an incorrect, illegal, improper decision or order.”

24. In the instant case, the applicants are facing various charges where a sum of money amounting to 4.3 billion got lost. The court gave a cash bail of 6 million to the 1st applicant and 5 million to the 2nd and 3rd applicants each. I have had a chance to look at previous decisions in relation to **Ferdinand Ndungu Waititu Baba Yao and 12 others vs. Republic [2019] eKLR** where the accused were released on a cash bail of 15 million or a bond with surety of 30 million with the value of the subject matter being money lost at Kshs 584 million. In the case of **Moses Kasaina Lenolkulal vs. Republic [ACEC Revision 7 of 2019 Nairobi]** bond terms were revised from 100 million to 10 million and bond with surety from 150 million to 30 million. Similarly, in **Prof. Mohammed Swazuri and 23 others vs. Republic ACEC Revision No. 13 of 2019** bail terms were reviewed from 12 million to 7 million and bond with surety from 30 million to 15 million.

25. Considering the above cited case law in which the amount of money allegedly lost was in terms of millions and not billions as in this case and taking into consideration all other factors I do not find anything unreasonable in the bail terms granted by the trial court. Although the term reasonable is relative, courts’ discretion shall not be interfered with where there is no apparent miscarriage of justice. This is the guiding principle in determining reasonableness. I do not find any illegality, error or impropriety in the bail terms imposed.

26. In any event, the applicants having honoured the impugned bail terms, it is a clear manifestation that the same was reasonable and affordable. The objective of granting bail is to protect the principle that an accused person is presumed innocent until proven guilty and that no one should suffer pre-trial punishment on account of inability to meet punitive and excessive bail terms. In this case, the applicants are already out and therefore cannot claim to have their liberty curtailed or being subjected to pre-trial punishments as compared to the position in the **Ramadhan Case** where the applicants were in custody while seeking revision of their bail terms.

27. On the other hand, the claim by the 1st applicant that he borrowed money from friends or shylock is not proven by way of evidence. The claim by the 1st applicant regarding borrowed money is a mere statement which is not substantiated. (See **Evans Odhiambo Kidero vs. Republic [2019] eKLR**).

28. In any event, after depositing security and/or cash deposit, it becomes cumbersome and extremely untidy to start revising bail terms downwards unless under extreme circumstances. Courts should therefore be cautious not to encourage revision on already honoured terms to avoid a multiplicity of revision applications as well as unnecessary refunds and deductions on already deposited money before conclusion of the case. For those reasons, the application to revise bail terms is not merited and the same is dismissed.

29. Touching on the orders restraining the 2nd applicant from visiting his office, the same is now settled in the case of **Ferdinand Ndungu Waititu Baba Yao vs. Republic [supra] and Moses Kasaine Lenolkulal vs DPP [2019] eKLR** where both courts found that the accused persons’ presence in the office would most likely interfere with the witnesses. Although the court was not invited by the prosecution specifically to bar the 2nd applicant from visiting his office, the court has powers to impose any other terms or conditions that are deemed appropriate.

30. Considering that the applicant allegedly committed the offence while in office, it is necessary to protect possible witnesses from interference. That is not to say that the applicant’s job is terminated. He is still an employee of the Lake Basin Authority save that he would not ordinarily go to his office during the pendency of the case subject to the directions given by the trial court.

31. For the above reasons stated, the applications for revision filed under revision numbers 44, 47 and 48 are hereby dismissed and the trial court’s orders to remain in force. Original files be returned to the lower court for the trial to continue as scheduled.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 17TH DAY OF DECEMBER, 2019.

J. N. ONYIEGO

JUDGE