REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI CORRUPTION AND ECONOMIC CRIMES DIVISION

ACEC REVISION NO 40 OF 2019

1. MRS. ZHANG JING

2. MR. ZEYUN YANG

3. ERDEMANN PROPERTY LIMITED.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(Being a Revision of Hon. D. Ogoti delivered on 9th September, 2019 in ACC No. 26 of 2019)

RULING

1 Vide Anti Corruption case no 26 of 2019 Republic vs Peter Aguko and 25 Others, the applicants herein Ms Zhang Jing (23rd accused person), John Zeyung Yang (24th Accused) and Erdermann property Ltd (25th accused company) were arraigned before Milimani Anti Corruption Chief Magistrate's Court on 9/9/2019 jointly with others facing various corruption related charges. Upon entering a plea of not guilty, the court admitted them to bail vide its ruling dated 9/9/19. Accordingly, each accused was admitted on a bond of Kshs 30 million with surety or in the alternative a cash bail of Kshs. 10 million.

2 Subsequently, the applicants honoured the bail terms imposed by depositing Kshs 10 million each. However, being aggrieved with the terms of bail which they termed unconstitutional, unreasonable and harsh, they moved to this court vide a letter dated 18/9/2019 and filed on 24/9/18 seeking a revision of the said terms.

3 The court was therefore asked to exercise its constitutional and statutory mandate under article 165 (6) and (7) of the Constitution and section 362 of the Criminal Procedure Code to call for and examine the lower court record in respect of ACCC no 26/19 so as to correct any error, illegality, or impropriety committed by the trial court.

4 They contended that they are renowned developers in Kenya having heavily invested and successfully developed well over 3000 housing units within Nairobi and Machakos counties besides construction of the project now the subject of the criminal proceedings. They further claimed that the bail terms made were per incuriam as they are manifestly excessive thus denying them the constitutional rights on release of reasonable bail terms as enshrined under articles 49(1) (h) of the Constitution and section 123 (2) and (3) and 123A (1) of the Criminal Procedure Code (CPC).

5 It was further stated that the excessive bail terms were pegged on the economic status perceived financial ability and nationality. Relying on the decision in the case of **Ramadhan Iddi Ramadhan and 5 Others UR (2015)eKLR**, they contended that the net effect of the excessive bail terms is tantamount to conviction and punishment without and before conducting a fair trial.

6 Further, it was argued that bail terms cannot be pegged on the basis of the amount alleged to be lost as stated in the charge sheet which is purely speculative. That as stated in the case of **Republic v Halima Adan Ali & Another (2018) eKLR.** Bail terms should not be used as a punitive tool in the hands of the state. It was further alleged that the learned magistrate did not make reference to the authorities cited before him inter alia **Kirit Bhangwanda Kanabar vs Director of Public Prosecution & Another (2018)eKLR and Ramadhan Iddi Ramadhani & 5 Others vs Republic (2019) eKLR.**

7 Despite service of the application, the DPP (respondent) did not file any response. When the matter came up for hearing, the respondent was not represented despite hearing date having been taken in the presence of both parties. Consequently, the matter proceeded exparte.

8 Mr. Achoki appearing for the applicant basically restated the content of the letter seeking revision. He also relied on his submissions filed

on 22/10/19. Mr. Achoki submitted that bail is a constitutional right which must reasonable and affordable. He asserted that under section 3 of the Magistrate's Court Act, exercise of its judicial authority should be guided by principles specified under article 10, 159(2) and 232 of the Constitution among them transparency and accountability.

9 Learned counsel submitted that the learned magistrate did not provide any factual and legal justification before arriving at the decision of imposing excessive bail terms. To support this proposition, counsel referred the court to the decision in the Canadian Supreme Court Case between **Queen v Sheppard [2002] 1 SCR 869** where the court emphasized on the need for the court to give reasons for every decision made and without leaving doubt in the mind of the party/parties concerned.

10 Mr Achoki further submitted that an accused person is innocent until proven guilty and that bail terms should not be so punitive as to amount to punishment before trial. In support of this submission, learned counsel placed reliance on the decision in the case of **Christopher Ndarathi Murungaru v KACC & Another (2006) eKLR** and the case of **Ndegwa vs Republic (1985) eKLR** where the court of Appeal stated thus:

> **"no rule of natural justice, nor rule of statutory protection, no rule of evidence and on rule of common sense is to be sacrificed, violated or abandoned when it comes to protecting liberty of the subject. He is the most sacrosanct individual in the system of our legal administration."**

11 Lastly, Mr Achoki urged that even in the right of public interest, the dictates of the constitution must be adhered to at all times. Counsel submitted that although already out on bond, the amount deposited by the three applicants (Kshs. 30 million) is too much to be lying in the courts instead of being utilized elsewhere.

Determination

12 I have considered the application herein, original record which is not opposed and the applicant's submissions I must from the onset clarify that, the mere fact that an application is not opposed does not lessen the applicant's burden in proving that there is an error, illegality or impropriety committed by the trial court.

13 There is no doubt that this court has jurisdiction under Article 165(6) to exercise supervisory authority over a subordinate court, over any person or authority exercising, judicial or quasi judicial function. Article 165(7) provides:

> **"For the purposes of clause (6), the High Court may 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."**

14 The above constitutional provision is further actualized by section 362 of the criminal Procedure Code which empowers the High Court to call for and examine the record of any criminal proceedings of a subordinate court for purposes 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.

15 Before the High Court proceeds to revise an impugned decision or order, it must be satisfied that the subordinate court did act on a wrong principle in arriving at the impugned decision or order made. See **Republic v Mohammed Abdalla Swazuri & 6 Others (2019) eKLR** where the court stated that:

> **"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 functions, the High court must be satisfied that the subordinate court must have acted on a wrong principle in arriving at an incorrect, illegal or improper decision or order"**

16 Release of an accused person pending trial is a constitutional and statutory obligation more specifically underpinned under article 49(1)(h) which recognizes that every person has the right to a fair trial, which includes release on a bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.

17 It therefore follows that, the only ground that would deny an accused bail or reasonable release on affordable bail terms, is the possibility that the accused may not turn up to court for trial to continue. However, section 123 and 123A has set out conditions to be considered when setting out bail terms among them the seriousness of the offence committed.

18 In his ruling, the trial magistrate stated that he had considered the nature of the offence, the amount of the money alleged to have been lost, the presumption of innocence and court's duty that in imposing bail terms, it should ensure that the accused turns up in court.

19 It is trite that an accused person is presumed innocent until proved guilty and that it is obligatory upon all courts to ensure that the treasured right to liberty is not curtailed by imposition of harsh and punitive terms. An accused person should not suffer pre-trial punishment simply because the terms imposed are so punitive. (see **Ramadhan Idd Ramadhani & 5 Others vs Republic** (supra).

20 The value of the subject matter as may be reflected in the charge sheet may be deceiving as the same is an allegation which may not necessarily be correct. In my view, seriousness of an offence can properly be measured from the nature of the penalty expected to arise in case of conviction. In the instant case, the offence is brought under ACECA sections 45 and 48 which provides for a sentence of a fine of 1 million or 10 years imprisonment and in addition, twice the amount lost or benefitted. That is where the catch is for offences of this nature

and in this case, the amount lost is alleged to be about Kshs. 4.1 billion. To that extent, the offence can be classified as a serious one.

21 The applicants in this case were not denied bail. They have already been released after depositing Kshs. 10 million cash each almost immediately. To that extent their liberty which is the key objective of Article 49(1)(h) of the Constitution and Section 123 of the CPC has not been curtailed. They are not in custody anymore to support the argument that they are serving an indirect and pre-trial conviction and sentence. Their liberty has therefore been realized.

22 Their only complaint is that the harsh bail terms have subjected them to economic hardship as Kshs. 30 million is being held in court instead of doing useful work elsewhere. There is a rebuttable presumption that, the fact that they were able to meet the bail terms implies that it was affordable. Although not necessarily the case, they have not produced any evidence to prove that they obtained the money through great difficulties thus subjecting them to greater economic suffering eg excessive interest out of the money borrowed to meet the harsh bail terms. (see **Evans Odhiambo Kidero vs Repubic (2019) eKRL** where the court rejected an application to review bail terms after depositing cash bail.

23 I must admit that, various judges have approached the imposition of bail terms differently and this has placed the lower courts at cross roads. For instance in the case of **Ferdinand Waititu Ndungu Babayao and 12 Others v Republic (2019) eKLR** the court upheld a cash bail of Kshs. 15 million or bond of Kshs. 30 million with surety where the value of the subject matter was over 588 million. In the case of **Moses Kasaine Lenolkulul vs Republic (2019) eKLR** the accused was released on a cash bail of Kshs. 10 million or a bond of Kshs. 30 million with surety.

24 Although the key word used in Article 149 (h) is reasonable bail terms, the same is relative. Its application will vary from judge to Judge or magistrate to magistrate. At the end of the day the key parameter is whether the terms imposed are reasonable in the circumstances of the individual case.

25 In this case, I will only conclude that the applicants having honoured the bail terms imposed without any proof that the money was raised with great difficulty, this court will only draw an inescapable conclusion that it was affordable as far as the applicants are concerned.

26 I would imagine the chaos that would arise and the multiplicity of revision applications that would arise in everybody coming back to court seeking to review their bail terms to suit their prevailing financial positions. It will be messy and untidy with the complications of trying to relocate the money and making piecemeal refunds. I will not encourage revisions on these grounds unless extremely necessary or under exceptional circumstances which will be determined on its own merit.

27 For the above reasons given, I do not find any illegality or impropriety committed in granting the applicants herein the impugned bail terms.

Accordingly the application is disallowed.

Dated, delivered and signed at Nairobi this 11th day of December 2019.

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J. N. ONYIEGO

JUDGE