



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

ACEC MISCELLANEOUS APPLICATION NO. 12 OF 2018

(Consolidated with Acec Misc Applications Nos. 17, 22 & 23 Of 2018)

1. FERDINARD ODOYO MATANO.....1ST APPLICANT
2. JACKSON ATHEMBOH JUMA.....2ND APPLICANT
3. WELENALO MULUPI.....3RD APPLICANT
4. STELLA JEPKEMOI KIPKORIR.....4TH APPLICANT
5. KEZIAH WANJUGU MWANGI.....5TH APPLICANT
6. STEPHEN KASYOKI MUNYUNZU.....6TH APPLICANT
7. ISAIAH CHAPIA ADALO.....7TH APPLICANT
8. TIMOTHY KIPLANGANT ROTICH.....8TH APPLICANT
9. JAMAL DUBA GALGALO.....9TH APPLICANT

Versus

REPUBLIC.....RESPONDENT

RULING

1. The Applicants are among forty seven (47) accused persons facing various counts of offences under the Anti Corruption & Economic Crimes Act (ACECA) filed at the Nairobi Chief Magistrate's Anti Corruption Court vide cases Nos. 8 of 2018 - 17 of 2018. The said accused persons had approached this court through various applications seeking to be released on bail/bond pending the hearing of their cases before the Nairobi Chief Magistrate's Court. On 19th June 2018 this court rendered its decision on the said applications. In the said decision the court granted them bail/bond with various terms and conditions.

2. The Applicants are now before this court seeking a variation and/or reduction of their bail/bond terms. In particular what is sought to be reviewed is the amount for the surety which this court placed at Kshs 2 million and the cash bail at Kshs 1 million.

3. All the Applicants save for the 7th & 8th Applicants filed affidavits explaining their financial standing, which they say can't allow them to get sureties of Kshs 2 Million and cash bail of Kshs 1 million. Mr Wangalwa filed a supporting affidavit in support of the application by the 7th & 8th Applicants. He too explained their financial standing and annexed their pay slips.

4. All the Applicants save for the 6th & 9th Applicants annexed their pay slips showing what their monthly earnings are. The 9th applicant annexed his letter of appointment showing his salary brackets while the 6th applicant annexed his notices of retirement. From the annexures it is clear that all the applicants save for the 6th applicant are employees of the National Youth Service (NYS). The 6th Applicant retired in 2016.

5. Mr Wangalwa submitted that the 7th & 8th Applicants were junior officers earning Kshs 17,000/- & 14,000/- per month respectively. That

they have even overdrawn their salaries. In response to para 8 of the Replying Affidavit counsel submitted that the Respondent had failed to show that the Applicants had other sources of income. That the fact that the Applicants have been in prison for almost three(3) months confirms their inability to raise the bail/bond.

6. Finally he submitted that the court acknowledged that the 47 accused persons in respect of the Ruling of 19th June 2018 were of different stations of life. It was therefore his submission that through these applications the court would now distinguish the current applicants individually.

7. Mr Omondi Ogutu for the 1st-5th Applicants requested for an interpretation to para 52(vi) of the Ruling of 19th June 2018 for clarity purposes. Referring to the annexed pay slips of the Applicants he asked the court to consider the Applicants' social standing. To buttress this point he cited the following authorities:

(i) Republic vs Leonard Kanani Gitau Nrb H.C.CR case no 49/16 (Wakiaga, J) [2017] eKLR

(ii) Republic vs Danson Mgunya & Kassim S. Mohammed Mombasa Criminal case No 26/08 [2010]eKLR

(iii) Joseph Mutua Kimeu vs Republic Nrb High Court Criminal. Case No. 166 of 2017. [2017] eKLR

8. He added that their suggestions on the bond terms were just but a guide on what the Applicants could afford. Referring to the 5th Applicant he said she has an 8 month old baby with her at the prison.

9. M/s Kiget for the 6th Applicant associated herself with the submissions by Mr. Wangalwa & Mr Omondi Ogutu. She wholly relied on the affidavit of the 6th Applicant and submitted that he is elderly and his continued stay in custody shows he can't afford the bond terms given.

10. Mr Mburu for the 9th Applicant too associated himself with the submissions by the other counsel for the Applicants. He urged that the Applicant earned Kshs 11,000 per month hence his inability to meet the bond terms. He reminded the court of the Applicant's social standing and his readiness for the hearing.

11. In reply M/s Kahoro for the Respondent opposed the application relying on the affidavit of Caroline Kimiri and the list of authorities. Referring to the Ruling of 19th June 2018 it was her submission that at paras 49-50 the court had extensively considered the issue of parity of the Applicants and their co-accused. She argued that the court needs to balance between public interest and individuals' interests. She added that the Applicants were facing serious charges whose fines were huge.

12. She further argued that the pay slips produced were not sufficient to prove the Applicants' social standing and that there was nothing to show any efforts made by them to raise the bond/bail terms. Referring to article 49 of the Constitution and section 123 Criminal Procedure Code which deal with bond she argued that the court had addressed all that in its Ruling and there was nothing to be reviewed.

13. M/s Kahoro contended that para 52(vi) of this court's Ruling had directed how any application in respect of the orders of the court had to be dealt with. There had been no explanation for the failure to proceed before the lower court. That pre-trials which are not a long process had already begun before different courts and the applications could be heard before those courts.

14. M/s Kimiri for the Respondent in distinguishing the cited authorities referred to the case of **Joseph Mutua Kimeu** (supra) who had been charged with 5 counts of trafficking in Narcotics. She said bond terms were reviewed but they remained commensurate with the offence. In the **Danson Mgunya case** (supra) the Applicants were each released on a bond of KShs 3 million with 2 sureties after the gravity of the offence had been taken into account.

15. She also cited the case of **Jayendra Khimji Malde and Others v Republic [2011] eKLR** where each of them was released on a cash bail of Kshs 22 Million. She further referred the court to the bail/bond policy. It was her submission that the charges in respect of the Applicants are grave in nature and involve millions of shillings. Further that the court had considered all this and given very reasonable terms which should be maintained.

16. On the issue of **Keziah** (5th Applicant) she submitted that the prison had all the provisions she and her child required and there was no material placed before the court to show the contrary. She argued that the same position applied to **Stephen Kasyoki** (6th Applicant) whose medical condition can be managed at the prison health facilities or Kenyatta National Hospital (KNH). That his age was not a limitation to getting a surety.

17. In a rejoinder Mr Wangalwa submitted that the Ruling by this court was not final, hence the application for review of the bond terms for which they had presented sufficient material. He contended that the Respondent had not shown that reduction of the bond terms would lead to interference with witnesses by the Applicants or their running away.

18. Mr Omondi submitted that the case of **Jayendrakh imji Malde & 2 Others** (supra) had no relevance to this application as it had nothing to do with revision. Further that in the case of **Vinrod Douglas Ochieng Obala alias Obed Ometekoringo v Republic [2017] eKLR** the applicant had been charged in 3 separate files with separate bond terms. This was reviewed and a consolidation of the files ordered.

19. Mr Mburu submitted that in their application for review they have referred to specific Applicants with their means and that's how the court will consider them individually.

20. I have considered the application for review of the bond terms set by this court. I have equally taken into account the contents of the affidavits, annexures, submissions and cited authorities. The issue for determination is whether the Applicants have made out a case meriting a review of the bond/bail terms set by this court in its Ruling of 19th June 2018. Before I delve into determining this issue I wish to clarify what is stated at para 52(vi) of the said Ruling which states:

“(vi) Any application in respect of these orders shall be made before the trial court once the hearing takes off”

21. The counsels appearing for the Applicants indicated to me before I received their submissions in this application that the learned Chief Magistrate had declined to hear them on this matter claiming that his hands were tied. Reason? Para 52(vi) of the Ruling. He therefore referred them back here. I have at the same time learnt that some of the counsels appearing in the same matter did apply for a variation of the Order under Para 52(i) of the same Ruling. The application was heard by the Chief Magistrate’s court and the order was varied. It is therefore not correct to say the present application could not be heard because of para 52(vi) of this court’s Ruling.

22. The court seized with jurisdiction to hear and determine the criminal case giving rise to this application is the Chief Magistrate’s Anti-Corruption Court. Plea taking; grant of bond; approval of bond; pre-trial conferencing; various applications; and recording of evidence are all recorded and is part of the proceedings. The meaning of hearing is therefore widespread and cannot be limited to the taking of evidence of the witnesses alone. I hereby direct that any application in respect of the orders issued vide the Ruling of 19th June 2018 among others **must** be heard by the trial court.

23. It is clear from the application and submissions that the bail/bond terms being contested by the Applicants are basically two i.e.

- (i) The cash bail of Kshs 1 Million
- (ii) Provision of a surety in the sum of Kshs 2 Million.

24. The main common ground relied on by the applicants save for the 6th Applicant is that though they are in gainful employment their salaries are so meagre. The same are also over committed and they cannot afford the huge sums of cash bail imposed on them by the court. They also state that by implication they have no friends or relatives who can bail them out in terms of sureties in sums of Kshs 2 million.

25. I have had a look at the pay slips and letters showing the applicants gross and net salaries. They are as follows:

	<u>Gross salary(Kshs)</u>	<u>Net Salary(Kshs)</u>
1 st applicant	27,005.00	-1,049/95
2 nd applicant	42,950.00	22,167/25
3 rd applicant	13,155.00	-243/10
4 th applicant	38,030.00	11,066/25
5 th applicant	27,005.00	23,971/15
6 th applicant (Rtd)		
7 th applicant	27,005.00	8,303/05
8 th applicant	16,885.00	-6,474/55
9 th applicant	11,010.00

26. The Respondent in the replying affidavit has referred to the terms of the bail/bond granted to the Applicants. M/s Kimiri has averred at para 4 that the said terms are commensurate to the charges and thus are neither harsh nor excessive as to force the hand of this court to review them. She has also referred to the bail/bond policy guidelines saying that the court has a duty to ensure uniformity to all the persons seeking to be released on bond so that the court is not deemed to be influenced by extraneous matters.

27. The bail/bond policy guidelines at 4.36 provides:

“Courts shall inform accused persons of their rights to apply for review of bail decisions and conditions. Bail decisions and conditions should be reviewed on a regular basis, as circumstances of the accused persons and case change.”

28. The Applicants have come before this court pleading for the court to consider more pocket friendly bail/bond terms owing to the financial constraints they find themselves in. The Respondent has not responded to that plea. Instead the State says that all persons should be released on uniform bond terms. As was noted even in the Ruling of 19th June 2018, the accused persons in this matter are not of equal financial

standing.

29. The court endeavoured to strike a balance but still the applicants are here crying for reconsideration of the terms. The respondent has gone further to state at paras 8 and 9 of the replying affidavit as follows:

8. THAT the Applicants have not sufficiently demonstrated to this court that they are incapable of meeting the bond/bail terms as the annexed pay slips are not conclusive proof of one's financial capability.

9. THAT the Applicants have not demonstrated to this court the efforts made to raise the bail and bond terms issued.

30. First of all it's now a month since the Ruling of 19th June 2018 when the Applicants were granted bond. They are still in prison due to their inability to raise the bail/bond terms. It's not clear what efforts they were to exhibit more than their presence behind bars. Secondly they have displayed their pay slips and the Respondent says that is not conclusive proof of one's financial capability.

31. The Respondent has not produced before this court the slightest evidence to counter those pay slips. This court would have expected the Respondent to produce before it evidence showing that the Applicants have moveable and immoveable properties and even cash in bank accounts to disapprove their reliance on pay slips. Otherwise how else can they convince this court that the Applicants are more financially capable than what they have shown through the pay slips?

32. The Respondent has not raised any issue on the Applicant's inability to attend court, or their interference with witnesses if released on bond. From the material placed before me I find that it is an impossibility expecting the Applicants to raise the bail/bond terms set out by this court. Sticking to these terms would amount to denying the Applicants their constitutional right to bail.

33. Having considered the nature of the charges facing the Applicants, their financial capability (drawn from their pay slips, and letters of employment) I am of the considered view that they have convinced me of the need to review the bail/bond terms imposed on them on 19th June 2018. In the premises, I hereby vary and revise the terms of bail and bond in respect of the Applicants as follows:

(i) Each applicant shall be released on a bond of Kshs 2.5 Million with a surety in the sum of Kshs 500,000/-.

(ii) Each applicant shall deposit a cash bail of Kshs 250,000/-

(iii) The other conditions remain unless otherwise varied by the trial court.

Orders accordingly.

Dated, signed and delivered this 20th day of July 2018 in open court at Nairobi.

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HEDWIG I. ONG'UDI

JUDGE