IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ,A)

CRIMINAL APPEAL NO. 109 OF 2019

BETWEEN

MOSES KASAINE LENOLKULAL.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the ruling of the High Court of Kenya, Anti Corruption and Economic Crimes Division

at Nairobi(Mumbi Ngugi, J.) delivered on 24th July 2019

in

HC.CRREV. 25 of 2019

****

JUDGMENT OF THE COURT

In this appeal ***the appellant, Moses Kasaine Lenolkulal***, who is ***the Governor of Samburu County*** is aggrieved by the decision of the High Court which upheld the trial court's ruling that barred him from accessing the Samburu County Government Offices without the prior written authorization of the Chief Executive Officer of the Investigative Agency (EACC).

The appellant was charged in *Anti-Corruption Case No.3 of2019, Republic vs Moses Lenolkulal and 13 others* with four counts under the ***Anti-Corruption and Economic Crimes Act*** *(ACECA).* Under Count I, he was charged together with 13 others for the offence of conspiracy to commit an offence of corruption contrary to ***section 47A (3)*** as read with ***section 48 (1)*** of ACECA. Under Count II, for the offence of abuse of office contrary to ***section 46*** as read with ***section 48 (1)*** of ACECA. Under Count III, for the offence of conflict of interest contrary to ***section 42 (3)*** as read with ***section 48 (1)*** of ACECA, and under Count IV, with the offence of unlawful acquisition of public property worth Kshs. 84,695,996.55 contrary to ***section 45(1) (a)*** as read with ***section 48 (1)*** of ACECA.

The offences were alleged to have been committed between 27th March, 2013 and 25th March 2019 during which period the appellant was the Governor of Samburu County. Upon arraignment in court on 2nd April 2019, Hon. Ogoti granted the bail on interim terms, the relevant part of which, are that;

"1...

2...

3. Since the Samburu County office is where the crime took place, that is a scene of crime. The governor is hereby prohibited to access those offices till the application to be directed to be filed is heard and determined.

4...

5…

6...

7. Considering the charges on the face of it besides depositing his passport in court Accused shall be released on a bond of Kshs 150 million with one surety of a similar amount or a cash bail of Kshs.100 million...."

Thereafter, following the trial court's directions, the prosecution filed a Notice of Motion dated 16th April 2019 seeking an order to bar the appellant from accessing the Samburu County offices until the trial was determined. The trial magistrate *(Hon. Murigi)* upheld Hon. Ogoti's decision, save to vary the terms in the following manner;

"The 1st Respondent who is the Governor of Samburu County is barred from accessing the Samburu County Government Offices without the prior written authorization from the CEO of the Investigative Agency (EACC) who shall put measures if any in placeso as to ensure that there is no contact between the 1st Respondent with the prosecution witnesses and preserve the evidence until further orders of this Court".

The appellant was aggrieved and, by a letter from his advocates, V.A. Nyamodi & Company Advocates dated 3rd June, 2019, the appellant sought a revision of that order in the High Court, arguing on three fronts. Firstly, that the appellant was the duly elected Governor of Samburu County by virtue of ***Article 180*** of the ***Constitution,*** and was a constitutional office holder within the meaning of ***section 62(6)*** of ACECA; that he can therefore only be removed from his office on grounds provided for under ***Article 181 (1)*** of the Constitution and pursuant to the procedure set out under ***section 33*** of the ***County Government Act***. It was his contention that the impugned order of the trial court that barred him, a constitutional office holder, from accessing the offices of the County Government of Samburu without written authorization from the Chief Executive Officer (CEO) of the Ethics and Anti-Corruption Commission (EACC), was tantamount to removing the appellant from office, and was unconstitutional and unlawful.

After hearing the parties' submissions, the learned judge (Mumbi Ngugi, J.) declined to exercise the court's powers of revision over the decision of the trial court, and instead determined that in the public interest, the bail terms pertaining to access to the County offices by the appellant for the duration of the trial should remain in force.

In considering the allegation that the Governor was being removed from office, the learned judge stated;

"The Governor in this case is not being 'removed' from office. He has been charged with an offence under ACECA, and in my view a proper reading of section ACECA requires that he does not continue to perform the functions of the officer of governor while the criminal charges against him are pending. However, if section 62 (6), which in my view violates the letter and spirit of the Constitution, particularly Chapter Six on leadership and Integrity, is to be given an interpretation that protects the applicant's access to his office, then conditions must be imposed that protect that interest. This is what the trial court in my view did in making the order

requiring that the applicant obtains authorization of the CEO of EACC before accessing his office. In the circumstances, I am not satisfied that there has been an error of law that requires that this court revises the said order, and I accordingly decline to do so."

The appellant was dissatisfied with that decision, and filed the present appeal against the decision of the High Court on the grounds that the learned judge was wrong in;

*I. failing to give effect to the provisions of **section 62(6)** of the ACECA contrary to **Article 10** of the Constitution.*

*2. finding that **section 62(1)** of the ACECA should apply to the appellant notwithstanding clear and unambiguous provisions of **section 62(6)** of the ACECA.*

*3. finding that **section 62(6)** of the ACECA was contrary to Chapter 6 of the Constitution.*

*4. finding that a proper reading of **section 62** of the ACECA requires that the appellant, once charged with an offence under ACECA, should not continue to perform the function of the office of the Governor while criminal proceedings are still pending, notwithstanding the clear and unambiguous wording of **section 62(6)** of the ACECA that expressly exempt the application of **section 62(1)** the ACECA to the appellant.*

*5. reading into and /or rewriting the provisions of **section 62(6)** of the ACECA by finding that, if **section 62(6)** of the ACECA is to be given an interpretation that protects the appellant access to his office, and conditions must be imposed that protects public interest by so doing the learned judge legislated contrary to **Article 94** of the **Constitution.***

*6. applying an unknown doctrine of constitutional interpretation and application in interpreting the constitutionality or otherwise of **section 62(6)** of the ACECA.*

7. *introducing new issues and arguments not urged before the High Court at the hearing of the application for revision brought under **section 362** of the **Criminal Procedure Code,** which application was not opposed, thereby denying the appellant the opportunity to respond contrary to **Article 50** of the **Constitution.***

8. failing to find that the orders of trial court barring the appellant, a constitutional office holder, from accessing his office without the written authorization of the CEO of the EACC rendered the appellant subject to their authority and control

contrary to the express provisions of the Constitution and was unlawful and unconstitutional.

9. in failing to access the practical impact of the orders of trial court barring the Appellant from accessing his office unless authorized in writing by the CEO of EACC.

10. *That the learned judge was biased and prejudiced against the appellant by allowing her personal views and / or beliefs which were contrary to the express provisions of statute law and which found itself in the ruling.*

During the hearing, Mr. Nyamodi learned counsel for the appellant gave a brief background to the appeal ***Mr. Nyamodi***, learned counsel for the appellant submitted that the appellant was duly elected as Governor for Samburu County on 8th August 2017; he was arrested and arraigned in court on 2nd April 2019 and had pleaded not guilty to the four counts under the ACECA; that when the issue of bail arose, the prosecution did not oppose it; that the Chief Magistrate Hon. Ogoti's ruling found the County offices to be a scene of crime, and barred the appellant from going to the offices without the prior authorisation of the Director of Public Prosecutions (DPP). A formal application was subsequently made, though a ruling (not on the record), where Hon. Murigi ordered that the appellant be barred from accessing the offices without the authority of the CEO of EACC; that it was that ruling that prompted the revision before the

High Court.

Counsel sought to argue the grounds under six heads which were; i) the failure of the learned judge to apply ***section 62 (6)*** of ACECA; ii) the constitutionality of ***section 62 (6)*** of ACECA; iii) the reasoning and arguments not led before the court; iv) the non- attendance of the revision hearing by the prosecution; v) the failure of High Court to find that the bail terms were unlawful, unconstitutional and subjected the County Government to the control of EACC; and vi) the failure of the judge to assess the impact of the trial court's orders. Counsel abandoned two grounds; namely that the learned judge wrongly read into and rewrote the provisions of ***section 62 (6)*** of the ACECA and that the learned judge was biased and prejudiced against the appellant.

With respect to the failure of the learned judge to apply the requirements of ***section 62 (6)*** of the ACECA, it was submitted that the provision created an exemption to ***section 62 (1),*** and did not apply to a State officer whose removal or vacation from that office was prescribed by the Constitution; that since ***Articles 181*** and ***182*** of the ***Constitution*** provided a process for removal and the vacating from that office, the appellant was exempted from the requirements of ***section 62 (1).***

Despite the learned judge's observation that the bail terms did not remove the governor from office, counsel contended that the bail terms imposed were a clear attempt to erode the appellant's rights under the ACECA; that whether or not the appellant was being removed from office was not the issue that was before the learned judge, and furthermore, in view of the Constitution, it could not be said that ***section 62 (2)*** of the ACECA was not applicable to the circumstances of this case; that restraining the governor from accessing the County offices was not mandated by ***section 62 (6)*** and that the learned judge merely chose not to apply ***section 62 (6),*** which failure was contrary to the provisions of ***Article 10*** of the Constitution which compels all persons to apply the law.

On the issue of the constitutionality of ***section 62 (6),*** it was asserted that though the prosecution did not oppose the application for revision, the learned judge went into a detailed interpretation of the provision. Counsel submitted that the constitutionality of ***section 62 (6)*** was not a matter for the court's determination, as a consequence of which, the appellant's right to fair hearing was not adhered to.

Counsel further asserted that the provisions of ***section 62 (1)*** were inapplicable to the circumstances of this case, as were the arguments and authorities cited by the court; that ***Articles 181*** and ***182*** of the Constitution, which provided for the manner of removal or vacation of county governor from office underpinned ***section 62 (6),*** and therefore it was not unconstitutional. It remained good law and the learned judge was duty- bound to apply it. Further, that ***Article 182 (1) (d)*** expressly provided that one must be convicted of an offence before being removed from office, and therefore, the trial court's orders, the effect of which was to subject the appellant's attendance of his office to the authority of the CEO of EACC was unlawful. Counsel drew a contradistinction between ***Article 168 (5)*** *on* the suspension of judges, and pointed out that if a judge could only be suspended in the manner specified by that provision, that similarly, ***Article 182*** as read together ***section 62 (6)*** was the only way to remove a governor from office.

Briefly submitting on the issue of the new matters introduced by the court, counsel stated that since our system of justice was adversarial, it was for the parties, and not the court's duty to identify issues for determination; that the learned judge introduced public interest considerations in corruption cases, which had not hitherto been addressed by the parties, and that was prejudicial to the appellant.

Next, counsel submitted that the court failed to assess the effect of the trial court's restrictive orders. It was asserted that the two stringent restrictions placed in the governor's way, namely the bond of Kshs. 150 million or cash bail of Kshs. 100 million, and the order barring him from accessing his office, without authorization from the CEO of EACC, were clearly intended to lock him out of his office, and were therefore unconstitutional and unlawful.

On his part ***Mr. Muteti,*** *Senior* Assistant Director of Public Prosecutions, adopted his written submissions and submitted that the learned judge considered all the relevant issues and applied the test of rationality,

reasonableness, correctness and legality. Addressing the question of whether the learned judge introduced new issues, counsel asserted that the learned judge analysed the record and the submissions and rendered a decision that was in accordance with the matters raised.

Concerning the constitutionality of ***section 62 (6),*** counsel argued that to the extent that the section declares a certain class of office holders beyond the reach of the law, that provision was unconstitutional and cannot stand together with ***Article 2;*** that a court addressing its mind to the provision required to also be cognisant of Chapter 6 of the Constitution on leadership and integrity; that the issue of constitutionality of ***section 62 (6)*** was raised before the trial magistrate and also addressed by the learned judge. Counsel further argued that, under the Constitution only the Office of the President enjoys immunity from prosecution, and therefore any attempt to introduce discriminatory legislation ought to be proscribed. Regarding the contradistinction of ***Article 168 (5)*** on suspension of judges, counsel argued that like judges, the office of the governor was also constitutional, and if judges could be suspended so could governors; that governors are not superior to judges or the Constitution.

Also presenting a contradistinction, counsel pointed out that, the appellant's arguments on the maintaining of ***section 62 (2)*** *created* an absurdity, as a reading of ***section 62 (6)*** together with ***section 63 (4)*** and ***Article 182 (1) (d),*** would mean that in the event a governor was convicted he or she could not be removed from office. In effect, counsel argued, ***section 63 (4)*** would allow all convicted state officers to run for electoral office, which amounted to an absurdity.

It was counsel's view that the learned judge was obliged to defend the Constitution and apply Chapter 6 of the Constitution; that in conjunction with the guiding principles and national values, ***section 3*** of the ***Court of Appeal Organisational and Administrative Act,*** enjoined this Court to develop jurisprudence that responds to the Constitution and to the needs of Kenyans. It was submitted that by upholding the appellant's complaints, this Court would not be responding to the needs of Kenyans, or the Constitution.

On the bail terms ordered set by the trial court, counsel submitted that ***Article 49*** of the ***Constitution*** allowed for imposition of bail terms; that the requirement for an accused person to report to the police or any other agencies were terms imposed time and again by courts, and therefore the trial court's order requiring the appellant to report to the CEO of EACC was not a newly created imposition, particularly as it was not indicated that difficulties were encountered in complying with the order, and no valid complaint had been raised. Counsel concluded by pointing out that in any event, it was not specified that the trial magistrate's orders were final.

In reply, Mr. Nyamodi asserted that instead of applying its powers of revision the High Court employed its powers of supervision which was uncalled for in this case; that it was not the appellant's case that he is immune from imposition of bail conditions, all that was being requested was equitable application of the law.

We have considered the parties' submissions, and are of the view that central to this appeal is the issue of whether the learned judge rightly exercised her discretion to decline to review the bail and bond terms ordered by the trial court. In determining this issue, we are guided by the principles espoused in the established case of ***Mbogo & Another vs Shah [1968] EA, p.15;***

> ***"An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice."***

Alongside the question of whether the courts below properly exercised their discretion, we are being called upon to ascertain whether the interpretation of the relevant provisions was in accordance with the requirements of the Constitution. In so doing, courts are obliged to apply the principles aptly set out in the case of ***Kigula & others vsAttorney General [2005]1 E.A.132 at page 133*** in the following terms;

"The principles applicable in the interpretation of the Constitution include the widest construction possible in its context, should be given according to the ordinary meaning of the words used, the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other, all provisions bearing on a particular issue should be considered together to give effect to the purpose of the instrument, the Constitution should be given a generous and purposive interpretation to realize the full benefit of the guaranteed rights, the Constitution of Uganda enjoins Courts in the country to exercise judicial power in conformity with law and with the values, norms and aspirations of the people."

In our view, the following issues are for consideration;

i) Whether the learned judge wrongly concluded that ***section 62 (6)*** *of the ACECA was unconstitutional;*

ii) Whether the learned judge was wrong in failing to apply ***section 62 (6)*** *of the ACECA;*

iii) Whether under ***Article 49 (1) (h)*** *of the Constitution the bail terms imposed were unreasonable and unlawful, and whether the learned judge introduced new arguments into the ruling;*

*iv) Whether the High Court failed to find that the restrictions ordered by the trial court were unlawful and unconstitutional and rendered the County Government subject to the control of EA*CC; *and*

v) Whether the learned judge failed to assess the impact of the orders in the application for review.

Beginning with whether the learned judge wrongly concluded that ***section 62 (6)*** of the ACECA was unconstitutional.

Section 62 (1) provides;

"A public officer or State officer who is charged with corruption or economic crime shall be suspended, at half pay, with effect from the date of the charge until the conclusion of the case: …"

The provision also provides that the case shall be determined within twenty-four months and the public officer ceases to be suspended if the proceedings against him are discontinued or if the public officer is acquitted.

In apposition to ***section 62 (1), section 62 (6)*** stipulates;

"This section shall not apply with respect to an office if thenConstitution limits or provides for the grounds upon which the holder of the office may be removed or the circumstances in which the office must be vacated."

Article 181 of the ***Constitution*** which deals with removal of governors specifies that;

"(1) A county governor may be removed from office on any of the following grounds-

(a) gross violation of this Constitution or any other law;

(b) where there are serious reasons for believing that the county governor has committed a crime under national or international law;

(c) abuse of office or gross misconduct; or

(d) physical or mental incapacity to perform the functions of office of county governor.

(2) Parliament shall enact legislation providing for the procedure of removal of a county governor on any of the grounds mentioned in clause (1).”

In the instant case, what is for determination is whether the bail terms imposed on the appellant were unconstitutional, unreasonable and unlawful because they were applied without appreciation of the mandatory requirements of ***section 62 (6).*** After having been urged to apply the finding of the High Court where similar terms were imposed in the case of ***Mohammed Abdulla Swazuri & 16 others vs Republic [2018] eKLR*** to the effect that there was a conflict of interest between the National Land Commission and the CEO of EACC, the learned judge determined the question of access by the governor to his office from a different perspective. In considering **section *62 (6)*** *to* be against the national values and principles of governance as well as the principles of leadership and integrity in Chapter Six, the learned judge opined that;

“...in my view, a proper reading of section 62 of the ACECA requires that he does not continue to perform the functions of the office of governor while the criminal charges against him are pending. However, if section 62 (6), which in my view violates the letter and spirit of the Constitution, particularly Chapter Six on Leadership and Integrity, is to be given an interpretation that protects the applicant's access to his office, then conditions must be imposed that protect the public interest”.

In the court's view, this is what led the trial court to order the bail terms which barred the appellant from accessing the County offices without authorisation of the CEO of EACC. We will return to the issue of constitutionality or not of the bail terms shortly.

The statement above quoted is what Mr. Nyamodi has contended was the learned judge's declaration of the ***section 62 (6)*** to be unconstitutional. But our analysis of the statement does not lead us to that conclusion. Indeed, we find that the statement cannot in any way be interpreted or construed as a declaration of ***section 62 (6)*** to be unconstitutional. The learned judge merely remarked that the provision stands against the intent and purport behind the leadership and integrity provisions of the Constitution, and stopped there. The court did not then proceed to declare or hold the provision unconstitutional.

On this question, it should be appreciated that a finding of any legislation to be unconstitutional is not a matter to be taken lightly. It involves a definitive process initiated either through a petition to Parliament, under ***Article 119 (1),*** or upon the placing of a substantive issue of interpretation, to the effect that the provision is inconsistent with or in contravention of the Constitution before the High Court which under ***Article 165 (3) (d) (i)*** is endowed with that mandate or any court of competent jurisdiction. As observed by the appellant’s counsel, no such question was placed before the court, and from a reading of the ruling, no determination of that nature was made in respect of the impugned provision. Consequently, we are satisfied that the learned judge did not declare ***section 62 (6)*** to be unconstitutional.

So, was the learned judge wrong to decline to apply ***section 62 (6)*** to the circumstances of this case? Again, our reading of the ruling does not lead us to such summation. Addressing the question of whether the provision on removal from office, that is, ***Article 181,*** when read together with ***section 62 (6)*** inferred that, despite the corruption charges for alleged abuse or misuse of their offices to the detriment of the public, such state officers should remain in office, the learned judge observed that, that was not the intent or purport of ***section 62 (6);*** particularly when the impugned provision was considered alongside ***Article 49 (1) (h),*** which allows courts to grant bail on reasonable terms. On the basis that the application was grounded on ***Article 49 (1) (h),*** the judge concluded that, ***section 62 (6)*** was irrelevant to the instant case. In so finding the High court held that the trial court was entitled to apply the bail terms it did, including one which barred the governor from accessing the County offices.

Determining whether or not ***section 62 (6)*** was applicable, requires that the genesis of the application be considered. The application for review in the High Court arose from a bail application in the trial court, which the respondent did not oppose, but nevertheless requested for the imposition of stringent bail conditions on the appellant. ***Article 49 (1) (h)*** of the ***Constitution,*** allows the trial court to impose bail terms.

It provides that an arrested 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."***

Section 62 (6) prohibits application of ***section 62 (1)*** in the case of a constitutional office holder charged with a corruption offence, where the Constitution already provides a method for removal, which in this case is, ***Article 181***. When these provisions are considered against ***Article 49 (1) (h)*** which allows for imposition of reasonable bail terms, it becomes patently clear that they address two disparate circumstances. One is concerned with removal from office and the other imposition of bail.

The complaint is that denying the appellant access to the County offices during the period of the trial was tantamount to his removal from office as contemplated by ***Article 181,*** and hence contrary to the requirements of ***section 62 (6).*** But limiting the governor's access to the County offices whilst he is facing trial for corruption offences cannot be construed or equated to a removal from office. The governor has not been ordered to vacate his office. He may access his office, but on the conditions imposed by the court. Though his access is limited, he remains the governor. Given the aforegoing, our view is that the allegation that the imposition of bail terms barring the appellant from the County offices was tantamount to a removal from office is therefore unfounded. As such, we agree with the High Court that application of ***section 62 (6)*** was unnecessary, and the learned judge was not compelled to apply that provision to the circumstances of this case.

Of greater relevance perhaps, is the question of whether the bail terms that barred the appellant from office, or subjecting the County Government to the control of EACC were reasonable. This brings us to the next issue of the reasonableness or otherwise of the bail terms.

As already seen above, ***Article 49 (1) (h)*** allows the trial court to impose bail terms. In addition, ***section 123*** of the ***Criminal Procedure Code*** specifies that;

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

Essentially, both the Constitution and the law stipulate that an arrested person may be released on bond or bail on reasonable conditions. And in granting bail or bond to an accused person, it must be borne in mind that the court is being called upon to exercise its discretion. In such exercise, the court is guided by certain well- established principles such as those enumerated in the case of ***Republic vs Pascal Ochieng Lawrence [20141 eKLR*** where it was stated;

> ***"It is to be noted that unlike in the past when an accused person had to demonstrate why he should be released on bail/bond, that duty now properly belongs to the state. The court in exercising its discretion as to whether or not to grant bond is however to be guided by the following parameters:-***
>
> ***- The seriousness of the offence although this carried greater weight under the old constitutional dispensation;***
>
> ***- The weight of the evidence so far adduced if the case is partly heard,·***
>
> ***- The possibility of the accused interfering with witnesses;***

- ***The safety and protection of the accused once he/she is released on bail/bond;***

- ***Whether the accused will turn up for trial;***

- ***Whether the release of the accused will jeopardize the security of the community."*** (emphasis ours)

And the Supreme Court of Nigeria in ***Alhaii Muiahid Dukubo-Asari vs Federal Republic of Nigeria, SC 20AI 2006*** set out similar criteria on the granting of bail where Justice Ibrahim T. Mohammed JCS stated thus:

"When it comes to the issue of whether to grant or refuse bail pending trial of an accused by the trial court, the law has set some criteria which the trial court shall consider in the exercise of its judicial discretion to arrive at a decision. These criteria have well-articulated in several decisions of this court. Such criteria include, among others, the following:-

i. The nature of the charges.

ii. The strength of the evidence.

iii. The gravity of the punishment in the event of conviction.

iv. The previous criminal record of the accused, if any.

v. The probability that the accused may not surrender himself for trial.

vi. The likelihood of the accused interfering with witnesses or may

suppress any evidence that may incriminate him.

vii. The likelihood of further charges being brought against the accused.

viii. Detention for the protection of the accused." (emphasis ours)

Having found as we have that the bail terms did not offend ***Article 181*** or ***section 62 (6),*** we also observe that no other reasons were advanced to demonstrate that the bail conditions imposed were unconstitutional, unreasonable or unattainable. So that in granting bail on the conditions it did, it is evident to us that, after appreciating the nature of the corruption charges preferred, and considering the possibility of witness interference or suppression or tampering with evidence, which as seen hereinabove are the usual criteria a court may take into account, the trial court imposed the impugned bail terms.

In addition to the above, and contrary to the appellant's assertion that the learned judge introduced new arguments, both courts below acceded to the dictates of ***Article 10 (1) (b)*** of the Constitution, and took into account the imperatives of Chapter 6 of the Constitution on leadership and integrity and, other public interest elements of the Constitution, and arrived at bail terms that were reasonable and constitutional. In observing that the safeguarding of public interest was an essential requirement in such cases, the High Court found that the bail terms imposed were sufficient and concluded that no error or misdirection had been made on the trial court's part.

Likewise, we too are satisfied that both courts below properly exercised their discretion when they took into account the appropriate principles or guidelines on bail. Further we can find no wrong in the two courts application of the national values and constitutional imperatives set out in Chapter 6 of the Constitution to arrive at bail terms imposed. After all, under both ***Articles 10 (1) (b)*** and ***259 (1)*** of the Constitution courts are duty bound to take into account the national values, principles of governance, and the Chapter 6 principles on leadership and integrity when applying provisions of the Constitution.

We need go no further than to cite the Supreme Court's direction on this issue as enumerated **in *Re The Matter of the Interim Independent Electoral Commission Constitutional Application [2014] eKLR*** at para. 51 when itbembraced the sentiments of Mohamed A J in the Namibian case of ***State vsbAcheson 1991 (20 SA 805, 813)*** where he stated that;

> ***"…The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship of government and the governed. It is a mirror reflecting the "national soul" the identification of ideas and ..... aspirations of a nation, the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the Constitution must, therefore preside and permeate the process of judicial interpretation and judicial discretion.***
>
> ***…Lastly and fundamentally, it is the principle that the provisions of the Constitution must be read as an integrated whole, without any one particular provision destroying the other but each sustaining the other (see Tinyefuza v Attorney General of Uganda Constitutional Petition No. 1 of 1997 (1997 UGCC 3).*** (emphasis ours)

Fortified by the above, our view is that the judge's application of the constitutional imperatives and the public interest factor were not newly introduced issues, but were applicable criteria to the circumstances of this case and we so find. On this basis, we find that the bail terms were constitutional and lawful.

Turning to the question of subordination of the appellant and the County offices to the CEO of EACC as highlighted in the ***Swazuri's case (supra),*** much as there will be a measure of inconvenience to the appellant in accessing the County offices, it is recognized that the bail terms imposed are intended to eliminate the possibility of witness interference and evidence tampering, in exchange for the granting of bail, as did the High Court, we see this as a necessary intervention for the effective enforcement of the court's orders.

Furthermore, on the complaint that the learned judge failed to consider the impact of the ruling on the County Government of Samburu, this is what the learned judge had to say;

> ***"First, I consider what the implications of directing that the applicant does not access his office. This is provided for in section 32 (2) of the County Governments Act, which states that:***

(2) The deputy governor shall deputize for the governor in the execution of the governor's functions."

The learned judge went on to state that therefore, there would be no vacuum in the County offices; and that there have been instances, where due to ill health, a governor has been unable to attend to their duties and that,

"*.. .given the fact that the Constitution provides for the seat of deputy governor, the counties have continued to function."1*

We would agree. Having found as we have that the bail terms did not remove the appellant from office, but merely required compliance with constitutionally sanctioned terms that of necessity limited his access to the County offices until determination of the trial, we find that the learned judge sufficiently addressed the issue by pointing out the relevant constitutionally crafted remedy.

All issues considered, we are satisfied that the learned judge determined and analysed only matters that were placed before her, and as we have found no misdirection in the exercise of discretion, we have no basis upon which to interfere with the High Court's decision.

In sum, the appeal is unmerited and is for dismissal with costs to the respondent.

It is so ordered.

Dated and delivered at Nairobi this 20th day of December, 2019.

D.K MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

A.K MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR