



REPUBLIC OF KENYA



Waititu v Republic (Petition 2 of 2020) [2021] KESC 11 (KLR) (22 October 2021) (Judgment)

Neutral citation: [2021] KESC 11 (KLR)

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
PETITION 2 OF 2020
MK IBRAHIM, SC WANJALA, N NDUNGU, I LENAOLA & W OUKO, SCJJ
OCTOBER 22, 2021

BETWEEN

FERDINAND NDUNGU BABA YAO WAITITU APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the Judgment of the Court of Appeal in Nairobi (Musinga, Gatembu & Murgor, JJA) in Civil Appeal No. 416 of 2019 delivered on 20th December 2019)

Barring a Governor from accessing his/her office pending his/her prosecution for corruption offences does not amount to removal from office

Reported by Kakai Toili

Devolution Law – governors – removal of governors from office – claim that barring of governors from accessing their offices pending their prosecution for corruption offences amounted to removal from office - whether the barring of a governor from accessing his/her office pending his prosecution for corruption offences amounted to his removal from office - Constitution of Kenya, 2010, article 181; County Governments Act, 2012, section 33; Anti-Corruption and Economic Crimes Act, 2003 section 62(6).

Civil Practice and Procedure – appeals – appeals to the Supreme Court – appeals as of right in matters involving the interpretation or application of the Constitution - what were the requirements to be met for one to appeal to the Supreme Court as a matter involving the interpretation or application of the Constitution - Constitution of Kenya, 2010, article 163(4)(a).

Jurisdiction – jurisdiction of the Supreme Court – jurisdiction to determine appeals over interlocutory decisions - what were the circumstances in which the Supreme Court could allow appeals over interlocutory decisions.

Constitutional Law – fundamental rights and freedoms – rights of arrested persons – right to bail - what were the factors courts considered in exercising discretion whether or not to grant bail pending trial - Constitution of Kenya, 2010, article 49(1)(b).

Jurisdiction – jurisdiction of appellate courts – jurisdiction to interfere with the exercise of discretion by trial courts - when could an appellate court interfere with the exercise of discretion by a trial court.



Brief facts

The appellant was arrested and charged with three counts of alleged dealing with suspect property and a charge of conflict of interest. The appellant denied the charges and applied for admission to bail and/or bond. The trial court granted bail by ordering that the appellant could either pay a cash bail of Kshs.15,000,000 or a bond of Kshs.30,000,000 with surety of a similar amount. Further, the trial court went on to attach conditions to the grant of the bail terms by stating that the appellant could not access his public office until the hearing and determination of his case and; that the appellant and all his co-accused were also to deposit their travel documents with the court and were not to contact witnesses either directly or indirectly or in any other way tampering with the exhibits or any evidence.

Aggrieved by the orders made by the trial court, the appellant filed a revision of the trial court's order relating to the bail and bond terms. In the revision application, the appellant, *inter alia*, stated that the bail and bond terms were excessive, issued *per incuriam* and the terms amounted to a constructive denial of bail and bond without compelling reasons. The appellant further claimed that the bail terms estopped him from attending to his constitutional office and that the trial court's orders constituted constructive removal from office.

The High Court found that it had supervisory and revisionary jurisdiction over interlocutory issues sought to be determined in the course of trial, such as the one that was before the court. The High Court further found that attaching conditions to the grant of bail was not tantamount to removal of the appellant from office. Aggrieved further by the decision of the High Court, the appellant moved to the Court of Appeal. Upon considering the appeal, the Court of Appeal upheld the High Court's decision and dismissed the appeal. Aggrieved, the appellant filed the instant appeal.

Issues

- i. Whether the barring of a governor from accessing his/her office pending his/her prosecution for corruption offences amounted to his removal from office.
- ii. What were the requirements to be met for one to appeal to the Supreme Court as a matter involving the interpretation or application of the Constitution?
- iii. What were the circumstances in which the Supreme Court could allow appeals over interlocutory decisions?
- iv. What were the factors courts considered in exercising discretion whether or not to grant bail pending trial?
- v. When could an appellate court interfere with the exercise of discretion by a trial court?

Relevant provisions of the Law

Constitution of Kenya, 2010

Article 181 - Removal of a county governor

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).

Held

1. Article 163(4)(a) of the Constitution of Kenya, 2010, (Constitution) had to be seen to be laying down the principle that not all intended appeals lay from the Court of Appeal to the Supreme Court. Only those appeals that arose from cases involving the interpretation or application of the Constitution



- could be entertained by the Supreme Court. It was not the mere allegation in pleadings by a party that clothed an appeal with the attributes of constitutional interpretation or application.
2. The appeal had to originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words, an appellant had to be challenging the interpretation or application of the Constitution that the Court of Appeal used to dispose of the matter in that forum. Such a party had to be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation of the Constitution, it could not support a further appeal to the Supreme Court under article 163(4)(a) of the Constitution.
 3. The substantive matter as originally filed was pending before the trial court and what was before the instant court was the subject of an interlocutory appeal. The court generally lacked jurisdiction to entertain appeals from interlocutory decisions. The right of appeal against interlocutory decisions was available to a party in a criminal trial but should be deferred, and await the final determination by the trial court. A person seeking to appeal against an interlocutory decision had to file their intended notice of appeal within 14 days of the trial court's judgment. However, exceptional circumstances could exist where an appeal on an interlocutory decision could be sparingly allowed. They included;
 - a. where the decision concerned the admissibility of evidence, which, if ruled inadmissible, would eliminate or substantially weaken the prosecution case;
 - b. when the decision was of sufficient importance to the trial to justify it being determined on an interlocutory appeal; and
 - c. where the decision entailed the recusal of the trial court to hear the cause.
 4. Although what had triggered the appeal was a question on the exercise of judicial discretion in issuing bail terms during the pendency of the trial, the court assumed jurisdiction as the question of whether judicial exercise of discretion had been done in accordance with established principles of law was one which was of sufficient importance in a trial and if not well exercised, provided justification for it to be determined in an interlocutory appeal. In addition, it was possible for bail terms imposed to be final in nature and an accused person, invoking article 49(i)(h) of the Constitution had to ventilate the issue before the close of his trial.
 5. The constitutional right to bail as guaranteed under the Constitution was subject to being granted on reasonable conditions pending trial or unless there were compelling reasons not to do so and did not mean that the right was absolute. The discretion to grant bail and determine the conditions rested with the court. In exercising that discretion, the court however had to seek to strike a balance between protecting the liberty of the accused person and safeguarding the proper administration of justice.
 6. The trial court, at the point of consideration of the application of bail, was not called upon to make a determination on the interpretation of the provisions of section 62(6) of the Anti-Corruption and Economic Crimes Act. Section 62(6) prohibited the suspension of a public officer charged with corruption or economic crime where the Constitution already provided a method for removal, which in the case of a governor, was provided for under article 181 of the Constitution.
 7. Imposing conditions subject to the release of an accused person (in the instant case, the appellant), barring him from accessing his office pending his prosecution for the corruption offences, did not equate to his removal from office, since he remained Governor. There was therefore no need for the application of section 62(6) of the Anti-Corruption and Economic Crimes Act. In addition, the constitutionality or otherwise of section 62(6) could not have been addressed in a bail/bond ruling nor in a revision ruling. Neither could it be properly invoked at both stages of the proceedings.
 8. Article 49(1)(h) of the Constitution provided that an arrested person could be released on bond or bail on reasonable conditions and it entrenched the right of the arrested person to be released on bail subject to the imposition of reasonable conditions. The right to bail was an inalienable right and could only be restricted by the court if there were compelling reasons for an accused not to be released. In



granting bail or bond, the trial court was called upon to exercise its discretion and if there were no compelling reasons to deny an accused person bail or bond, the trial court should exercise its discretion in favour of the accused.

9. When it came to the issue of whether to grant or refuse bail pending the trial of an accused by the trial court, the law had set out some criteria which the trial court should consider in the exercise of its judicial discretion to arrive at a decision. The criteria included among others, the following; -
 - a. the nature of the charges;
 - b. the strength of the evidence which supported the charge;
 - c. the gravity of the punishment in the event of conviction;
 - d. the previous criminal record of the accused, if any;
 - e. the probability that the accused would not surrender himself for trial;
 - f. the likelihood of the accused interfering with witnesses or suppressing any evidence that could incriminate him;
 - g. the likelihood of further charges being brought against the accused;
 - h. the probability of guilt;
 - i. detention for the protection of the accused; and
 - j. the necessity to procure medical or social reports pending final disposal of the case.
10. Limiting the appellant's access to the county offices of Kiambu County pending the determination of trial did not equate to his removal from office as contemplated under article 181 of the Constitution. Barring a governor from accessing his office pending his trial for corruption charges could not be equated to removal from office. The trial court merely attached a condition to the bail granted for the appellant not to access his office and did not order his removal from office. Removal from office had to be undertaken by the procedure set out in section 33 of the County Governments Act. The procedure was only invoked, not through the ruling of the trial court but by notice to the Speaker of the Kiambu County Assembly which led to the eventual removal of the appellant as Governor.
11. Discretion by a trial court could be exercised to limit the enjoyment of bail if the accused was likely to interfere with witnesses or suppress the evidence against him. There was no reason to fault the trial court in exercise of that discretion noting the specific circumstances of the case facing the appellant and where his office could be the source of incriminating evidence and staff under him being witnesses. If the appellant was dissatisfied by any condition in the bail ruling, the proper procedure was to seek a review at any stage of his trial and show that the condition was no longer efficacious and ought to be lifted.
12. The appellant clutched onto the misguided notion of constructive removal, a mirage, when all he had to do was focus on bail terms and conditions and use lawful means to challenge the same. Removal was later conducted, and he was no longer in office. The trial court's ruling could not therefore be said to be the basis for his eventual removal, and as a basis for challenging the bail ruling.
13. The trial court considered the nature of the corruption charges and considered the possibility of the appellant interfering with witnesses, who were his subordinates at the time. The need to preserve the integrity of the evidence of the witnesses by finding that it would not be right if the witnesses were to be intimidated by them being suppressed was therefore a valid consideration. The trial court in the event properly considered the usual criteria a court took into account while imposing bail terms. The bail terms imposed were sufficient.
14. An appellate court should not interfere with the exercise of the discretion of a trial court unless it was satisfied that the trial court misdirected itself in some matter and as a result arrived at a wrong decision, or unless it was manifest from the case as a whole that the trial court was clearly wrong in the exercise of its discretion and that as a result there had been injustice.



15. The appellant had not demonstrated how the exercise of discretion was not judicious and how the High Court and the Court of Appeal erred in failing to interfere with the exercise of the trial court's discretion. There was no reason to interfere with the Court of Appeal's findings.

Appeal dismissed.

Orders

Appellant to bear the costs of the appeal.

Citations

Cases

Kenya

1. *Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 others* Application 10 of 2017, [2018] eKLR - (Explained)
2. *Bush, George & another v Republic; John Wamagata (Interested Party)* Judicial Review Application No 31 of 2019; [2020] eKLR - (Explained)
3. *Deynes Muriithi & 4 others v Law Society of Kenya & another* Civil Application 12 of 2015, [2016] eKLR - (Explained)
4. *In the Matter of Kenya National Commission on Human Rights* [2014] 2 KLR 356 - (Mentioned)
5. *International Centre for Policy and Conflict & 5 others v Attorney General & 5 others* Petition Nos 552, 554, 573 & 579 of 2012; [2013] eKLR (Consolidated) - (Explained)
6. *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* Advisory Opinion Reference No 1 of 2017; [2020] eKLR - (Mentioned)
7. *Matemu, Mumo v Trusted Society of Human Rights Alliance & 5 others* Civil Appeal No 290 of 2012; [2013] eKLR - (Explained)
8. *Nduttu & 6000 others v Kenya Breweries Ltd & another* [2012] 2 KLR 804 - (Explained)
9. *Republic v Peter Muia Mawia* Criminal Case No 48 of 2015; [2016] eKLR - (Explained)
10. *Republic v Ahmad Abolfathi Mohammed & another* Petition No 39 of 2018; [2019] eKLR - (Explained)
11. *Republic v Danfornd Kabage Mwangi* Criminal Case No 8 of 2016; [2016] eKLR - (Explained)
12. *Republic v Danson Mgunya & another* Criminal Case No 26 of 2008; [2010] eKLR - (Explained)
13. *Republic v Fredrick Ole Leliman & 4 others* Criminal Case No 57 of 2016; [2019] eKLR - (Explained)
14. *Republic v Joshua Mueke Mutunga & 3 others* Criminal Case No 17 of 2019; [2020] eKLR - (Explained)
15. *Republic v Pascal Ochieng Lawrence* Criminal Case Murder No 129 of 2013; [2014] eKLR - (Explained)
16. *Swazuri, Muhammed Abdalla & 16 others v Republic* Criminal Revision No 13 of 2018; [2018] eKLR - (Explained)
17. *Waswa, Joseph Lendrix v Republic* Petition No 23 of 2019; [2020] eKLR - (Explained)

South Africa

1. S v Coetzee and others [1997] ZACC 2; 1997 (4) BCLR 437; 1997 (3) SA 52 - (Explained)

Nigeria

1. *Alhaji Muiahid Dukubo – Asari v Federal Republic of Nigeria* SC 20AI /2006 - (Explained)

Regional Courts

Mbogo & another v Shah [1968] EA 93 - (Explained)

Texts

1. Garner, BA., (Ed) (2009), *Black's Law Dictionary* St Paul Minnesota: West Group 9th Edn

Statutes



Kenya

1. Anti-Corruption and Economic Crimes Act, 2003 (Act No No 3 of 2003) section 47(1)(2); 48; 62(1)(2)(6) - (Interpreted)
2. Constitution of Kenya articles 1, 10, 38(3)(c); 49(1)(h); ; 159(2)(d); 163 (4)(a)(b); 165(6)(7); 174(c), 175(a); 181(1); 182(1) - (Interpreted)
3. County Governments Act, 2012 (Act No 17 of 2012) section 32 & 33 - (Interpreted)
4. Criminal Procedure Code (cap 75) sections 362 & 364 - (Interpreted)
5. Supreme Court Act, 2011 (cap 9B) section 15(2) - (Interpreted)
6. Supreme Court Rules, 2011 (cap 9B Sub-Leg) rules 9 & 33 - (Interpreted)

Advocates

None mentioned

JUDGMENT

A. Introduction

1. The petition of appeal dated 3rd February 2020 and lodged on 4th February 2020 is brought pursuant to the provisions of article 163(4)(a) of the Constitution read together with section 15(2) of the *Supreme Court Act* and rules 9 and 33 of the *Supreme Court Rules*, 2012 (repealed). The petitioner seeks orders setting aside the Judgment of the Court of Appeal (Musinga, Gatembu & Murgor, JJA), delivered on 20th December 2019. The Court of Appeal upheld the High Court' (Ngenye-Macharia, J) Ruling in *Ferdinand Ndungu Waititu Babayao & 12 others v Republic* Anti-Corruption Revision No 30 of 2019 delivered on 8th August 2019 where the High Court, in upholding the trial Court's Ruling found that attaching conditions to the grant of bail in a criminal case is not tantamount to removal of a Governor from office.

B. Background

Proceedings before the Trial Court

2. The appellant was arrested alongside twelve others not before us and charged with three counts of alleged dealing with suspect property and a charge of conflict of interest. He was arraigned before the Chief Magistrates Court on 29th July 2019 in Anti-Corruption Case No 22 of 2019 *R v Ferdinand Waititu & 12 others*. The charges were as follows:
 - a. The first count was conflict of interest contrary to section 42(3) as read with section 48 of the *Anti-Corruption and Economic Crimes Act*, 2003. The particulars of the offence were that between 2nd July, 2018 and 13th March, 2019 at Kiambu County, the Appellant, knowingly, acquired an indirect private interest, to wit, receipt of Kshs 25,624,500/= in respect of payments made to Testimony Enterprises Limited for contracts awarded to the said company by the Kiambu County Government.
 - b. The second count was dealing with suspect property contrary to section 47(1) as read with sections 47(2)(A) and 48 of the *Anti-Corruption and Economic Crimes Act*, No 3 of 2003. The particulars of the offence were that between 2nd July, 2018 and 13th March, 2019 in Nairobi, the Appellant and Saika Two Estate Developers Limited (a company associated with the Appellant), received Kshs 18,410,500 from Testimony Enterprises Limited, having reason to believe that the said amount was acquired from Kiambu County Government through corrupt conduct.



- c. The third count against the appellant and his wife, Susan Wangari Ndung'u trading as Bienvenne Delta Hotel, was; dealing with suspect property contrary to section 47(1) as read with section 47(2)(A) and 48 of the [Anti-Corruption and Economic Crimes Act](#), No 3 of 2008. The two were alleged to have received Kshs 7,214,000 from Testimony Enterprises Limited, while having reason to believe that the said amount was acquired from Kiambu County Government through corrupt conduct.
3. The appellant denied the charges and applied for admission to bail and/or bond. The Respondent did not oppose the application, although the Respondent urged the trial court to impose conditions for the Appellant's release on bail. The trial court agreed to grant bail by ordering that the appellant could either pay a cash bail of Kshs 15,000,000 or a bond of Kshs 30,000,000 with surety of a similar amount. Further, the trial court went on to attach conditions to the grant of the bail terms by stating that the Appellant could not access his public office until the hearing and determination of his case and; that the appellant and all his co-accused were also to deposit their travel documents with the court and were not to contact witnesses either directly or indirectly or in any other way tampering with the exhibits or any evidence.

ii. Proceedings at the High Court

4. Aggrieved by the orders made by the trial court, the appellant filed a revision of the trial Court's order relating to the bail and bond terms being *Ferdinand Ndungu Waititu Babayao & 12 others v Republic Anti-Corruption* Revision No 30 of 2019 consolidated with Revision Application No 29 & 31 of 2019; [2019] eKLR. In the Revision application, the appellant, *inter alia*, stated that the bail and bond terms are excessive, issued *per incuriam* and the terms amount to a constructive denial of bail and bond without compelling reasons. Of particular relevance in the revision was the order that he court to exercise its supervisory jurisdiction under article 165(6) of the Constitution, as read with section 362 of the [Criminal Procedure Code](#), the appellant argued that there were violations of his rights under articles 49(1)(h), 181 and 182 of the Constitution, section 62(6) of the [Anti-Corruption and Economic Crimes Act](#) as read with section 33 of the [County Governments Act](#). The appellant further claimed that the bail terms estopped him from attending to his constitutional office and that the learned Magistrate's orders constituted constructive removal from office.
5. The High Court, while determining the Revision application framed three issues for determination; Whether the court had jurisdiction to entertain the application; Whether the learned trial magistrate erred in imposing a condition to the bail terms that the appellant does not set foot in his office pending the hearing and determination of the trial and Whether the bail terms imposed on the appellant and his co-accused were harsh and excessive.
6. In its ruling delivered on 8th August 2019, the High Court (Ngenye-Macharia, J) in addressing the issue of jurisdiction, found that it had supervisory and revisionary jurisdiction over interlocutory issues sought to be determined in the course of trial, such as the one that was before the court, as the appellant and his co-accused were yet to be convicted and that the supervisory jurisdiction was conferred by sections 362 and 364 of the [Criminal Procedure Code](#) and buttressed by article 165(6) & (7) of the [Constitution](#).
7. The High Court went on to note that the contested issue was whether the learned magistrate erred in imposing bail conditions and found that attaching conditions to the grant of bail is not tantamount to removal of the appellant from office. The learned Judge further went on to find that the constitutionality of section 62(6) of the [Anti-Corruption and Economic Crimes Act](#) was not an issue before the trial court and went on to find that the trial court did not make a conflicting interpretation



of the provision as alleged by the appellant and that since the Constitution provides for mechanisms for removal or vacating of such offices, then no other law would supersede it. The learned Judge in that regard held that the procedure for removal is as provided for under articles 181 and 182 of the Constitution as read with section 33 of the *County Government Act* and no other law could be invoked to do so.

8. The court also held that the trial Magistrate did not err in barring the appellant from accessing his office since the charges against the appellant were grave owing to his position, the weight of the offence and the public interest and there was therefore need for stringent bail terms to be attached. To this end, the learned Judge upheld the decision on the bail and bond terms by the trial Magistrate noting that the setting of bond or bail amounts is an exercise of discretion and that an appellate court should be slow and cautious to interfere with. The High Court thus upheld the trial court's decision.

iii. At the Court of Appeal

9. Aggrieved further by the decision of the High Court, the Appellant moved to the Court of Appeal in Nairobi Civil Appeal No 416 of 2019. Upon considering the appeal, the Court of Appeal framed the following three issues for determination; whether the court had the jurisdiction to entertain the appeal as instituted; whether the denial of access to the appellant's office amounted to his removal from office; and whether bail terms of cash bail of Kshs 15,000,000/= or bond of Kshs 30,000,000/= with a surety of a similar amount was harsh and excessive for charges of amounts totaling to a sum of Kshs 51,249,000/= was correct.
10. On the issue of jurisdiction, the Court of Appeal strived to answer the question of how the case metamorphosed from a criminal one to a civil one by noting that the appellant filed his notice of appeal under rule 75 of the *Court of Appeal Rules* which falls under Part IV of the rules that deals with civil appeals. The court went on to note that the appropriate procedure was to file the appeal in conformity with rule 59 of the *Court of Appeal Rules* which falls under part III of the rules which deals with criminal appeals. The court further noted that ordinarily in criminal matters, there are no interlocutory appeals, as appeals are filed only after the final determination of a case. Nevertheless, the court while addressing this issue relied on the Supreme Court's decision in *Dynes Muriithi & another v Law Society of Kenya & another* Sup Ct Application No 12 of 2015; [2016] eKLR where the Court held that appeals dealing with constitutional issues may in substance be civil in nature. Further, the court went on to hold that to strike out the appeal on grounds that it was not instituted as a criminal appeal would be tantamount to rejection of the appeal on form rather than substance which would be contrary to the spirit and intent of article 159(2)(d) of the Constitution. The Court of Appeal thus embraced jurisdiction.
11. With regard to the second issue of whether the appellant's denial of access to his office amounted to removal of office, the Court of Appeal held that in determining this issue, the learned judge of the High Court had in mind that it involved the interpretation of articles 49(1)(h), 181 and 182 of the Constitution, as well as sections 62(1) and (6) of the *Anti-Corruption and Economic Crimes Act*.

That neither the learned judge's nor the trial magistrate's holding purported to remove or suspend the appellant from office and that the provisions of section 62(6) of *Anti-Corruption and Economic Crimes Act* had no application before the matter before her as the procedure for removal of a Governor is as provided for under articles 181 and 182 of the Constitution on removal of a County Governor and the vacancy arising thereof. It was therefore the Court of Appeal's finding that the issue of constitutionality or otherwise of section 62 of the *Anti-Corruption and Economic Crimes Act* was not before the court for determination in the appeal and that the court could therefore not express any opinion on the same.



12. Further, it was the court's holding that bearing in mind the nature of the charges preferred against the appellant, the circumstances under which the alleged offences were committed and that some of the prosecution witnesses were County staff who are answerable to the appellant, it was not far-fetched for the Prosecution to contend that the appellant would most likely interfere with witnesses or conduct himself in a manner likely to compromise the case if he was not barred from accessing his office during the pendency of the trial.
13. On the third issue on whether the bail terms were harsh, the Court of Appeal held, that there was no basis for faulting the learned judge's exercise of discretionary powers in upholding the bail terms and upheld the High Court's finding that the discretionary powers of the court should not be interfered with unless it was shown that the decision was plainly wrong, or granted without consideration of relevant factors. The appellate court thus upheld the High Court's finding and dismissed the appeal.

iv. Proceedings before the Supreme Court

14. Aggrieved by the decision of the Court of Appeal, the appellant filed the instant petition arguing that the learned judges of the Court of Appeal erred in law and in fact in;
 - i. Failing to fully appreciate the legal implications of a temporary deprivation of a County Governor's powers/privilege to access office.
 - ii. By holding that section 62(6) of the *Anti-Corruption and Economic Crimes Act* had no application in the matter and by failing to appreciate the indispensable role of a County Governor in running the affairs of a County Government.
 - iii. Failing to employ the principle of harmonization as a principle of interpretation while considering the tension between the imperative to impose bail terms and conditions under article 49(1)(h) of the Constitution while issuing bail and respecting the constitutionally underpinned process for removal of a Governor from office under article 181(2) of the Constitution.
 - iv. Sanctioning bail terms and conditions that violated key objects and principles of devolved Government under article 174(c) and article 175(a) of the Constitution, respectively.
 - v. Upholding bail conditions that limited/unjustifiably violated the petitioner's right to hold office as an elected leader under article 38(3)(c) of the Constitution.
 - vii. Failing to interfere with the finding of the learned judge of the High Court (Ngenye-Macharia) that the trial Court had exercised its discretion lawfully and reasonably while setting the bail terms and amounts of the appellant.
 - viii. Failing to disturb the finding by the High Court that the Appellant had breached the Public trust of the people of Kiambu County and violated article 73(1) and (2) of the Constitution of Kenya.
15. The appellant thus seeks the following reliefs:
 - a. The petition of appeal herein be allowed as prayed.
 - b. The Judgment dated 20th December 2019 and subsequent Orders of the Court of Appeal be set aside.
 - c. A declaration do issue that the Order of the Learned Trial Magistrate L N Mugambi in ACC No 22 of 2019, *Republic v Ferdinand Ndungu Waititu Babayao & 12 Others* issued on 30th



July 2019, and as affirmed by both the High Court in ACC Revision No 30 of 2019, *Ferdinand Ndungu Waititu Babayao & 12 Others v Republic* and the Court of Appeal in Civil Appeal No 416 of 2019, *Ferdinand Ndungu Babayao v Republic* that the Appellant shall not access his office until his criminal case is heard and determined was unlawful, illegal and amounted to a constructive removal and/or suspension of the petitioner from office.

- d. The bail amounts of cash, Kshs 15,000,000.00 or bond of Kshs 30,000,000.00 granted to the appellant by the trial Court be reduced to a cash bail of Kshs 2,000,000.00 or bond of Kshs 5,000,000.00;
 - e. The costs of this petition of appeal be borne by the respondents.
 - f. The costs of the proceedings at the Court of Appeal, at the High Court and the bail proceedings at the trial Court be awarded to the appellant herein.
 - g. Such further Orders as may seem just to be made.
16. The respondent filed Grounds of Objection dated 28th August 2020 in response to the appeal contesting this court's jurisdiction to hear the appeal claiming that the appellant ought to have first obtained certification for leave to appeal under article 163(4)(b) of the Constitution thus the appellant has no *locus standi* to prosecute the appeal. The respondent contends in that regard that the petition of appeal does not raise any constitutional issue meriting interpretation or application of the Constitution.

C. Parties' Submissions

i. The appellant's

17. The appellant's written submissions are dated 9th October 2020. Therein, the appellant has addressed us under the following heads; that this court has Jurisdiction under article 163(4)(a) of the Constitution; that conditions attached to the bail terms on the Appellant amounted to constructive removal from office; that section 62(6) of the *Anti-Corruption and Economic Crimes Act* is applicable; constructive removal of the appellant challenges the constitutional protection on presumption of innocence and; the integrity question and whether it should be determined when criminal charges have been preferred.
18. On the issue of jurisdiction, the appellant submits that this court is vested with the requisite jurisdiction to hear and determine the instant petition pursuant to article 163(4)(a) of the Constitution as the appeal involves the interpretation and application of the Constitution. He submits that the appeal has met the threshold set out by this court in *Lawrence Nduttu & 6000 other v Kenya Breweries Ltd & Another* Sup Ct Petition No 3 of 2012; [2012] eKLR (*Nduttu case*) where the court noted that the intent of article 163(4)(a) of the Constitution was to lay down the principle that not all intended appeals lie from the Court of Appeal to the Supreme Court. That only those appeals arising from cases involving the interpretation or application of the Constitution can be entertained by the Supreme Court.
19. The appellant further submits that the Court of Appeal, in its Judgment addressed the issue whether "denial of access to his office amounts to removal of the appellant from office" and then went on to note affirmatively that "the determination of this issue involved interpretation of articles 49(1)(h), 181 and 182 of the Constitution as well as section 62(6) of the *Anti-Corruption and Economic Crimes Act*". The appellant thus argues that his Petition of Appeal meets the jurisdictional threshold set by this court since constitutional interpretation issues raised in the petition were the subject of determination from



- the trial court to the High Court and the Court of Appeal. In support of this, he also relies on this court's decision in the case of *Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 Others* [2018] eKLR.
20. The appellant, in addition, contends that, while before the High Court, he had submitted that the bail terms that ostensibly removed him from office were made in violation of articles 181 and 182(1) of the Constitution as read together with section 62(6) of the *Anti-Corruption and Economic Crimes Act* and were therefore unconstitutional. Further, he submits that the constitutional questions raised in this appeal cannot be downplayed, as it seeks to institute a balance in constitutional interpretation which should be adopted for future disputes regarding the removal of a public officer from office, and in particular removal of a sitting Governor other than by the direct provisions of articles 181 & 182(1) of the Constitution and section 33 of the *County Governments Act*.
 21. The appellant further argues that the sanctity of the Constitution and its assurance on the presumption of innocence is also on trial in the appeal and calls upon this court to make a resounding interpretation in favour of the sanctity of the criminal justice system which, he contends, must be kept sacrosanct bearing in mind the authoritarian hurdles of Kenya's historical past. The appellant thus urges the court to find that the appeal raises constitutional questions whose time has come for determination by the court.
 22. On the issue of whether the conditions attached to the bail terms amounted to constructive removal, the appellant submits that the provisions on removal of a Governor from office are as provided under articles 181 and 182 of the Constitution and section 33 of the *County Governments Act*. It is however the appellant's submission that the bail conditions imposed against him violated his right to a fair trial, as they resulted in him being removed from office by making it impossible for him to perform his functions, without due regard to due process established by law.
 23. Further to the above, the appellant submits that he was constructively removed from office and points out that by being prohibited from setting foot in his office, some time bound functions of a Governor such as submitting county plans and policies to the County Assembly for approval and consideration, approving and assenting to bills passed by the County Assembly could not be performed. The appellant maintains that he was kicked out of office following the orders by the trial Court and he could therefore not fulfill his mandate as a Governor. The appellant relies on the case of *Muhammed Abdalla Swazuri & 16 others v Republic* [2018] eKLR where the High Court (Ongudi, J) frowned upon conditions attached to bail terms preventing a constitutional office holder from accessing his office. While relying on this decision, the appellant submits that the impracticability of him undertaking his functions without accessing the office amounts to constructive removal from office. The appellant further relies on the definition of constructive dismissal found in the *Black's law Dictionary (9th Edition)* as follows 'a termination of employment brought about by the employer making the employee's working conditions so intolerable that the employee feels compelled to leave.' He thus urges the court to prevent the attempt to slide in a new procedure of removing Governors other than by the manner provided for in the Constitution.
 24. Also, in the above context, it is the appellant's contention that the Constitution and the *County Governments Act* do not envisage the constitutionally delineated functions of Governor being taken up by a Deputy Governor while the Governor is still in office. In support of this position, he relies on the provisions of section 32 of the *County Governments Act* which provides that the Deputy Governor's function is to deputize the Governor in execution of his duties. That section 32(4) specifically provides that "when acting in office as contemplated in article 179(5) of the Constitution, the deputy governor shall not exercise any powers of the governors, to nominate, appoint or dismiss, that are assigned to the Governor under the Constitution or other written law". That the only scenario envisioned for



- the Deputy Governor to assume constitutional duties designated to the Governor is when there is a vacancy in the office of the Governor pursuant to article 182(1) of the Constitution. The appellant thus took issue with how his then Deputy Governor, the Hon James K Nyoro, ‘sprang into action’ once the appellant was barred from accessing his office despite the Governor’s office not being declared vacant as contemplated under article 181(1) of the Constitution.
25. Furthermore, the appellant submits that the imposed bail terms amounted to constructive removal and the Court of Appeal, by upholding the decisions of the High Court and trial court on bail terms that were disproportionate, unbalanced and incommensurate to the object that the court achieved acted in error. That the court also negated the provisions of article 1 of the Constitution, which was invoked when the appellant was elected as a Governor. The appellant urges us to therefore find that the court of Appeal erred in failing to fully appreciate the legal implications of temporary deprivation of the powers of a Governor’s access to office, which resulted in bad precedent, which the appellant submits should not be upheld.
 26. With regard to whether section 62(6) of the *Anti-Corruption and Economic Crimes Act* is applicable, the appellant submits that it is applicable as it touches on the core of this dispute. He submits that he was a public officer at the time, within the meaning of section 2 of the *Anti-Corruption and Economic Crimes Act* and that section 62(6) of the Act was meant to prevent, with certainty, situations such as the one the appellant has found himself in by stating that “This section shall not apply with respect to an office if the Constitution 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.” The appellant thus submits that based on this provision, the court should adopt a purposive interpretation of the Statute as read together with the relevant provisions and that, in realizing the supremacy of the Constitution and in seeking to jealously protect the gains made by the Constitution, the drafters inserted section 62(6) of the *Anti-Corruption and Economic Crimes Act*.
 27. The appellant further submits that the Court of Appeal erred in stating that the provisions of section 62(6) were not applicable in the present matter. The appellant instead submits that being a public officer within the meaning of section 62(1) of *Anti-Corruption and Economic Crimes Act*, he may not be removed from office other than in the manner or circumstances in which the office was created, and that the orders issued by the trial court effectively led to the temporary deprivation of the appellant’s powers and privileges such as access to his office and inevitably, a constructive removal from office, in contravention of the provisions of the said section 62(6) of the *Anti-Corruption and Economic Crimes Act*.
 28. On whether the alleged constructive removal of the appellant challenges the constitutional protection on presumption of office, the appellant submits that the constructive removal from office was against the constitutional presumption of innocence, in that, the appellant was impeached as a result of the indictments that are yet to be determined in court, which was further aggravated by the orders issues by the court. This, he submits, went against the decision of this court in *Republic v Ahmad Abolfathi Mohammed & another* Sup Ct Petition No 39 of 2018 [2019] eKLR, wherein it was stated that the courts are required to strike a balance between the public’s interest on one hand, and constitutional principles applicable within the criminal justice system, on the other, with the most fundamental principles being the presumption of innocence until proven guilty. He also relied on the decision of the Constitutional Court of South Africa in *S v Coetzee and others* (CCT50/95) [1997] ZACC 2 to buttress this submission.
 29. In addition to the above, the appellant submits that the Court of Appeal essentially found in its decision, that public interest is not served by breach of fundamental guarantees for an accused person in a criminal trial, and that most importantly, public interest is not served when a Governor is denied



access to office on account of committing a grievous offence in the eyes of the public. Further, the appellant contends that, should this court uphold the Court of Appeal's finding, then there shall emerge a practice where the proper procedure for removal of a Governor will be downplayed by creating an easier channel for their removal in the pretext of criminal charges in the form of what the Appellant is charged with, forming the basis of impeachment together with unconstitutional bail terms preventing access to office to discharge official duties.

30. On whether the question of integrity should be determined when criminal charges have been preferred, the appellant submits that the courts are un-procedurally finding holders of public office who are facing charges for various offences as having breached integrity provisions in chapter 6, as read with article 10 of the Constitution as unfit to hold office due to being morally unfit or of moral turpitude. The appellant submits that this is unprocedural, and against the tenets pronounced in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR. He submits, relying on *Mumo Matemu*, that the finding of unfitness must have been specifically proven. He further submits that there must be a distinction between the process of finding out whether or not an individual is fit to hold public office, from the process of a criminal trial where the burden of proof lies on the Prosecution and the accused is protected under the presumption of innocence principle. The appellant further relies on the High Court case of *International Centre for Policy and Conflict & 5 others v Attorney General & 5 others* [2013] eKLR in making this submission.
31. In conclusion, the appellant urges the court to find that it has jurisdiction to hear this appeal, and to give a final interpretation in this matter by forbidding constructive removal of Governors from office by virtue of indictment on corruption charges as is provided in section 62(6) of *Anti-Corruption and Economic Crimes Act* and prays that this court finds that the decisions by the trial Courts and superior courts amounted to removal of the appellant from office, in a manner other than what is provided in the Constitution.

ii. Respondent's

32. In the submissions dated 23rd October 2020 and filed on 26th October 2020, the respondent submits on two issues; (a) that the appeal is incurably defective and (b) whether barring from access to an office amounts to removal.
33. On the issue of the appeal being incurably defective, the respondent submits that the Petition has been filed without leave of the court as is required by article 163(4)(b) of the Constitution. The respondent further argues that the issues for determination have been framed as issues affecting public interest and security of tenure of public officers holding constitutional and independent offices whereas the subject of appeal as was argued before the High Court and the Court of Appeal was on the bail terms and conditions which affected a single person, the appellant.
34. In the above context, the respondent submits that the appellant is attempting to convert an appeal against bail and bond terms into a constitutional petition seeking interpretation and declaration of legal provisions that were not canvassed during the hearings at the subordinate and superior courts. For this reason, they contend that the Petition does not meet the threshold on jurisdiction as set out in the case of *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another (supra)*. The respondent further argues that, if the appellant felt aggrieved, then he should have filed a constitutional petition before the High Court, which under article 165 of the Constitution, has the jurisdiction to interpret the Constitution and grant redress to a successful litigant and for interpretation of section 62(6) of *Anti-Corruption and Economic Crimes Act vis-à-vis* section 33 of the *County Governments Act* as well as articles 181 and 182 of the Constitution.



35. The respondent also submits that on 2nd October 2020, the Council of Governors filed Petition No HCCHR Pet E312 of 2020 before the High Court at Nairobi seeking declarations on the same issues the appellant is raising in his appeal and submits that should this court proceed to hear and determine the constitutional issues in this appeal, then the High Court, as the court with the primary and original jurisdiction under article 165 of the Constitution to determine the petition, shall be unable to interpret the Constitution with regard to those issues. That doing so may result in an absurdity and varying declaratory judgments on the same subject matter and will deny the parties in the petition by the Council of Governors a chance to appeal. This court's decisions in the cases of *In the Matter of the Kenya National Commission on Human Rights* Sup Ct Advisory Opinion Reference No 1 of 2012; [2014] eKLR and *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* Sup Ct Advisory Opinion Reference No 1 of 2017; [2020] eKLR were relied on to buttress this submission.
36. On the issue as to whether barring access to office amounts to removal, the respondent submits that the appellant was only barred from accessing his office pending the hearing and determination of his criminal case to preserve the integrity and credibility of the case in light of public interest. It is thus urged that the appellant's argument that the bail terms barring him access to his office amounts to constructive removal from office and contravenes the provisions of section 62(6) of *Anti-Corruption and Economic Crimes Act* is erroneous and misleading as the appellant was not removed from office, as alleged.
37. The respondent furthermore contends that section 62(1) of the *Anti-Corruption and Economic Crimes Act* provides for suspension from office of public or state officers charged with economic and corruption offences, which section they claim, contravenes the provisions of the Constitution by being discriminatory as it seeks to favor the appellant by unconstitutionally elevating him to a higher pedestal at the expense of common public officers. The respondent in addition, argues that the learned Judges of both the High Court and Court of Appeal confirmed that the issue of constitutional interpretation of section 62(6) of *Anti-Corruption and Economic Crimes Act* was not argued before the High Court, hence the reason the Court of Appeal failed to make a determination on it.
38. The respondent further submits that the appellant was not removed from office, or that the bail terms barring him from access to his office were tantamount to removal from office, and that the provisions of section 62(1) of *Anti-Corruption and Economic Crimes Act* provides for suspension from office of public or state officers charged with economic and corruption offences. Further, it is submitted that the appellant is seeking refuge under section 62(6) of *Anti-Corruption and Economic Crimes Act*, which interpretation thereof was not in issue at the superior courts. It is thus submitted that the phrase "constructive removal from office" as submitted by the appellant does not exist since no such procedure is provided for under the Constitution or the *County Governments Act*.
39. The respondent, in addition, submits that there is a distinction between suspension and removal of an office holder, arguing that articles 181 and 182 of the Constitution provide for the process of removal of a Governor from office. That the provisions of article 182 of the Constitution never arose in the present case resulting in the position of Kiambu Governor being declared vacant. It is the respondent's submission therefore that the appellant was only charged before the trial court and granted bail terms, of which none of the terms included his removal from office. The respondent also contends that the appellant's eventual removal from office was done by the members of the Kiambu County Assembly. It is therefore their submission that this matter has been overtaken by events and is a mere academic exercise aimed at wasting judicial time. The High Court case of *George Bush & another v Republic; John Wamagata (Interested Party)* [2020] eKLR was relied on to buttress the submission that there is no



cause of action for this court to grant redress to the appellant and that the court is only engaging in an unwarranted academic exercise.

40. Further to the above, the respondent submits that since the office of the Governor was not declared vacant, no prejudice was occasioned to the ordinary members of Kiambu County or the appellant since services at the County never ground to a halt as the Governor's office is not individualistic in nature.
41. The respondent furthermore submits that in granting bail, the trial court had to delicately weight the scales of justice and was fully aware of the need to balance the interest of administration of justice in protecting witnesses and evidence from interference on one hand, and the duties of a Governor in the performance of his functions, to which the court tilted the scales in favour of the administration of justice. Also, it is argued that the bail terms and conditions set by the subordinate and superior courts were to ensure that there was no interference with the witnesses, given the position of authority of the appellant, and to safeguard the integrity of the trial since the witnesses were employees of the County Government and subordinate to the appellant. The High Court cases of *Republic v Peter Muia Mawia* [2016] eKLR and *Republic v Fredrick Ole Leliman & 4 others* [2018] eKLR were submitted in support of this position.
42. In conclusion, the respondent submits that the appellant should be subjected to the same treatment and processes as any other accused person would be subjected in a criminal trial. That the appellant should not be given preferential treatment on account of his social status or the position he holds. The respondent therefore prays that the appeal be dismissed.

D. Analysis and Determination

43. Having considered the respective parties' pleadings and submissions in the instant appeal, this court is of the considered view that the issues arising for determination are;
 - a. Whether this court has jurisdiction to entertain this appeal;
 - b. Whether the bail conditions imposed by the trial court were reasonable, and if the answer is in the affirmative;
 - c. Whether they resulted in the removal of the appellant from office;
 - d. What reliefs are available to the parties?

a. Whether this court has jurisdiction to entertain this appeal

44. While this court has on numerous occasions defined the extent of its jurisdiction under article 163(4) (a) of the Constitution as regards appeals filed as of right, it is the one issue that this court has to address, before proceeding to determine a matter. The Respondent urges us in that regard that there is nothing of constitutional interpretation and/or application in this appeal to warrant invocation of this court's jurisdiction under article 163(4)(a) of the Constitution. They contend that the appellant is seeking to concur into an appeal that involves interpretation and declaration of legal provisions that were not considered by the three courts below. In response, the appellant is emphatic that this court has jurisdiction and that he has properly invoked it, as the constitutional interpretation issues raised in the Petition were the subject of determination before the trial court, the High Court and the Court of Appeal.
45. The appellant further submits that the issue that is presently before this court involves the interpretation of article 49 (1)(h) of the Constitution and an answer as to the question whether the learned Magistrate properly exercised his discretion in his decision to impose bail and bond terms and



conditions subject to the release of the appellant, following his arrest. The appellant, in that regard, contends that the decision by the trial Court to impose stringent bail and bond terms that denied him access to his office as the Governor of Kiambu (as he was at the time) resulted in his constructive removal from office and seeks to have this court, while determining that issue, interpret the provisions of articles 181 and 182 of the Constitution.

46. On our part, and on the question whether the present appeal is properly before us, in *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another* (Tunoi and Wanjala SCJJ) Sup Ct Petition No 3 of 2012; (2012) eKLR, this court was categorical that;

“ Article 163 (4) (a) must be seen to be laying down the principle that not all intended appeals lie from the Court of Appeal to the Supreme Court. Only those appeals arising from cases involving the interpretation or application of the Constitution can be entertained by the Supreme Court.....Towards this end, it is not the mere allegation in pleadings by a party that clothes an appeal with the attributes of constitutional interpretation or application.”

47. The court expounded upon this principle at paragraph 28 of that decision where it pronounced itself thus:

“ The appeal must originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words, an appellant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of article 163(4)(a).”

48. We are, in applying the above principles, cognizant of the fact that the substantive matter as originally filed is still pending before the trial court and what is before us is the subject of an interlocutory appeal. Do we have the jurisdiction to determine such an appeal as of right under article 163(4)(a) of the Constitution? The position of this court on interlocutory appeals is that it generally lacks jurisdiction to entertain appeals from interlocutory decisions. So then, what happens, as it did in this case, when a party is aggrieved by a decision of the trial court during the trial on a legal or constitutional issue that arises within a criminal trial? This question was well answered by this court in the case of *Joseph Lendrix Waswa v Republic* Sup Ct Petition No 23 of 2019; [2020] eKLR where we stated thus on interlocutory appeals arising from criminal trials:

“ 94. Flowing from the above, we are of the view that the right of appeal against interlocutory decisions is available to a party in a criminal trial but should be deferred, and await the final determination by the trial court. A person seeking to appeal against an interlocutory decision must file their intended notice of appeal within 14 days of the trial court’s judgment. However, exceptional circumstances may exist where an appeal on an interlocutory decision may be sparingly allowed. These include:

- a. Where the decision concerns the admissibility of evidence, which, if ruled inadmissible, would eliminate or substantially weaken the prosecution case;
- b. When the decision is of sufficient importance to the trial to justify it being determined on an interlocutory appeal;



- c. Where the decision entails the recusal of the trial court to hear the cause.” [Emphasis ours]

49. In the circumstances, although what has triggered the present appeal is a question on the exercise of judicial discretion in issuing bail terms during pendency of the trial, we deem it fit to assume jurisdiction as the question of whether judicial exercise of discretion has been done in accordance with established principles of law is one which we deem, in our view, to be of sufficient importance in a trial and if not well exercised, justifiable for it to be determined in an interlocutory appeal. In addition, it is possible for bail terms imposed to be final in nature and an accused person, invoking article 49(i)(h), of the Constitution must ventilate the issue before the close of his trial.

Consequently, we hold that we have jurisdiction to entertain this appeal.

b. Whether the bail conditions were reasonable and if not, whether they amounted to removal of the Appellant from office

50. Both counsel for the appellant argued before us that by granting bail to the appellant upon the condition that he should not access his office until the hearing and determination of the trial, the trial court’s orders resulted in the appellant’s removal and/or suspension from office in violation of section 62(6) of the *Anti-Corruption and Economic Crimes Act*, article 181 and 182 of the Constitution of Kenya, 2010 as read together with section 33 of the *County Governments Act*, 2012.

51. Counsel for the respondent, by contrast, urged us to find that the bail terms did not amount to removal of office as the appellant was only barred from accessing his office pending the hearing and determination of the case to preserve the integrity and credibility of the trial in light of public interest.

52. For us to determine whether the bail terms amounted to ‘constructive removal of office’ as the appellant has so strongly argued before us, we need to determine the question whether the trial court properly exercised its discretion while considering the appellant’s application for bail and whether the High Court and Court of Appeal erred in failing to interfere with that exercise of discretion.

53. In that regard, article 49(1)(h) of the Constitution provides that:-

“ An accused person has the right ...

....

- h. to be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released”.

54. The constitutional right to bail as guaranteed under the Constitution is therefore subject to being granted “on reasonable conditions” pending trial or unless there are compelling reasons” not to do so and does not mean that the right is absolute. In the end, the discretion to grant bail and determine the conditions rests with the court. In exercising this discretion, the court however must seek to strike a balance between protecting the liberty of the accused person and safeguarding the proper administration of justice. This was well explained by Mativo J who persuasively stated in *Republic v Danford Kabage Mwangi* [2016] eKLR that:

“ Granting bail entails the striking of a balance of proportionality in considering the rights to the applicant who is presumed innocent at this point on the one hand, and the public interest on the other. The cornerstone of the justice system is that no one will be punished without the benefit of due process. Incarcerations before trial, when the outcome of the



case is yet to be determined, cuts against this principal. The need for bail is to assure that the accused person will appear for trial and not to corrupt the legal process by absconding. Anything more is excessive and positive...”

55. The appellant’s claim in the above context was that the bail terms and conditions imposed against him, preventing him from directly accessing his office, resulted in him being ‘constructively removed’ from office. He decries that by being temporarily deprived of his powers and privileges, he could not fulfill his mandate as a Governor and therefore, the bail terms were disproportionate, unbalanced and incommensurate to the objective the court intended to achieve.
56. Before we delve into this issue, it is prudent that we first address the question of whether the provisions of section 62(6) of the *Anti-Corruption and Economic Crimes Act* are applicable in this case. This is because the appellant claims that the two superior courts erred in upholding the trial court’s finding that the provisions of section 62(6) of the Act were not applicable in the present matter.
57. The appellant in stating so, was calling upon the High Court and Court of Appeal to interpret the provisions of section 62(6) of the *Anti-Corruption and Economic Crimes Act* claiming that the bail terms contravened this provision. Further, the appellant claims that the provisions on removal of a Governor are as provided for under section 33 of the *County Governments Act* and anchored on articles 181 and 182 of the Constitution. The appellant’s justification for that position is that as a holder of a constitutional office, he can only be removed and/or suspended from office in accordance with the procedure stipulated in the Constitution.
58. It should be noted in answering his plea, that section 62 of the Act deals with suspension of public or state officers charged with corruption or economic crimes. Section 62(6) more specifically provides that the provisions on suspension shall not apply if the Constitution limits or provides the grounds on which an office holder may be removed. The said section 62(6) of the Act provides that;
- “ (6) This section does not apply with respect to an office if the Constitution limits or provides for the grounds upon which a holder of the office may be removed or the circumstances in which the office must be vacated.”
59. The trial court while deciding on the applicability of the said section found that the trial court could not rely on it in determining bail terms. The learned magistrate thus held as follows;
- “On the issue of section 62[6] of ACECA, I would say that following the decision of the learned Judge in Criminal Revision No 25/2019 *Moses Kasaine Lenokulal vs DPP*-the said section has now been rendered nugatory. The judge found in no uncertain terms that the said section offends the principle of equality before the law under article 27 of the Constitution and further violates, article 10 on integrity hence this court cannot therefore be urged to rely on it”
60. Upon the High Court being called to make a determination on this issue, the learned judge in her rendition on its interpretation, held, *inter alia*:
- “ 27. Suffice it to state, subsection (6) of section 62 was not in issue and the Court cannot therefore be said to have made a conflicting interpretation of the provision. This is buttressed by my understanding that the court did not make any determination on the provision and any assertion that the learned Judge



later contradicted her earlier decision in the Lenolkulal case are baseless and moot.”

61. The learned judge of the High Court further held that the issue of interpretation of section 62(6) of the *Anti-Corruption and Economic Crimes Act* was not before the trial Court. Similarly, the Court of Appeal also found that section 62(6) of the Act had no application in the matter and while considering the provision held as follows:

“ 44. In our view, to the extent that neither the trial magistrate nor the learned judge’s holding purported to remove or suspend the appellant from office of Governor, Kiambu County, section 62(6) of ACECA had no application in the matter that was before her. The appellant has not been suspended from his office, he is still the Governor of Kiambu County; he is still entitled to his full pay, not half. In the circumstances, the learned judge cannot be accused of having failed to apply the “omitted case” canon of statutory interpretation in affirming the terms of the appellant’s grant of bail. The issue of constitutionality or otherwise of section 62(6) of ACECA is not before us for determination in this appeal and therefore we cannot express any opinion on the same.”

62. To our minds, the trial court, at the point of consideration of the application of bail, was not called upon to make a determination on the interpretation of the provisions of section 62(6) of the Act, as the learned magistrate, quite rightly found. Section 62(6) prohibits the suspension of a public officer charged with a corruption or economic crime where the Constitution already provides a method for removal, which in the case of a Governor, is provided for under article 181 of the Constitution.

63. On the other hand, imposing conditions subject to the release of an accused person, in this case, the appellant, barring him from accessing his office pending his prosecution of the corruption offences, did not equate to his removal from office, since he still remained Governor. There was therefore no need for the application of section 62(6) of the Act, as was rightly held by the trial court and upheld by both the High Court and the Court of Appeal. On our part, we see no reason to hold otherwise, and we therefore uphold the position of the trial court and the two Superior Courts on the same. In addition, the constitutionality or otherwise of section 62(6) could not have been addressed in a bail/bond ruling nor in a Revision ruling. Neither could it be properly invoked at both stages of the proceedings for reasons we shall shortly address.

64. Having so stated, what ought to be determined is the question of whether the bail terms that barred the appellant from office were reasonable and as was stated above, article 49(1)(h) of the Constitution provides that an arrested person may be released on bond or bail on reasonable condition and entrenches the right of the arrested person to be released on bail subject to the imposition of reasonable conditions. Ibrahim, J (as he then was) in *Republic v Danson Mgunya & another* [2010] eKLR described the right to bail as an “inalienable right” by holding that; “The result of the foregoing is that a murder suspect has a

Constitutional Right to be released on bail. This is an inalienable right and can only be restricted by the court if there are compelling reasons for him not to be released.”

65. Therefore, in granting bail or bond, the trial court is called upon to exercise its discretion and if there are no compelling reasons to deny an accused person bail or bond, the trial court should exercise its discretion in favour of the accused. The High Court persuasively addressed in the case of *Republic v*



Pascal Ochieng Lawrence [2014] eKLR the parameters guiding a court in exercising that discretion by holding thus:

“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.”

66. Similarly, the High Court in the case of *Republic v Joshua Mueke Mutunga & 3 others* [2020] eKLR in determining the criteria to be applied on whether to grant bail or not relied on the decision by the Supreme Court of Nigeria in *Alhaji Muiabid Dukubo – Asari v Federal Republic of Nigeria*, SC 20AI /2006 which set out a similar criteria on the granting of bail by holding as follows:

“...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 out some criteria which the trial court shall consider in the exercise of its judicial discretion to arrive at a decision. These criteria have been 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 which supports the charge;
- 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. The probability of guilty;
- ix. Detention for the protection of the accused;
- x. The necessity to procure medical or social report pending final disposal of the case”. [Emphasis added]

67. The bail condition that has attracted the appellant’s wrath is condition No 1 where the trial court stated: “The 1st accused shall not access his office until this Criminal case is heard and determined.”



68. Does this condition amount to removal of office? As we earlier held, the grounds on which a County Governor may be removed from office are as set out under article 181 of the Constitution which provides:

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

69. Article 182 states the circumstances under which the office of the County Government shall be declared vacant by providing that;

- “182. The office of the county governor shall become vacant if the holder of the office
- (1) —
- a. dies;
 - b. resigns, in writing, addressed to the speaker of the county assembly;
 - c. ceases to be eligible to be elected county governor under article 180 (2);
 - d. is convicted of an offence punishable by imprisonment for at least twelve months; or
 - e. is removed from office under this Constitution”.

70. Did limiting the appellant’s access to the County offices of Kiambu pending the determination of trial equate to his removal from office as contemplated under article 181 of the Constitution? The answer to this is in the negative. Barring a Governor from accessing his office pending his trial on corruption charges cannot be equated to a removal from office. The trial court merely attached a condition to the bail granted for the appellant not to access his office and did not order his removal from office. Removal from office has to be undertaken by the procedure set out in section 33 of the *County Governments Act*. It is agreed that the said procedure was only invoked, not through the Ruling of the trial court but by notice to the Speaker of the Kiambu County Assembly which led to the eventual removal of the appellant as Governor.

71. What of the argument that the appellant was subjected to constructive removal? In his submission, the appellant relied on *Black’s Law Dictionary* (9th Edition) to argue that the bail terms made his working conditions so intolerable that he felt as if he was being compelled to leave office. That was a curious



submission because the reason for the order not to access his office was made to safeguard the integrity of the criminal trial during its pendency and no more.

72. Furthermore, as was stated in *Alhaj Muiahid Dukub*, discretion by a trial court may be exercised to limit the enjoyment of bail if the accused was likely to interfere with witnesses or suppress the evidence against him. We see no reason to fault the trial court in exercise of that discretion noting the specific circumstances of the case facing the appellant and where his office may be the source of incriminating evidence and staff under him being witnesses. If the appellant was dissatisfied by any condition in the bail Ruling, the proper procedure was to seek a review at any stage of his trial and show that the condition was no longer efficacious and ought to be lifted.
73. In conclusion on this issue, it is our opinion that the appellant clutched onto the misguided notion of constructive removal, a mirage, when all he had to do was focus on bail terms and conditions and use lawful means to challenge the same. Removal was later conducted, and he is no longer in office. The trial court's Ruling cannot therefore be said to be the basis for his eventual removal, and as a basis for challenging the bail Ruling.
74. Having found that the bail terms did not amount to removal of office, the appellant has not advanced other reasons to show that the bail conditions imposed were unconstitutional, unreasonable or unattainable. The trial court, while considering the application for bail, was very conscious of the nature of the offence, the gravity of the punishment in the event of conviction and the likelihood of the accused interfering with witnesses or suppressing any evidence that may incriminate him. The trial court held as follows in that regard:

“Imposing conditions that guarantee the integrity and credibility of the trial cannot be an illegality. In the present case, the court was urged to take Judicial Notice of the fact the charges accused persons are facing relates to activities that took place within their offices. Consequently, it is logical to expect that witnesses who will testify are people who work in the said County Government. Where the 1st accused holds the highest Executive Office that is the County Governor where the Executive authority is vested; officers working in the county are at his back (sic) and call.

In my view, restricting access to the office is a reasonable condition under article 49[1][h] in the circumstances of this case.”

75. It is thus evident to us that the trial court considered the nature of the corruption charges and considered the possibility of the appellant interfering with witnesses, who were his subordinates at the time. The need to preserve the integrity of the evidence of the witnesses by finding that it would not be right if the witnesses were to be intimidated by them being suppressed was therefore a valid consideration. The trial court in the event properly considered the usual criteria a court takes into account while imposing bail terms. The Court of Appeal while agreeing with the trial court held that as follows:

48. In the case of the appellant, bearing in mind the nature of the charges preferred against him; the circumstances under which the alleged offences were committed; that some of the prosecution witnesses are county staff who are answerable to the appellant, it was not far-fetched for the prosecution to contend that the appellant would most likely interfere with their witnesses or conduct himself in a manner likely to compromise their case if he was not barred from accessing his office during the pendency of the case. There are documented incidents of loss and/or disappearance of vital documents from certain offices where public or state officers, charged



with corruption or economic crimes related to their work, have been allowed unrestricted access to their offices during the pendency of the cases.

76. The Court of Appeal, in our view, correctly observed that the bail terms imposed were sufficient and concluded that no error or misdirection had been made by the trial court or the High Court in upholding the trial court's findings.

It was therefore its finding that discretion was exercised judiciously and the High Court deemed it right not to interfere with the same unless it is convinced that doing so would be in furtherance of the administration of justice in line with the holding in *Mbogo v Shab* [1968] EA 93 where it was held thus:-

“A Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice.”

77. The appellant has not demonstrated how the exercise of discretion was not judicious and how the learned judges of the High Court and the Court of Appeal erred in failing to interfere with the exercise of the trial court's discretion. Consequently, we do not find any reason to interfere with the Court of Appeal's findings.

78. For the above reasons, the appeal therefore fails and the only relief that attracts our mind is that the same is hereby dismissed. Costs follow the event and so the appellant shall bear the costs of the appeal.

E. Orders

79. Consequent upon our findings above, the final orders are that:

1. The petition of appeal dated 3rd February 2020 and filed on 4th February 2020 be and is hereby dismissed.
2. The appellant shall bear the costs of the appeal.

80. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF OCTOBER 2021.

.....
M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT
.....

S. C. WANJALA

JUSTICE OF THE SUPREME COURT
.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT
.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT



.....

W. OUKO

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA

