



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

ACEC APPEAL NO. 1 OF 2022

FRANCIS ZURIELS MOTURIAPPLICANT

VERSUS

REPUBLICRESPONDENT

RULING

1. The Applicant Francis Zuriels Moturi was charged with five counts of corruption related offences in *Chief Magistrate ACC No. 15 of 2010 Republic v Francis Zuriels Moturi and 8 others*. At the culmination of the trial, the Applicant was convicted with 2 counts and sentenced as follows:

- i. *Count 4: conspiracy to defraud contrary to Section 317 of the Penal Code and sentenced to a fine of Kshs. 1 million in default to serve 2 years imprisonment*
- ii. *Count 5: deceiving a principal contrary to section 41 (2) as read with section 48 of the Anti-Corruption and Economic Crimes Act, 2003 and sentenced under Section 48(1) of ACECA to Kshs. 1 million in default 3 years imprisonment and a mandatory sentence under Section 48(2) (b) of a fine of Kshs. 2,402,286,744.80 for occasioning the loss of Kshs. 1,201,143,372.40 at the NSSF.*

The trial court made further orders that the sentences shall, in default of fine, run consecutively and that none of the accused persons may be appointed to public office for the next 10 years subject to section 64(1) of the ACECA.”

2. The Applicant vide a Notice of Motion Application brought under a Certificate of Urgency dated 9th February 2022 seeks to be admitted to bail pending appeal. The Application is brought under **Section 357 and 124** of the **Criminal Procedure Code Cap 75 and Articles 47,48,50 and 159 of the Constitution** and is supported by the applicant’s affidavits sworn on 9th February 2022 and 1st March 2022. The Applicant relies further on his written submissions dated 8th February, 2022.

3. The Respondent fervently opposes the Application vide its Replying affidavit sworn by Caroline Kimiri, Senior Prosecution Counsel sworn on 1st March 2022 and written submissions dated 14th March, 2022.

4. On 17th March, 2022 when this matter came up for hearing, the court made orders that the Applicant to file an affidavit sworn by the medical doctor who authored the medical report and that the Respondent was at liberty to appoint its own doctor to conduct an examination upon the applicant and file an affidavit in that respect. This resulted in the filing of an independent medical report and an affidavit sworn by Dr. John Ngigi a Consultant Physician and Senior Director, Kenyatta National Hospital both dated 25th March 2022.

The Applicant’s case

5. The Applicant relies on the grounds stated on the body of the Application and his two affidavits summarized as follows:

- i. The Applicant’s intended appeal raises substantial questions of law and fact that will render an overwhelming chance of success
- ii. The Applicant has demonstrated exceptional reasons for grant of bail pending appeal including that the applicant is 72 years old suffering from inter alia high blood pressure and diabetes, he does not have any previous convictions, he is not a flight risk or danger to the community as the trial court did grant him bail and he consistently presented himself to court for the hearing of the matter.
- iii. The Applicant is ready and willing to abide by any conditions that the court may impose

iv. This court has the jurisdiction to grant bail pending appeal

v. The wider interests of justice would be served by granting the orders prayed.

6. The Applicant's learned Counsel Assa Nyakundi and Peter Wanyama while highlighting submissions stated their case on two broad grounds: the chances of success of the appeal and the Applicant's alleged exceptional circumstances.

7. They begun by listing the 17 grounds of appeal raised in their Petition of Appeal dated 2nd February 2022 and urge the court to have a cursory consideration of these grounds as they raised weighty and substantial issues. They took issue with the sequence in which the learned Magistrate considered the evidence of the prosecution witnesses, that is PW11 PW16, PW3, PW15, PW10, PW13, PW1, PW2 and so on instead of the chronological order of the testimonies by witnesses proving that he selectively considered evidence that was negative to the Applicant and was biased against the Applicant. That the Judgment did not set out the points for determination as required under section 169(1) of the CPC and if it did, the issues were incorrect and determination wrong. They cited the case of **Oketh Okale v Republic (1965) EA 55** in support.

8. The Applicant gives a detailed analysis of the evidence and the record of the trial court to demonstrate that the appeal raises substantial legal issues including the following:

i. Whether the approach of the trial magistrate in his judgement expressed a skewed appreciation of the entire case

ii. Whether the trial magistrate succinctly set out the issues for trial and how he resolved those issues.

iii. Whether the trial magistrate's consideration of the defense case was fair and balanced

iv. Whether the trial magistrate treated the prosecution case separately as well as that of the defense and if so, whether that led to biased and legally unsound conclusions.

v. Whether the learned trial magistrate's approach was in accord with the constitutional presumption of innocence.

vi. Whether the entire judgement was fraught with conjecture and inferences that were largely inconclusive and unsupported by evidence.

vii. Whether there existed exculpatory evidence for the applicant and how the learned magistrate treated the same.

viii. Whether the charges against the applicants were valid and accorded with the law

ix. Whether the case against the applicant was proved beyond reasonable doubt taking into account inter alia the provisions of section 61 of the National Social Security Fund Act

x. Whether the charges were bad for duplicity in view of the evidence generally and that of PW35 John Lolkoloi in particular.

xi. Whether the finding and basis of the applicant's conviction that the applicant was required to verify information provided by the broker with the Nation Stock Exchange was supported by any evidence and/or plausible.

xii. The extent of the responsibilities of the applicant in procurement of shares.

xiii. Were there any systemic failures that led to the alleged loss of public funds and did the trial magistrate put those systemic failures upon the shoulders of the applicant

xiv. Did a trial that lasted for 12 years accord with the constitution?

xv. Does the legislation upon which the charges against the applicant were based contain rabid, cruel, unfair, unreasonable and/or unconstitutional provision?

xvi. Were the sentences imposed too harsh in the circumstances?

9. They submit that the circumstances that would favour the grant of bail pending appeal were laid down by the Supreme Court of Uganda in **Criminal Civil Application 1 of 2003 Arvid Pate v Uganda** follows: the character of the applicant, whether or not he is a first offender, whether the offence of which the applicant was convicted involved personal violence, the appeal is not frivolous and has a reasonable possibility of success, the possibility of substantial delay in the determination of the appeal and whether the appellant has complied with all bail conditions granted after the applicant's conviction and during the pendency of the appeal (if any). That these conditions are mutually exclusive; they need not be all present in every case.

10. They submit that the trial court's findings were in stark contradiction with the evidence of tendered before him, particularly that of PW35. That the evidence showed that the appellant/applicant worked under the command and direction of the Managing Trustee in executing his duties. That the applicant had no responsibility to authenticate the letters of order from the Managing Trustee and the demand letters from suppliers in respect of payments due to them. That the buck stopped with the Managing Trustee.

11. The Applicant explains the procedure for investment in shares at the NSSF briefly as follows: that the investment commenced with a decision by the investment committee to invest following a write-up from the Investment Manager. The investment committee was chaired by the Managing Trustee who would then issue procurement orders to brokers that were prequalified by the fund, including Discount Securities Limited. The brokers would then write a confirmation to the Managing Trustee on the shares that had been procured. The Managing Trustee would then forward the letter to the Investment Manager who would prepare the documentation necessary for approval of payment. That accordingly, the Applicant could not deceive the Managing Trustee as he was him who received communication from the stock brokers and then communicated internally; that he could not deceive the Managing Trustee as the principal and questioned whether he was a zombie. That on this ground alone, the conviction cannot stand.

12. They proceed to analyze the evidence of PW1, PW2, PW4, PW5, PW7, PW10, PW11, PW14, PW16, PW17, PW18, PW24, PW27, PW30, PW31 and Pw35 and submit that collectively, the evidence shows no wrongdoing by the Applicant in light of the rules and procedure of the Fund or that any wrongdoing if any, was as a result of bad faith. That the appeal stands an overwhelming chance of success as none of the evidence was inculpative of the accused. They submit that the Applicant did not benefit a single cent from the funds and that there were gaps in the evidence showing the culpability of the Applicant.

13. On the second limb, the Applicant's Counsel argue that there exist exceptional circumstances. That the applicant fell ill while in prison, is admitted at Kenyatta National Hospital and is in need of medical attention outside the country as per the medical report produced before this court dated 28th February 2022 which concludes that he requires medical treatment outside the country. That the Applicant's treatment at Kenyatta National Hospital was not adequate and it is recommended that the Applicant be treated at a dedicated spinal hospital in India. They urge the court to allow the Application.

The Respondent's case

14. Ms. Wangia and Ms. Kimiri learned Counsel for the Respondent fervently opposed the application. They relied on the Respondent's replying affidavit and submissions in their entirety.

15. The Respondent submits that under the bail and bond policy guidelines, the burden lies on the Applicant to establish that the appeal has overwhelming chances of success and that he is likely to serve a substantial sentence before the appeal is heard. That in this case, the appeal does not have overwhelming chances of success because the trial court in arriving at its decision to convict the Appellant correctly and properly analyzed the evidence tendered in court. That the court evaluated the evidence of 35 prosecution witnesses and 645 exhibits that were produced in support of the case vis a vis the evidence that was tendered by the defense then rightly convicted the Appellants.

16. While referring to their written submissions, they systematically rebut each of the 8 grounds upon which the Applicant argues that the appeal had overwhelming chances of success. First and with regard to the assertion that the judgment of the trial court was not in compliance with the provisions of section 169 of the Criminal Procedure Code, they submit that this ground is unmeritorious and should fail. That the trial court set out points for determination for the respective counts before proceeding to analyze the evidence in relation to the counts and arriving at his findings. They referred to page 116 of the judgment where the court set out the issues in Count 5 as follows:

“If NSSF was the 1st accused principal; whether the 1st accused through that several memos knowingly made statements that were false in fact; and whether the said statements misled the NSSF to its detriment.”

17. They submit further that the court at paragraph 152 of the judgment set out the key elements of the offence of conspiracy to defraud as follows:

“Agreement by two or more persons. This is to demonstrate that the accused persons were parties to the conspiracy and; they had knowledge regarding the purpose of the scheme was to primarily defraud the public out of its property, meaning they were aware of an intention to cheat the public out of its property, meaning they were aware of an intention to cheat the public out of its property or to obtain public property through its deceitful ways.”

18. It is the Respondent's position that the record and the judgment reflect that the court analyzed the charges, the defenses by all the accused persons, the evidence and the law. that it is on this basis that the court acquitted the Applicant on Counts 1 and 2 on the charges of fraudulent disposal of public property and willful failure to comply with applicable procedures and guidelines relating to procurement but convicted him on Counts 4 and 5. That the court upheld the constitutional rights of the accused persons throughout the trial by ensuring that their trial rights were duly exercised and enjoyed; he was afforded bail, supplied with the prosecution evidence and given an opportunity to challenge the evidence on cross examination.

19. On whether the trial magistrate erred in holding that the charge of deceiving principal was proven beyond reasonable doubt, they submit that the evidence of PW35 and the exhibits 529(a) and (b) and exhibit 477 gave a detailed analysis of the transactions leading to the loss of Kshs. 1,201,143,372.40 which had been paid towards the purchase of shares that were never bought and certificates not delivered. That investigations at the Central Depository and Securities (CDSC) and the Nairobi Stock Exchange (NSE) revealed glaring disparities between the transaction numbers relied upon for payment for the shares. That the Applicant in his position as Investment Manager deceptively issued internal memos and signed a certificate in the payment vouchers certifying that the shares had been purchased and taken on charge when none or very few shares had been bought.

20. On whether the charges were fatally defective, they submit that the charges were properly drawn pursuant to the provisions under Section 134 of the Criminal Procedure Code. that the allegation that the transactions were independent and should have been charged separately were addressed by the court at page 100 to 103 of the judgment. The trial court was clear that the transactions were interlinked particularly during the delivery of shares as these deliveries were not transaction specific and were incomplete and impartial causing a spillover of the outstanding shares in the subsequent deliveries. That notwithstanding, section 382 of the CPS is clear that errors or defects in charges should not be set aside unless where it has occasioned injustice; these alleged errors were dealt with the trial court.

21. On whether the legislation upon which the charges were based were unreasonable, unconstitutional and the sentences unfair and harsh, the Respondent submits that the charges and the sentence meted upon the Applicant were dictated by the provisions of the ACECA and the Penal Code. That the ACECA has mandatory sentences which the trial court properly applied in accordance with the law and the sentencing policy guidelines. On the duration of the trial, the Appellant submits that the record shows that there was no unwarranted delay. The trial begun in 2010 and 35 witnesses who had lengthy testimonies were heard and over 600n exhibits produced through the motions. That the matter was also affected by a transfer of the court that initially heard the matter.

22. Nonetheless, it is their position that the applicant alongside the other accused persons exercised their rights under **Section 200(3)** of the **CPC**. That the trial court comprehensively addressed all the facts raised vis a vis the law when it delivered the Judgment which concluded that the appellant was guilty as charged and was sentenced accordingly.

23. On the second issue on whether the Applicant's has demonstrated that there exists exceptional and unusual circumstances for granting bail pending appeal, they submit that the Applicant's ill health does not constitute exceptional circumstances where medical facilities are available for prisoners.

24. Lastly, on the issue of whether the sentences were excessive, they reproduce in their submissions the trial court's sentence for Counts 4 and 5 and submit that the sentence meted was lawful, just and commensurate to the offences committed by the Applicant and the colossal amount lost by the NSSF. That the sentences were fair because the Applicant was given the alternative of a non-custodial sentence in terms of a fine and the court took into account all the relevant factors. They close by submitting that the Applicant has failed to demonstrate sufficient grounds to warrant grant of bail/bond pending appeal and urge the court to dismiss the Application

Analysis

25. It is trite that the right to bail pending appeal is not automatic; the Applicant is enjoined to demonstrate that his appeal has overwhelming chances of success and that there exist exceptional and unusual circumstances which would entitle him to bail or bond pending appeal. These principles were set out in the locus classicus case of **Somo v Republic (1972) E.A. 476** where the court held:

“But generally speaking, whatever grounds may properly be taken into account in favour of the grant of the application” “... the most important of them is that the appeal will succeed. There is little, if any, point granting the application if the appeal is not thought to have an overwhelming chance of being successful... I have used the word “overwhelming” deliberately and for what I believe to be good reason. It seems that when these applications are considered it must never be forgotten that the presumption is that when the Applicant was convicted, he was properly convicted. That is why, where he is undergoing a custodial sentence, he must demonstrate, if he wishes to anticipate the result of this appeal and secure his liberty forthwith, that there are exceptional or unusual circumstances in the case. That is why, when he relies on the ground that his appeal will prove successful, he must show that there is an overwhelming probability that it will succeed.”

26. The court takes cognizance of the fact that an applicant for bail has been convicted by a properly constituted court and is undergoing punishment because of that conviction which stands until set aside on appeal. The Applicant may only be set at liberty where there is real reason for the court to do so. Reference is made to the case of **Mutua v Republic (1988) KLR 497** where the Court of Appeal made a similar finding.

Issues for determination

27. Abiding by the principles set in **Somo v Republic Supra**, the following issues arise for determination:

- i. Whether the Appeal has overwhelming chances of success; and*
- ii. Whether there exists exceptional circumstances to warrant the grant of bail pending appeal.*

Whether the Appeal has overwhelming chances of success

28. The Court of Appeal in **Dominic Karanja v. Republic [1986] KLR 612** while affirming the principles for bail pending appeal expounded further that the principal consideration is that if prima facie it appears that the appeal is likely to be successful on account of some substantial point of law to be argued. **“Overwhelming chances of success”** has been likened to a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed and the proper approach is the consideration of the particular circumstances and weight and relevance of the points to be argued. I refer to the case of **Jivraj Shah v Republic [1986] KLR 605** where the court held:

“(1) The principal consideration in an application for bond pending appeal is the existence of exceptional or unusual circumstances upon which the Court of Appeal can fairly conclude that it is in the interest of justice to grant bail.

(2) If it appears prima face from the totality of the circumstances that the appeal is likely to be successful on account of some substantial point of law to be argued and that the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail exists.

(3) The main criteria is that there is no difference between overwhelming chances of success and a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed and the proper approach is the consideration of the particular circumstances and weight and relevance of the points to be argued.”

29. The Applicant in this case was convicted of the offences of conspiracy to defraud contrary to **Section 317** of the **Penal Code** and deceiving a principal contrary to **Section 41 (2)** as read with **Section 48** of the **Anti-Corruption and Economic Crimes Act, 2003**. They have filed a Petition of Appeal which raises 17 grounds of appeal upon which they challenge the trial court's Judgment.

30. The Applicant's main contention is that the charges were defective, that the learned trial court's analysis of the evidence was manifestly flawed and incorrect hence leading to wrong conclusions and finally that the sentences imposed were too harsh, violated the constitution and was an assault on judicial discretion.

31. The Applicant has not demonstrated that the charges were defective and how his constitutional rights were violated. In my view, the errors of the trial court ought to be apparent or obvious from a cursory perusal of the Judgment and point to a high likelihood of success and this has not been demonstrated. The Applicant has not discharged his burden of demonstrating that there are overwhelming chances of the appeal succeeding.

32. From a review of the record and the trial court's judgement, it is my considered view that the analysis of the evidence and the conclusions to be drawn thereon and the severity of the sentences and the determination of whether they were in violation of the Constitution though being arguable points which should be determined by the appellate court do not necessarily demonstrate that the appeal has an overwhelming chance of success. This court would have to evaluate the evidence as a whole to arrive at this conclusion. See the case of **Kenneth Mutegi Kilonzo v Republic [2021] eKLR**

Whether there exists exceptional circumstances to warrant the grant of bail pending appeal.

33. The Applicant argues that his age (72 years) and his ill health are exceptional circumstances that warrant the grant of bail pending appeal.

34. A review of the independent medical report dated 24th March 2022 and the affidavit of Dr. John Ngigi, Senior Director at Kenyatta National Hospital indicate that though the Applicant is ill, his medical condition can be treated at the Kenyatta National Hospital. The report reads in part:

"..... the pain is well controlled by analgesics and therefore only requires conservative treatment for now. In case operative treatment is considered, this can be performed in the country and can be done at KNH"

35. This medical report discredits the initial medical report by Dr. S Ngare dated 28th February 2022 produced in the further affidavit of the Applicant as it clarifies that whereas the Applicant had been admitted at Kenyatta National Hospital under Dr. S Ngare on 3rd February 2022, he was examined further by a doctor Wamutitu Maina who confirmed that his conditions were manageable through regular follow up with relevant specialists. However even were this court to decide not to consider this report by Kenyatta National Hospital, it is trite that the Applicant's ill health does not constitute exceptional circumstances where medical facilities are available for prisoners and where the prison is well equipped to take care of the ill health of the Applicant and where if need arises the prisons personnel may seek referral to other medical facilities outside the prison facility. See the cases of **Dominic Karanja v Republic [1986] KLR 612** and **Peter Mwandia Waitaha v Republic [2019] eKLR**

36. Having considered all the above, it is my finding that the applicant does not meet the conditions for grant of bail pending appeal. The application is dismissed.

37. The appeal shall be heard on priority basis given that this court is giving priority to appeals for convicted persons who are in custody and also given the age and ill health of the applicant. It is so ordered.

SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 21ST DAY OF APRIL, 2022.

E.N. MAINA

JUDGE