



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. E048 OF 2020

CHRISTOPHER MATECHE KAFUNA.....APPLICANT/APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. **CHRISTOPHER MATECHE KAFUNA** was convicted on 20th November 2020 vide Makadara Chief Magistrate's Court Criminal Case No. 3103 of 2015, on various counts of forgery, uttering false documents, theft by servant.

2. He was fined as follows:

1st Count - Kshs 50,000/= in default one (1) year imprisonment.

2nd Count – Kshs 50,000/- in default one (1) year imprisonment.

5th Count – Kshs 50,000/- in default one (1) year imprisonment.

6th Count – Kshs 100,000/- in default two (2) years imprisonment. There was a further order for compensation of the stolen goods.

3. He filed this appeal citing 12 grounds. His main argument is that the prosecution did not adduce sufficient evidence to prove a criminal case against him.

4. In his Notice of Motion dated 11th December 2020 he seeks for an order releasing him on bail/bond pending the hearing and determination of the appeal. In the alternative he prays for an order suspending the execution of the sentence passed against him on 20th November 2020. The application is supported by several grounds and an affidavit, which I have carefully read.

5. **Mr. Okong'o** for the applicant in his submissions has reiterated the grounds and the Applicant's averments, in his affidavit. He has relied on **Section 357 of the Criminal Procedure Code** and the case of **JIVRAJ SHAH v R [1986] KLR 605** cited in **Pauline Ruguru Kithumbu [2019] KLR**.

6. Counsel has submitted that the evidence adduced before the lower court was below the required standard in a criminal case. He argues that the lower court relied on the evidence of 2 out of 15 witnesses to convict the Applicant. The forensic evidence he says was not reliable as it was contracted by ten of the witnesses.

7. He asked the court to release the Applicant on similar bond terms to those in the lower court.

8. **Mr. Mutuma** for the Respondent submitted that he had considered the application, petition of appeal and also read the evidence on record. He was of the view that the appeal raises triable issues. He agreed that the Applicant had been on bond in the trial court and had duly complied with the bond terms. He did not oppose bond but asked for strict bond terms.

9. Bail/bond pending appeal is provided for under **Section 357 of the Criminal Procedure Code** which states as follows:

(1) After the entering of an appeal by a person entitled to appeal, the High Court, or the subordinate court which convicted or sentenced that person, may order that he be released on bail with or without sureties, or, if that person is not released on bail, shall at his request order that the execution of the sentence or order appealed against shall be suspended pending the hearing of his appeal:

Provided that, where an application for bail is made to the subordinate court and is refused by that court, no further application for bail shall lie to the High Court, but a person so refused bail by a subordinate court may appeal against refusal to the High Court and, notwithstanding anything to the contrary in sections 352 and 359, the appeal shall not be summarily rejected and shall be heard, in accordance with such procedure as may be prescribed, before one judge of the High Court sitting in chambers.

(2) If the appeal is ultimately dismissed and the original sentence confirmed, or some other sentence of imprisonment substituted therefor, the time during which the appellant has been released on bail or during which the sentence has been suspended shall be excluded in computing the term of imprisonment to which he is finally sentenced.”

10. The case of **Jivraj Shah v R (Supra)** set out the principles upon which bond pending appeal may be granted. They are as follows:

1. The principle consideration in an application for bail pending appeal is, the existence of exceptional or unusual circumstances upon which the Court of Appeal can fairly conclude that it is in the interests of justice to grant bail.

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

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.”

11. There are many later decisions on this. Besides the principles stated above the court may also consider any other peculiar circumstance that may have been raised by an Applicant. This varies from case to case.

12. In the instant case, I have gone through the record and read through the evidence of the witnesses. There are issues of the exact role that the applicant and his co-accused played in this case vis a vis the role played by other actors who were called as prosecution witnesses.

13. That goes to the strict analysis of the evidence that was adduced. In fact this issue is the backbone of this appeal plus HCCRA No. E043 of 2020 (**Godfrey Serete Shitambasi v R**). Without saying much on this I find that the appeal raises triable issues which will be dealt with during the hearing.

14. The Respondent has also confirmed that there are triable issues to be addressed by the court. It follows that the appeal could fall either way.

15. I therefore find the application for bail/bond pending appeal to be merited and I allow it.

Since this appeal is related to HCCRA NO. E043/2020 and a similar application has been argued I direct that this Ruling applies to **Godfrey Serete Shitambasi** in the said appeal.

16. I order that each appellant i.e. in this file and HCCRA E043/2020 be released on the same bond terms and security documents which were used in the lower court. It has been confirmed that the securities are still held at Makadara Law Courts.

17. The Applicants will appear before the Deputy Registrar for purposes of their full particulars and copies of identity cards being taken. They will be appearing for mention before the Deputy Registrar every two (2) months until their appeals are ready for hearing. The lower court file to be returned to Makadara Law Courts for preparation of the Record of Appeal.

Orders accordingly.

Delivered, signed and dated in open court on 8th day of January, 2021.

H. I. ONG’UDI

JUDGE