



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL CASE NO. E008 OF 2020

JOHN NJOROGI KAMENDE.....APPELLANT/APPLICANT

VS.

REPUBLIC.....RESPONDENT

RULING

1. **JOHN NJOROGI KAMENDE**, (appellant), was convicted on 17th December, 2020 before the Thika Chief Magistrate's Court in Criminal Case No. 2501 of 2019 for the offence of failing to pay **National Social Security Fund** (NSSF) contribution in respect of his employees contrary to Section 10(1) and 36(a) of the NSSF Act. He was sentenced to pay various fines totalling Kshs.2,281,215/= and in default to serve 2½ years imprisonment. He has filed this appeal against his conviction and sentence.
2. The appellant has filed a **Notice of Motion** application dated 22nd December, 2020. By it the appellant seeks he be released on bail pending the determination of this appeal.
3. The application is supported by an affidavit of the appellant's advocate, **James Mwaura Ndungu**. In that affidavit the advocate deponed that the appellant had been unable to pay the fines imposed on him and was therefore serving the prison sentence.
4. The advocate deponed that the appeal has high chances of success and that the appellant suffers from diabetes and high blood pressure. That due to those underlining medical condition the appellant is at risk to contract COVID-19 virus.
5. The application is opposed by the state on the ground that the appellant having been convicted was therefore devoid of presumption of innocence and that the appellant has not shown he has an appeal with overwhelming chances.

ANALYSIS

6. **Section 357(1)** of the Criminal Procedure Code is the Law which the court resorts to when application for bail pending appeal is made. That section provides:-

“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.”

7. The jurisdiction in respect to applications for bail pending appeal recognizes that an applicant cannot be presumed innocent having been convicted. This was clearly stated by *Justice F. Muchemi* in the case of **KIGORO MACHORO V. REPUBLIC (2019) eKLR** as follows:-

“In the case of CHIMAMBHAI V REPUBLIC 1971 EA 343, J. Harris made another observation in such an application when he said:-

“The case of an appellant under sentence of imprisonment seeking bond lacks one of the strongest elements normally available to an accused person seeking bail before trial, namely, the presumption of innocence, but nevertheless the law of today frankly recognizes, to an extent at one time unknown, the possibility of the conviction being erroneous or the punishment excessive, a recognition which is implicit in the legislation creating the right of appeal in criminal case...”

8. In making the present application the appellant has relied on his illness as a basis for seeking bail. In the case of **DOMINIC KARANJA VS. REPUBLIC (1986)** the Court of Appeal stated:-

“(a) The most important issue was that if the appeal had such overwhelming chances of success, there is no justification for depriving the applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances;

(b) The previous good character of the applicant and the hardships if any facing his family were not exceptional or unusual factors. Ill health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners;

(c) A solemn assertion by an applicant that he will not abscond if released, even if it is supported by sureties, is not sufficient ground for releasing a convicted person on bail pending appeal.”

DISPOSITION

9. I have considered the application, the trial court’s judgment and the appeal filed herein. I find that there is no merit in the application because on prima facie basis I observe that the pending appeal has no high chances of success. Accordingly, the Notice of Motion dated 22nd December, 2020 is dismissed.

RULING DATED, SIGNED AND DELIVERED THIS 22ND DAY OF APRIL, 2021.

MARY KASANGO

JUDGE

Coram:

C/A

Appellant:

For the Appellant:

For the Respondent:

COURT

Ruling delivered virtually.

MARY KASANGO

JUDGE