

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 18 OF 2020

(From original conviction and sentence in Mumias SPMCCRC No. 676 of

2019, of 29th May 2020, by Hon. TA Odera, Senior Principal Magistrate (SPM))

FELIX ONGOMA ETOKHO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The appellant was convicted by Hon. TA Odera, Senior Principal Magistrate, on 29th May 2020, of obtaining money by false pretences, contrary to section 313 of the Penal Code, Cap 63, Laws of Kenya, and was accordingly sentenced to pay compensation to the complainant, Emmanuel Olukwo Wanzala, at Kshs. 120, 000.00, or serve two years imprisonment in default. He subsequently filed the appeal herein against the conviction and sentence.

2. I am called upon to determine a summons, dated 11th June 2020, where the appellant seeks to be admitted to bail pending appeal. He avers that he was elderly and with a medical condition, that may 'jeopardize' him if he continued to be detained in prison, and that the sentence was manifestly illegal as the criminal trial court ordered restitution rather than a fine. In the affidavit sworn in support, he avers that his appeal had overwhelming chances of success, for the documents relied on to convict him were contradictory, did not bear his signature and lacked the requisite Land Control Board consent. He expresses fear that if his application is not granted, the appeal may be rendered nugatory should he serve the imprisonment term to its fullest. He states that he is a sole breadwinner for his family of one unemployed wife and twelve children. He explains that he suffers from diabetes, and needs specialized treatment, and avers that prison did not have the facilities for his treatment.

3. On 18th June 2020, the parties agreed to canvass the application by way of written submissions. Both sides have filed their respective written submissions.

4. In his submissions, the appellant argues that the charge was brought in respect of an offence allegedly committed thirteen (13) years prior. He points out that whereas the charge alleged that the offence was committed with respect to a property known as North Wanga/Mayoni/125, the evidence placed on record related to another piece of land, being North Wanga/Mayoni/1257. He has gone on to discuss some of the evidence that was placed before the court, and to point out some of the issues that he will be arguing on appeal. He has also submitted that the sentence that he compensates the complainant was illegal.

5. On the part of the respondent, it is submitted that the sentence to pay compensation in addition to or substitution of any other punishment was in keeping with section 31 of the Penal Code. It is submitted that the grounds of appeal listed in the petition did not disclose an arguable appeal, as no points of law are raised in the petition of appeal, save for the argument that the trial court could not order restitution. It is further submitted that the appellant had not provided any proof that he was elderly or had a critical medical condition.

6. Bail pending appeal is provided under section 357 of the Criminal Procedure Code, Cap 75, Laws of Kenya. It is undoubtedly a right that accrues to the appellant herein, and I need not reproduce the provision verbatim in this ruling.

7. It was stated by the Court of Appeal in *Mutua vs. R* (1988) KLR 497, that: -

'It must be remembered that an applicant for bail has been convicted by a properly constituted court and is undergoing punishment because of that conviction which stands until it is set aside on appeal. It is not wise to set the applicant at liberty either from the point of view of his welfare or of the state unless there is real reason why the court should do so.'

8. A court faced with an application for bail pending appeal has to exercise discretion judicially upon taking into account various factors, which include whether the appeal has overwhelming chances of success (see *Ademba vs. Republic* (1983) KLR 442, *Somo vs. R* (1972) EA 476 and *Mutua vs. R* (supra), whether exceptional or unusual circumstances warrant the court's exercise of its discretion (see *Raghibir Singh Lamba vs. R* (1958), and whether there is a high probability of sentence being served before the appeal is heard (see *Chimabhai vs. R* (1971) EA 343).

9. The appellant addressed me at length on the alleged shortcomings at the trial, that it took 13 years for the charges to be brought and that the matter was purely civil in nature. There is also the matter of the sentence to pay compensation. I agree with the respondent that the appellant ought to have made an effort to demonstrate that he was elderly and had a medical condition.

10. I note that the default punishment is only two years imprisonment. The appellant would have served at least a quarter of it before the appeal is determined, and it would be prudent that he is released on bail pending appeal, in the circumstances. Consequently, I do hereby allow the summons, dated 11th June 2020. He is accordingly admitted to bail pending appeal. He shall be released from prison custody upon executing a bond of Kshs.100, 000.00 or depositing a sum of Kshs. 50, 000.00 in court as cash bail. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 24TH DAY OF JULY, 2020

W. MUSYOKA

JUDGE