



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO.19 OF 2020

EDMOND KIPNGETICH MUTAI.....APPELLANT/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicant EDMOND KIPNGETICH MUTAI filed the Application dated 20/3/2020 seeking the following orders:

- i) THAT the Application be certified urgent and be heard exparte in the first instance (SPENT).**
- ii) THAT the Appellant/Applicant be granted bond or bail pending the hearing and determination of this Application.**
- iii) THAT the Appellant/Applicant be granted bond or bail pending the hearing and determination of the appeal filed herein.**
- iv) THAT the court do issue any other orders it deems fit in the circumstances.**

2. The parties filed written submissions in this Application which I have duly considered. The Appellant/Applicant was charged with two offences as follows before the trial court:

- i) Conspiracy to defraud contrary to section 317 of the Penal Code.
- ii) Stealing contrary to section 275 of the Penal Code.

3. The particulars of the first charge were that on diverse dates between 5/3/2009 and 24/3/2011 at Kericho Township within Kericho District the Appellant/Applicant jointly with others who were charged with him as the 1st and 2nd accused persons conspired to defraud Ndege Chai Savings and Credit Cooperative Society (Sacco) by opening a personal account and falsely pretending that he was a genuine customer at the said Sacco.

4. The Appellant/Applicant was also accused with stealing Kshs. 1,278,605.94 between 1/12/2010 and 22/12/2010 the property of Ndege Chai Sacco.

5. The prosecution evidence was that the Appellant/Applicant together with two others who were charged jointly with him 1st and 2nd accused persons who were employees of Ndege Chai Sacco conspired to defraud the Sacco by manipulating the system and paying money to an account operated by the Appellant/Applicant who was the 3rd accused person. The Appellant/Applicant was not an employee of Ndege Chai Sacco.

6. The trial court found that the Appellant had a case answer and placed him on his defence.

7. The Appellant/Applicant's defence was a denial. He said that he had no ATM Card and that he did not make the withdrawals.

8. The trial court found the Appellant/Applicant guilty and sentenced him to three years imprisonment on each count and the sentences were to run concurrently.

9. He has now appealed to this court on the grounds that the prosecution did not prove their case beyond reasonable doubt and further that

his defence was not taken into account and also that he was not accorded a fair hearing.

10. The parties filed written submissions which I have duly considered and I find that the Appellant/Applicant was on out on bond during the trial of his case and he did not abscond.

11. There are several factors to be taken into account in considering an application for bail pending appeal.

12. In the case of **Somo v. R (1972) EA 476**, the court said that for an applicant to succeed in being released on bail pending the hearing of his appeal, he must satisfy the following conditions:

- 1. The applicant must show that he has overwhelming chances of success in his appeal, or**
- 2. There are exceptional or unusual circumstances in his appeal.**

13. In the case of **SAMUEL MACHARIA NJAGI Vs REPUBLIC[2013] eKLR**, the court stated as follows:

“A determination on bail pending appeal is a fundamental right under the Bill of Rights as much as pre-trial bail. The only difference is that the fundamental freedom of an applicant in bail pending appeal is circumscribed to the extent that he or she remains prima facie a convict until the appeal is heard and turns out to be successful. The benefits that accrue from the interpretation of the constitution however extends to such applicant subject to qualifications hereinbefore stated.

In the Botswana's case of Laing -vs- State 1989 BLR 54 (HC) the considerations for bail pending appeal were stated as:-

- 1. If there is likelihood or reasonable prospect of the appeal succeeding;**
- 2. If there are exceptional or unusual grounds for application;**
- 3. If having regard to the sentence there is going to be considerable delay either in preparing the record of appeal or because of undue delay resulting in the appellant serving the whole or substantial portion of the sentence;**
- 4. If it was a case of the nature that it would require the applicant free to confer with his counsel in the preparation of the appeal.**

In Uganda, the Supreme Court of that country in the case of Arvind Patel -vs- Uganda S.C Cr. Appeal No. 1 of 2003 has set them out as:-

- 1. Whether the applicant is or not a first offender;**
- 2. Whether the offence of which the applicant is convicted involved personal violence;**
- 3. The appeal must not be frivolous and has reasonable chance of success;**
- 4. The possibility of substantial delay in the determination of appeal and;**
- 5. Whether the applicant complied with bail conditions granted before the applicant's conviction during the pendency of the appeal.”**

14. I have considered all the factors stated above and I find that there is a possibility of substantial delay in the determination of this appeal in the prevailing circumstances arising from the covid19 pandemic.

15. I also find that the offence he was convicted with did not involve physical violence.

16. I grant the Appellant/Applicant bail pending appeal on the following conditions:

- i) THAT the Appellant/Applicant may be released on a bond of Ksh.500,000 with one surety similar amount or cash bail of Ksh.200,000.
- ii) THAT the Appellant/Applicant should appear in court as and when required.
- iii) THAT the sentence is suspended awaiting the outcome of the appeal.
- iv) THAT the Appellant/ Applicant to prosecute the appeal within six months from the date of his release from custody.

Delivered, signed and dated at Kericho this 24th day of July 2020.

A. N. ONGERI

JUDGE