REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION

ACEC CR. APPEAL NO. 7 OF 2020

JOHN KOYI WALUKE.............................1ST APPLICANT/APPELLANT

GRACE SARAPAY WAKHUNGU............2ND APPLICANT/APPELLANT

VERSUS

REPUBLIC..RESPONDENT

RULING

1. John Koyi Waluke and Grace Sarapay Wakhungu (hereinafter the 1st and 2nd Applicant/Appellant respectively), were on 2nd August 2018 arraigned before the **Milimani Anti-Corruption Chief Magistrate's Court in ACC No. 31/18** jointly charged with various charges relating corruption. According to the charge sheet, the 1st Applicant herein was the 2nd accused, the 2nd Applicant as the 1st accused while Erad General Supplies and contracts Ltd was the 3rd accused.

2. In respect to Count one, the 1st and 2nd accused (2nd and 1stt applicants respectively) were together with Erad Supplies and General Contracts Limited (3rd accused) charged with uttering false documents contrary to Section 353 as read with Section 349 of the Penal Code Cap 63 Laws of Kenya. Particulars were that, on or about the 24th day of February, 2009 being the Directors of Erad Supplies and General Contracts Limited, within Nairobi City County in the Republic of Kenya, knowingly and fraudulently uttered a false invoice No. 12215-CF – Erad for the sum of USD 1,146,000 and National Cereals and Produce Board purporting it to be an invoice to support a claim for costs of storage of 40,000 metric tonnes of white maize purportedly incurred by Chelsea Freight.

3. In respect to Count two, the 1st accused (2nd Applicant/Appellant) Grace Sarapay Wakhungu, was charged with the offence of perjury contrary to Section 108(1) as read with Section 110 of the Penal Code Cap 63 Laws of Kenya. Particulars were that, on or about the 24th day of February, 2009 being a Director of Erad Supplies and General Contracts Ltd, within Nairobi City County in the Republic of Kenya while giving testimony in an arbitration dispute between Erad Supplies and General Contracts Limited and National Cereals and Produce Board knowingly gave false evidence for claims for costs of storage of 40,000 metric tonnes of white maize purportedly incurred by Chelsea Freight.

4. Regarding Count three, the Applicants/Appellants (1st and 2nd accused), were together with Erad Supplies and General Contracts Limited jointly charged with the offence of Fraudulent Acquisition of Public Property contrary to Section 45(1)(a) as read with Section 48(1) of the Anti-Corruption and Economic Crimes Act 2003. Particulars were that, on or about the 19th March 2013, in Nairobi City County within Nairobi in the Republic of Kenya, being the Directors of Erad Supplies and General Contracts Limited, together with Erad Supplies and General Contracts Limited, jointly and fraudulently acquired public property to wit Kshs. 297,386,505 purporting to be costs of storage of 40,000 metric tonnes of white maize purportedly incurred by Chelsea Freight, loss of profits and interest.

5. Count four, the applicants/appellants (1st and 2nd applicants/Appellants) were charged jointly with Erad Supplies and General Contracts Ltd with the offence of Fraudulent Acquisition of Public Property contrary to Section 45(1)(a) as read with Section 48(1) of the Anti-Corruption and Economic Crimes Act 2003. Particulars read that, on or about the 27th day of June 2013 in Nairobi City County within Nairobi in the Republic of Kenya, being the Directors of Erad Supplies and General Contracts Limited, together with Erad Supplies and General Contracts Limited, jointly and fraudulently acquired public property to wit, Kshs. 13,364,671.40 purporting to be costs of storage of 40,000 metric tonnes of white maize purportedly incurred by Chelsea Freight loss of profits and interest.

6. Concerning count five, the 1st and 2nd accused (Applicants/Appellants) together with Erad Supplies and General Contracts Limited were charged with Fraudulent Acquisition of Public Property contrary to Section 45(1) (a) as read with Section 48(1) of the Anti-Corruption and

Economic Crimes Act 2003. Particulars were that on or about 2nd day of July 2013 in Nairobi City County within Nairobi in the Republic of Kenya, being the Directors of Erad Supplies and General Contracts Limited together with Erad Supplies and General Contracts Limited, jointly and fraudulently acquired public property to wit, USD 24,032,000 purporting to be costs of the storage of 40,000 metric tonnes of white maize purportedly incurred by Chelsea Freight and loss of profits and interest.

7. Having returned a plea of not guilty, prosecution called a total of 27 witnesses, in its endeavour to prove its case. After tendering their defence, the trial court delivered its Judgment on 22nd June 2020 thereby convicting the Appellants (accused persons) as follows;

(a) Count 1 – (i) The 1st accused is found guilty and accordingly convicted.

(ii) The 2nd accused is found not guilty and acquitted under Section 215 of the Criminal Procedure Code.

(iii) The 3rd accused found not guilty and acquitted under Section 215 of the Criminal Procedure Code.

(b) Count 2 – The 1st accused is found guilty and accordingly convicted.

(c) Count 3 – The 1st, 2nd and 3rd accused found guilty and accordingly convicted.

(d) Count 4 – The 1st, 2nd and 3rd accused found guilty and accordingly convicted.

(e) Count 5 – The 1st, 2nd and 3rd accused are found guilty and accordingly convicted.

8. On 25th June 2020, the court went further to sentence the Appellants (accused persons) as follows;

(a) Count 1 – 1st accused (2nd Applicant) a fine of Kshs. 100,000/- in default to serve one (1) year imprisonment.

(b) Count 2 – First accused (2nd Appellant) fined Kshs. 100,000/- in default serve one (1) year imprisonment.

(c) Counts 3, 4 and 5 under Section 48(1)(a)-

(i) 1st accused (2nd Applicant) fined Kshs. 500,000/- in default serve 3 years imprisonment.

(ii) 2nd accused (1st Applicant) fined Kshs. 500,000/- in default serve 3 years imprisonment.

(iii) 3rd accused fined Kshs. 500,000/- to be paid by the 1st and 2nd accused persons(applicants) in default to serve 3 years imprisonment.

(d) Count 3, 4 and 5 under Section 48(2)(a) being double the amount lost by NCPB-

(i) 1st accused (2n Applicant) fined Kshs. 594,175,125 in default serve 7 years imprisonment.

(ii) 2nd accused (1st Applicant) fined Kshs. 594,175,125 in default serve 7 years imprisonment.

(iii) 3rd accused – fined Kshs. 594,175,125 and that, the 1st and 2nd accused persons (Applicants) each to pay in default each of them to serve 7 years imprisonment.

(e) Count 4 – under Section 48(1)(a)-

(i) 1st accused fined Kshs. 500,000/- in default 3 years imprisonment.

(ii) 2nd accused fined Kshs. 500,000/- in default 3 years imprisonment.

(iii) 3rd accused fined Kshs. 500,000/- and that the 1st and 2nd accused each to pay in default each to serve 3 years imprisonment.

(f) Count 4 under Section 48(2) (a) a mandatory fine two times the amount of loss suffered by the complainant NCPB amounting to Kshs. 13,364,671.40 (X2)-

(i) 1st accused – fined Kshs. 26,729,342.80 in default 7 years imprisonment.

(ii) 2nd accused fined Kshs. 26,729,342.80 in default 7 years imprisonment.

(iii) 3rd accused – fined Kshs. 26,729,342 to be paid by the 1st and 2nd accused each in default each of the accused to serve 7 years imprisonment.

(g) Count 5 – under Section 48(1)(a)-

(i) 1st accused fined Kshs. 500,000/- in default 3 years imprisonment.

(ii) 2nd accused fined Kshs. 500,000/- in default 3 years imprisonment.

(iii) 3rd accused fined Kshs. 500,000/- to be paid by the 1st and 2nd accused (appellants) each in default each to serve 7 years imprisonment.

(h) Count 5 under Section 48(2)(a) which provides for two times of the quantifiable loss of USD 24,032-

(a) 1st accused (2ndAppellant) fined USD 48,064 in default 7 years imprisonment.

(b) 2nd accused fined USD 48,064 in default 7 years imprisonment.

(c) 3rd accused fined USD 48,064 to be paid by the 1st and 2nd accused (Applicants) in default each to serve 7 years imprisonment. The fine imposed in terms of U.S. Dollars to be paid in Kenya shillings at the prevailing market rates.

(i) Count 5 under Section 48(2)(b) being fine double the amount benefitted.

(a) 1st accused (2nd applicant) fined Kshs. 80,000,000/- in default to serve 7 years imprisonment.

(b) 2nd accused (applicant) fined Kshs. 100,000,000/- in default o serve 7 years imprisonment.

9. Turning to the provision for compensation, the Court ordered that, in the event that fine is raised, the amount equivalent to the sums lost from NCPB account held at KCB, NBK and Co-operative as charged in count 3, 4 and 5 be paid as follows;

(i) An amount equivalent to the court (sic) in count 3 out of the fines in Count 3 be restored to NCPB.

(ii) Count 4 – out of the fines in Count 4, amount to the extent lost sum in Count 4 be paid to NCPB.

(iii) Count 5 – NCPB to be compensated to a tune of the money lost from Co-operative Bank as per count five

10. The court further directed that, if the fine is not received or the amount received is not sufficient to compensate the complainant, it shall be at liberty to take legal action to recover. Further, the Speaker of the National Assembly and Parliamentary Service Commission was to be notified of the 1st Appellant's conviction in compliance with Section 63(1) of ACECA 2003 pending the outcome of any appeals.

11. Aggrieved by both the conviction and sentence, the first applicant (appellant/accused 2) moved to this court vide a Petition of appeal dated 29th June 2020 and filed on 2nd July 2020 citing 35 Grounds of Appeal. The appeal was registered as **Anti-Corruption Appeal No. 7/2020.** Equally, the second Appellant (1st accused) challenged both the conviction and sentence through a Petition of Appeal dated 7th July 2020 and filed on 8th July 2020 citing 18 Grounds of Appeal. Her appeal was registered as **Anti-Corruption Criminal Appeal No. 21/2020.**

12. Subsequently, the 1st Applicant filed a Notice of Motion dated 8th July 2020 seeking orders as follows;

(1) That the Honourable Court be pleased to certify this application as extremely urgent and be heard exparte in the first instance.

(2) That the Honourable Court be pleased to direct and order an expedited typing, and certification of proceedings in Nairobi Chief Magistrate's Anti-Corruption Case No. 31/18 and the Applicant be at liberty to introduce the said proceedings once certified in this matter by way of a supplementary affidavit.

(3) That the Honourable Court be pleased to admit the Applicant to bond/bail pending the hearing and determination of the substantive appeal herein.

(4) That the Honourable Court be pleased to issue any such further orders, directions and or reliefs it may deem fit and expedient in the circumstances of this case.

13. The application is premised upon grounds set out on the face of it and an affidavit in support sworn on 8th July 2020 by Hon. John Koyi Waluke (1st Applicant/Appellant).

14. On the other hand, the 2nd Applicant (1st accused in the lower Court) filed under Certificate of Urgency a Notice of Motion dated 7th July 2020 seeking;

(1) That this application be certified urgent and service thereof be dispensed with in the 1st instance.

(2) That this Court be pleased to admit the Appellant on bond pending hearing and determination of the appeal from Milimani Anti-Corruption Criminal Case No. 31/2018 Republic v Grace Wakhungu and 2 Others filed herewith.

(3) That this Court be pleased to issue an order directed at the Officer Incharge of Langata Women's Prisons requiring a Government Geriatric and Psychiatrist, in the presence of the Appellant's representative Doctor to examine the Appellant and file a report within a reasonable time on her physical and mental health.

(4) That this Court be pleased to issue an order requiring that the Executive Officer of Milimani Anti-Corruption Chief Magistrate's Court to expeditiously avail typed proceedings in Milimani Anti-Corruption Criminal Case No. 31/2018 Republic v. Grace Wakhungu and 2 Others for purposes of hearing of the substantive appeal within a reasonable time.

(5) That the Honourable Court be pleased to issue any such further orders, directions and or reliefs it may deem fit and expedient in the circumstances of this case.

15. The application is also predicated upon grounds advanced on the face of it and an affidavit sworn on 7th July 2020 by Duncan Okubasu counsel for the applicant.

16. In response to the two applications, the Respondent (DPP) relied on a replying affidavit sworn on 30th July 2020 by Ruby A. Okoth Principal Prosecution Counsel office of the DPP. When the two files came up for hearing, the Court with concurrence of both parties consolidated the two appeals/applications on 12th August 2020. Accordingly, **Anti-Corruption Criminal Appeal No. 7/2020** became the lead file with the Appellant in that file John Koyi Waluke as the 1st Appellant/Applicant and Grace Sarapay Wakhungu the Appellant/Applicant in **Anti-Corruption Appeal No. 21/20** as the 2nd Appellant.

17. On 17th August 2020, the matter proceeded with the hearing of the Appellants' application for their release on bail pending appeal. Mr. Ongoya and Mr. Nyaberi appeared for the 1st Applicant/Appellant while S.C.Mr. Muite, Mr. Monari and J. Okubasu appeared for the 2nd Applicant. The Respondent (DPP) was represented by Mr. Muteti, M/s Kimiri and M/s Gateru. The National Cereals and Produce Board the complainant/victim in this case had Mr Katwa Kigen watching brief.

1st Applicant's Case

18. In his affidavit in support of the application, the 1st Appellant stated that; the trial Magistrate convicted him despite there being a manifest absence of proof of the prosecution case to the required standards by law; he was erroneously convicted for payments made pursuant to an order of a court superior to that of the trial Court; he was convicted without proof of any role played by him in the impugned transaction; the trial Court manifestly shifted the burden of proof from the prosecution to him and that he was subjected to undignified, harsh and unlawful sentence which is not contemplated in a democratic society where sentences are meant to be rehabilitative.

19. He contended that, being a serving Member of Parliament for Sirisia Constituency, he was likely to lose his seat in Parliament if he is not admitted to bail hence an exceptional circumstance for consideration as the appeal will be rendered nugatory if the appeal succeeds.

20. He averred that, he is aged 59 years and currently experiencing serious medical challenges that cannot be effectively and efficiently addressed in Prison as supported by a bundle of exhibits marked JKW3. He sought refuge in his regular and faithful attendance before the trial Court as proof that he will abide by any directions the Court may impose.

21. He was of the view that, if he is not released on bail and his appeal succeeds, he will have served substantial sentence in Prison. He averred that; the trial Court was not independent and impartial as it selectively recorded evidence leading to major distortions of evidence; that the Court did not appreciate that the transaction leading to the charges against him commenced through arbitration proceedings; there were material contradictions in the prosecution's evidence and that the Court made wrong inferences based on misapprehension of the facts pertaining to the invoices presented taking into account maize the subject of the contract in question is a perishable commodity.

2nd Applicant's Case

22. The 2nd Respondent relied on the averments contained in the affidavit in support of the application sworn by her counsel Mr. Okubasu. According to Mr. Okubasu; the 2nd Applicant's appeal has overwhelming chances of success; that the 2nd Appellant is aged 79 years with poor health bordering on hypertension which she has been suffering even when the trial was ongoing.

23. Mr. Okubasu deposed that upon her conviction, the 2nd Applicant displayed symptoms of inferior mental health which in his own observation included anxiety, forgetfulness, difficulty in concentrating and long lasting sadness.

24. He further averred that, he was informed by the 2nd Applicant's son one Benard Wakhungu that the Applicant has undergone character transformation since the trial started. It was deposed that, it was necessary for this Court to establish the Applicant's suitability to stand trial in the first place, considering that her conviction is based mainly on the contradictions she gave to the trial Court.

25. Lastly, Mr. Okubasu contended that, the Respondent will not suffer any prejudice by the 2nd Applicant is released on bail.

Respondent's Response

26. Through a replying affidavit sworn on 30th July 2020 by A. Okoth, Principal State Counsel, the Respondent opposed release of the Applicants on bail pending appeal arguing that; the appeals do not have overwhelming chances of success; there are no exceptional circumstances to warrant such release and that justice and public interest demands that they remain in custody pending hearing and determination of the appeal.

27. According to Mr. Okoth; there was sufficient evidence duly proved beyond reasonable doubt for the Court to convict; sentence meted out was lawful; the Appellants were subjected to fair trial whereby they cross examined witnesses.

28. It was further deponed that the Appellants through forgery obtained payment from NCPB pretending that they had bought maize from Ethiopia for supply to NCPB and that they had incurred losses by securing storage which was never utilized due to the NCPB's breach of contract a fact that was disproved as a lie as no maize was purchased in the first place hence nothing to store.

29. He further contended that although the Appellants/applicants were paid through an arbitral award, the same was issued erroneously by relying on forged documents regarding storage facility which was never secured in the first place. He denied that the burden of proof was shifted to the Appellants.

30. Touching on sentence, he deposed that the applicant will not have served substantially the sentence imposed by the time the appeal is heard and determined.

Submissions

1st Applicant's Submissions

31. In submission, Mr. Ongoya lead counsel and Mr. Nyaberi appearing for the 1st Applicant relied on the averments contained in the affidavit in support of the application and submissions dated 3rd August 2020 but filed on 17th August 2020. Mr. Ongoya addressed the Court on three grounds;

> **(a) Firstly, the 1st Applicant's appeal has high chances of success.**
>
> **(b) There are exceptional circumstances on account of advanced age and sickness of the 1st Appellant to warrant his release on bail pending appeal.**
>
> **(c) That the sentence imposed by the trial Court was illegal, irregular and in any event harsh in the circumstances.**

32. To advance his submission, the Court was first addressed on salient legal principles for consideration before release of a convicted person on bail pending appeal. Learned counsel highlighted on some of the principles as; the Court must have jurisdiction to grant bail; exercise of this jurisdiction is discretionary; character of the Appellant; whether the applicant is a first offender; appeal is not frivolous and has reasonable chances of success; possibility of substantial delay in the determination of the appeal; Existence of exceptional circumstances and, whether the Applicant complied with bail terms during trial and pending appeal.

33. In support of these principles, reliance was placed on the holding of the Ugandan Supreme Court case of **Arvind Patel v Uganda, Supreme Court (At Mengo) Criminal Appeal No. 1 of 2003** where the Court relied on the above principles to release the Applicant on bail notwithstanding that both the High Court and Court of Appeal had confirmed the conviction. Further reliance was placed in the holding in the case of **Merali v Repulbic (1932)EA 47** where similar principles were espoused.

34. Learned Counsel urged and emphasized that the Court is enjoined to assess the evidence and make a finding whether the appeal has high chances of success on the grounds advanced by the Court in **Tom Omare Magutu v Republic Criminal Appeal No. 89/2017** where the Court summarized the grounds for consideration on grant of bail pending appeal as;

> **"These grounds can be narrowed down and stated as whether the appeal has overwhelming chances of success and whether there are exceptional circumstances warranting the release of the Appellant on bail pending appeal."**

35. Learned Counsel went ahead to justify each of the principles as follows; the appellant is a 1st offender hence of good character; the possibility that hearing of appeal may delay leading to serving sentence substantially; applicant had faithfully attended court proceedings and that appeal is not frivolous.

36. It was contended that the trial Court's judgment and sentence cannot stand because it lacks analytical vigor; conviction is plainly unlawful and sentence is illegal.

37. In an endeavor to bring the Court to speed and understanding of the circumstances leading to the prosecution of the Appellants, learned Counsel stated that; the Applicants herein were jointly charged with the 3rd accused a juristic person (Company) known Erad Supplies and General Contractors a company in which the appellants were co-Directors.

38. That sometime the year 2004, NCPB had a shortage in its National Grain Reserve thus necessitating the government to call out for tenders for supply of maize to which Erad applied and won part of the contract to supply maize. However, Erad could not supply maize as per the contract due to breach of contract by NCPB who failed to issue a letter of credit. That following the said breach, Erad sued NCPB and the dispute was resolved before an arbitrator as per the Arbitration Clause provided in the contract. As a result, the 3rd accused was awarded damages for breach of contract, loss of profit, cost of storage, interest plus costs of the suit. However, the counterclaim by NCPB was dismissed.

39. Learned Counsel contended that, an award of USD 1,960,000 for loss of profit and loss incurred in storage charges of USD 1,146,000 was also awarded. A further award of USD 106,000 with interest at 12% per annum was made. Lastly, costs were awarded to the 3rd accused.

40. According to Counsel, the award having been confirmed before the High Court as required in law and NCPB having failed to set aside the award and the execution decree, prosecution cannot use criminal charges to recover the money that was legally paid through a garnishee order where NCPB's accounts in three bank accounts (NBK, KCB and Co-op Bank) containing Kshs. 13,364,671.40, Kshs. 297,086,5050 and USD 24,032 respectively were attached.

41. That out of the recovered amount, the 1st accused (2nd Applicant) benefitted 40,000,000 and the 2nd accused (1st Applicant) got 50 million. Counsel argued that the money received by the Appellants was out of breach of contract sanctioned by a court order. Counsel referred to the testimony of PW25 and PW27 who on cross examination confirmed that the payment to the Appellants were lawful and legal hence no criminal liability should arise or be construed.

42. Referring to the specific charges preferred against the 1st Appellant (2nd accused in the lower court), counsel opined that, Count 1 on uttering false document being a false invoice No. 122-5 does not concern the 1st Appellant as he did not utter the same before the arbitrator and that it was the 3rd accused who uttered.

43. Counsel submitted that a bulk of the claim against NCPB by the 3rd accused amounting to Kshs. 600,000,000/- was loss of profit, interest and costs. That out of the Kshs. 600,000 million, the 3rd accused has received only 314,000,000/- hence posed the question, how did the trial Court arrive at the conclusion that Kshs. 314,000,000/- was on account of storage charges and not lost profit, interest and costs of litigation. In counsel's view, there is a serious error and omission which makes the appeal raise overwhelming chances of success.

44. Concerning the conviction in respect of Counts 3, 4 & 5 Counsel submitted that there was no evidence to prove that the 1st Appellant did receive the money in question. To illustrate that argument counsel pointed at a sum of Kshs. 13,364,671/- allegedly received by the 1st Applicant (2nd accused) in respect of Count 4 yet the evidence of PW25 at page 246 exhibit No. 30 which was a bank transaction showed the beneficiary of the same amount to be the law firm of Ahmed Nassir and Abdikadir.

45. Referring to the amount allegedly received by the 1st Applicant in Count 3, amounting to Kshs., 297,386,5050, Mr. Nyaberi submitted that the same was said to have been paid out to various law firms among them N. Barasa **and AbdiKadir** and Kshs. 40,000,000/- to the Applicant. In Counsel's view, all these monies cannot be apportioned to the 1st Applicant.

46. Touching on the alleged forged invoice from Chelsea Freight Limited which was relied on by the 3rd accused to claim storage charges and which was disowned by PW22 a Director with the said company, counsel submitted that NCPB in its evidence before the arbitrator had dismissed Chelsea as a non-entity. Counsel dismissed evidence of PW22 which was heavily relied on to convict as incredible as the witness was coached and his statement and that of one Thicogen Pillay was identical word by word. That the prosecution failed to call a crucial witness by the name of Lean a Director from Chelsea who could have shed light on the authenticity of the invoice in question.

47. Commenting on the defence of the 2nd Appellant (1st accused), learned counsel submitted that her testimony did exonerate the 1st Applicant from the process of following the tender thus removing him from the arena playing any active role in the tendering process leading to the questioned payment. Further, that the 1st Applicant was not a party to the arbitration process nor did he participate hence arbitration record cannot be used against him.

48. Turning to the penalty meted out, learned counsel argued that, it was unlawful as money was alleged to have been received jointly instead of severally.

49. Commenting on the existence of unusual circumstances, it was claimed that the applicant is a sitting Member of Parliament who is likely to lose his sit if not released on bail hence the appeal will be rendered nugatory should it succeed. Further, that the Applicant is diabetic and hypertensive. That he is presently sick and that he had undergone brain surgery hence suffers from recurrence of migraine headache which makes him susceptible to the current pandemic of Corona. Mr. Ongoya made reference to medical reports from Nairobi Hospital showing that the Applicant is suffering from Diabetes which makes him have a pre-existing condition which is risk against exposure to Corona.

2nd Applicant's Submission

50. S.C. Mr. Muite and Mr. Okubasu for the second Applicant adopted the averments contained in the affidavit in support of the 2nd Applicant's application and their written submissions dated 5th August 2020 filed on 17th August 2020 by the firm of Okubasu, Munene and Kazungu Advocates. Basically, the 2nd Applicant's submissions are more less the same as those of the 1st Applicant.

51. In support of the application, learned Senior Counsel Mr. Muite urged the Court to consider circumstances under which the trial charges against his client were framed. Counsel referred to the contract awarded to Erad a company to which the 2nd Appellant was one of the

Directors and that the amount of money constituting various monies received by the Applicant as stated under various items was money paid lawfully following an arbitral a ward which was confirmed by the High Court against the NCPB for breach of contract.

52. Based on the above argument, Mr. Muite submitted that the evidence adduced and relied on by the trial Court was shaky hence the appeal has overwhelming chances of success. Mr. Muite further stated that the allegation that the 2nd Applicant used a forged invoice from Chelsea Freight Ltd to claim that they had secured storage space for the maize to be supplied to NCPB and that NCPB having breached the contract they incurred losses, was not supported by any tangible evidence. Counsel went further to submit that no other employee from Chelsea Freight was summoned to testify save for PW22 who admitted to have been compromised by being given stipend, travelling expenses and security by EACC.

53. Challenging further the evidence revolving around the subject invoice alleged to have been forged by the Applicant to justify illegal payment from NCPB on account of storage charges incurred, counsel submitted that no forensic evidence was adduced to prove forgery. To support this position, the Court was referred to the decision in the case of **Alice Wachuka Kinyanjui v. Republic (2016)eKLR** and **Republic v. Rashid Mathobe Maalim (2019)eKLR** where the Court absolved the accused from blame on the account that prosecution did not prove that the accused personally partook in the making of a forged letter the subject of the charges.

54. It was further submitted that the trial Court shifted the burden of proof to the accused person contrary to the law as stipulated in the case of **Republic v David Ruo Nyambura and 4 Others (2001)eKLR** where the Court held that the burden of proof never shifts to the accused who assumes no burden to prove his innocence.

55. It was counsel's assertion that the ingredients of the offence of uttering a document was not proved to the required degree i.e whether the document was fake; whether the accused used the documents as genuine; whether the accused knew or had reason to believe that the document was forged and whether the accused used it dishonestly and fraudulently. To support this proposition the Court was referred to the case of **Joseph Mukuha Kimani v Republic (1984)eKLR** where the Court emphasized on proof of the above elements in proving the offence of uttering.

56. Commenting on sentence, learned counsel submitted that, whereas the 2nd Appellant only received 40 million, she was fined double the amount lost and benefited out of Kshs. 313,364,671 being the cumulative sum paid out for loss of profit, storage charges, interest and costs. That it was illegal to punish the Appellant and order her to pay a fine imposed on the 3rd accused (juristic person) in the event it failed to pay. That the Court failed to state whether the sentence was to run concurrently or consecutively.

57. Referring to the existence of exceptional circumstances, counsel urged the Court to consider that the Applicant is an elderly person aged 80 years. Besides, Mr. Muite argued that in the era of Covid 19, a person confined in Prison has a higher risk of exposure than one in her house.

58. Addressing the issue of age as an exceptional circumstance, counsel invited the Court to rely on the holding of J. Muchemi in the case of **Kigoro Machoro v Republic (2019)eKLR** where the Court found the Applicant to be aged 80 years old hence regarded it as an exceptional circumstance combined with his hypertension to warrant his release on bail pending appeal.

59. Further reliance was placed on the decision in the case of **Stephen Ngui Kyalo v Republic (2019)eKLR** where the Court regarded the Applicant's age at 70 years as an exceptional circumstance to attract Court's attention to release him on bail pending appeal. The Court was also referred to the case of **Wilson Kipchirchir Koskei v Republic (2019)eKLR** where J. Mativo considered the Applicant's ailing health conditions and age at 85 as an exceptional circumstance.

Respondent's Submissions

60. The Respondent appeared through Mr. Muteti, M/s Kimiri and M/s Gateru both prosecution counsel from the DPP's office. It is the Respondent's submission that a sum of Kshs. 313,000,000/- paid by the NCPB to the Appellants was illegally obtained through an arbitral award against NCPB after Erad Company (3rd accused) to which the Appellants were Directors and who had won a tender from NCPB for supply of maize produced a fraudulent invoice (Ex 43) purporting to be from Chelsea Freight which Company the 3rd accused and by extension the Appellants had allegedly obtained storage space for the maize.

61. That this fact was disproved by PW22 a Director working with Chelsea Freight Limited who disowned the invoice No. 12225 CF-Erad dated 22nd January 2005 as having emanated from their office. It is the Respondent's submission that the money in question was obtained through misrepresentation of the truth and fraudulent document.

62. Based on the above submission, the Respondent's position is that the appeals do not have any chances of success nor are there any exceptional or unusual circumstances. To fortify this argument the Court was referred to the holding in **Michael Kipkemboi Tarus v. Republic High Court Cr. Appeal No. 66/2015, Somo v. Republic (1972)E.A 476** and **Dominic Karanja v Republic (1986)KLR 612**.

63. Regarding whether there are exceptional circumstances to warrant the Appellant's release, it was submitted that ill health perse would not constitute an exceptional circumstance where there exists medical facilities for prisoners. To support this argument, reference was made in respect of the case of **Dominic Karanja v Republic (supra).** M/s Kimiri asserted that Prisons have sufficient medical facilities to take care of the alleged sicknesses.

64. Touching on the likelihood of delay of the hearing of the appeal, counsel termed the same as speculation as no evidence was tendered to prove that likelihood. Counsel contended that the record of appeal is ready and therefore the hearing of the appeal can start any time.

65. Turning on to the 2nd Appellant, Counsel submitted that she was a flight risk as evidenced by the trial Court proceedings on pages 5, 14,

16, 17, 18, 19, 20, 21, 22, 33, 35, 36 and 37 which reflects instances when she absconded Court attendances. That all the evidence tendered before the arbitrator laying a basis for a claim in respect of storage charges for no maize supplied, loss of profit and subsequently interest and costs was a scheme and a fraudulent activity meant to extort the NCPB (Government).

66. Regarding charges of perjury, Counsel submitted that, by the 2nd Appellant giving false testimony before the arbitrator under oath while fully aware of the forged documents among them a false invoice is sufficient proof of perjury. That the acquisition of Kshs. 297,386,5050 as storage charges amounts to public property which could not have been awarded had the Appellants not submitted false claims.

67. As to payments made to law firms, it was submitted that the same was obtained for and on behalf of the Appellants and 3rd accused. Submitting on prosecution's failure to call witnesses the DPP submitted that prosecution made every effort to call some witnesses from Chelsea besides PW22 to rebut the defence evidence but the same was thwarted by the defence opposing the application and then the court upheld it. As to the excessive sentence, the DPP submitted that the sentence was lawful and imposed in accordance with the law.

Analysis and Determination

68. Before me are two applications seeking release of the applicants on bail pending appeal on grounds that; the appeals have overwhelming chances of success; there are exceptional or unusual circumstances to warrant release on bail and, that the sentences imposed are illegal and harsh in the circumstances.

69. The applications were vehemently opposed by the prosecution arguing that; the appeals do not have high chances of success nor are there exceptional circumstances to warrant the applicants' release. I have considered the two applications, affidavits in support and replying affidavit. I have also considered rival submissions by both sides. Issues that fall for determination are;

> **i. Whether the applicants' appeals raise overwhelming chances of success**
>
> **ii. Whether there are exceptional or unusual circumstances to justify the applicants' release on bail**
>
> **iii. Whether sentences imposed are harsh and illegal**
>
> **iv. Whether the applicants are likely to serve substantial sentence by the time the appeal is heard and determined**
>
> **v. Whether the 2nd applicant is a flight risk**

70. The law governing proceedings relating to bail pending appeal is anchored under section 357 of the Criminal Procedure Code which provides that;

> **"Sub–section 1-After the entering of the 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."**

71. Unlike bail pending trial, bail pending appeal has its own distinct conditions which must be taken into consideration or met before such orders can issue. Although to some extent some conditions considered when granting bail pending trial can complement orders for bail pending appeal, the court must consider or be satisfied that; the appeal has overwhelming chances of success; there exist special or unusual circumstances to warrant such release and, whether the applicant is likely to serve substantial or full sentence by the time the appeal is heard and determined.

72. The above factors have been considered in a myriad of judicial precedents inter alia; **Jivraj J Shah Vs Republic (1986)eKLR** in which the court held;

> **''There is not a great deal of local authority on this matter and for our part such as we have seen and heard tends to support the view that the principal consideration is if there exist exceptional or unusual circumstances upon which this court can fairly conclude that it is in the interest of justice to grant bail. If it appears primafacie from the totality of the circumstances that the appeal is likely to be successful on account of some circumstantial point of law to be urged, and that the sentence or a substantial part of it, will have been served by the time the appeal is heard, conditions for granting bail will exist"**

73. Similar position was held in the case of **Peter Hinga Ngatho Versus Republic (2015)eKLR, Rebecca Nabutola Versus Republic (2012)eKLR and Dominic Karanja Versus Republic (Supra)** where the court of appeal set out guiding principles for grant of bail pending appeal as;

> **i) The most important is if the appeal has such overwhelming chance of success, there is no justification for depriving the applicant of liberty and the minor relevant consideration will be whether there were exception or unusual circumstances.**
>
> **ii) The previous good character of the applicant, if any, facing the family were not exceptional or unusual factors. Ill health would also not constitute exceptional circumstance where the existed medical facilities for prisoners.**
>
> **iii) Solemn assertion by the 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.

iv) Upon considering the relevant materials in this case there was no overwhelming chance of appeal being successful.

74. For a court to grant bail pending appeal, it has to bear in mind that the applicant is no longer innocent. In other words, his/her benefits for release on bail under Article 49(i)(h) of the Constitution are limited. However, human liberty is a constitutional right which must be protected at all times where appropriate without compromising other people's rights e.g. victims of the crime the subject of the proceedings and society at large. A court seized of those powers must therefore balance the delicate and competing interests of the applicant against those of the complainant as well as the public interest. **See Peter Hinga Ngotho Versus Republic (Supra)** where the court observed that;

> **"Granting bail entails striking of a balance of proportionality in considering the rights of the applicant, and the public interest on the other. On the one hand it is the duty of the court to ensure that crime where it is proved, is appropriately punished, this the protection of the society" on the other hand is equally the duty of the court to uphold the rights of the persons charged with criminal offences, particularly the human rights guaranteed under the constitution."**

75. Therefore, it is incumbent upon the applicant to persuade and convince the court at least on a primafacie basis that he/she has an arguable case (appeal) which is worth consideration while he/she is out on bail. The court has however the discretion to grant or not to grant a bail application depending on the circumstances of each case**. See Krishnan Versus The People(CZD19OF2011) (2011) ZMSC17) (21OCTOBER2011) (20OCTOBER2011)**; where the Indian Supreme Court held;

> **"It is settled law that bail is granted at the discretion of the court. For bail pending appeal to be granted, the court must be satisfied there are exceptional circumstances that are disclosed in the application. The fact that the applicant, due to delay in determining his appeal, may, have served a substantial part of his sentence by the time the appeal is heard, is one such exceptional circumstance"**

76. In the instant case, the applicants have raised several issues or grounds in their respective appeals in an endeavour to discredit the prosecution case. One key factor/ground relied on by the prosecution is that the payment made to the applicants leading to their prosecution for obtaining public property fraudulently was based on a contract for supply of maize by the 3rd Accused (Erad Suppliers) where both applicants were Directors. However, there are certain undisputed facts relating to this matter to the effect that; the applicants were Directors of the 3rd accused who tendered and won the contract for the supply of maize to the National Cereals and Produce Board(NCPB); the 3rd accused did not supply the maize; failure to supply the maize was due to failure by the NCPB in not issuing a letter of credit to the 3rd Accused; Erad Supplies (3rd accused) sued the NCPB for breach of contract before an Arbitrator; the Arbitrator entered judgment against the NCPB for breach of contract and, awarded damages for loss of profit, storage charges, interest and costs; the Arbitral Award was confirmed by the High court and payment honoured through a garnishee order upon extracting a court decree.

77. The bone of contention is, whether the Arbitrator could have made the award he made if there was material disclosure or knowledge that the document used by the 3rd Accused to claim damages for accrued charges in storage expenses was forged. Further, there is a dispute as whether the total amount paid to the 3rd Accused and by extension to the applicants constitutes storage charges alone and, whether the applicant should be punished for obtaining public property and therefore ordered to refund the full amount received even when the same amount includes general damages for breach of contract, loss of profit, interest and costs which was confirmed by the High Court, a decree drawn and payment made through a garnishee order.

78. Several issues regarding the tabulation of the actual amount received by the applicants *viz vis* money lawfully paid to lawyers representing the 3rd accused before the arbitrator arose. The question is whether such legal fees paid to lawyers should constitute money alleged to have been fraudulently obtained by the applicants yet the same was legal fees to advocates lawfully awarded and paid for their professional services.

79. More issues were raised and argued in detail but this court cannot delve into their evaluation and determination at this stage as doing so will jeopardise the likely detailed arguments during the appeal and the final outcome.

80. Taking into consideration the evidence on record, materials placed before the trial court and submissions laid before me, I am persuaded and convinced that the applicants on a primafacie basis have an arguable appeal.

81. Regarding existence of exceptional or unusual circumstances, the first appellant (1st Accused) argued that he is a sitting member of parliament and is likely to lose his seat due to failure to attend the mandatory minimum parliamentary sittings and if the appeal succeeds, it will be rendered nugatory as he would have lost his seat. There is no law providing for special treatment of certain categories or classes of people based on their status, community responsibility, position or social standing. What matters here is the equal treatment of everybody regardless of one's social status or position in society. Being a member of parliament is not an exceptional ground to warrant his release.

82. Touching on his age, the 1st applicant said he is now clocking 59 years old. Although a number of authorities were cited where various courts considered ages 70, 80 and 85 as constituting exceptional circumstances, I am not convinced that age 59 which is below the constitutionally recognised age of 60 years as that of an old person is sufficient ground to grant bail. At age 59 the 1st applicant in my view is an active person. He is not yet reached even the age of retirement of 60years. Accordingly, that ground is dismissed.

83. Concerning his diabetic and hypertension condition, there was no evidence adduced to show that the prison's facility is not capable of managing that condition. See **Dominic Karanja Versus Republic (Supra)** where the court stated that ill health on its own is not an exceptional circumstance for one to be admitted on bail pending appeal unless proved that the prison's facility is not capable of managing such ailment. For those reasons, that ground also fails.

84. With regard to the 2nd applicant (1st Accused), Mr. Okubasu her Counsel, swore an affidavit claiming that the 2nd applicant is suffering from hypertension and arthritis. Unfortunately, the applicant did not swear any affidavit to confirm her medical condition. Mr. Okubasu could not ascertain or affirm with certainty the 2nd applicant's health condition. However, there are medical notes attached from AAR dated 13th of October 2018 which confirmed that they had treated the 2nd applicant in August 2018 for blood pressure which is now controlled. That she was also suffering from back pain which was also managed. Equally, there is no medical report from the prisons medical facility confirming that the 2nd applicant is suffering from an ailment which cannot be managed in prison. For those reasons that ground is not available.

85. However, the 2nd applicant raised the issue of age as an exceptional ground for consideration. There is no dispute that she is aged 80 years old. In the case of **Stephen Ngui Kyalo Versus Republic (Supra)** **J. Ongudi** considered the applicant's age at 70 as an exceptional circumstance for consideration to grant bail pending appeal. Equally J. Muchemi in the case of **Kigoro Machoro Versus Republic (Supra)** regarded the applicant's age at 80 as an exceptional circumstance for consideration.

86. In view of the 2nd applicant's age at 80 years and taking into account the World Health Organization and Ministry of Health Covid -19 guidelines that old people and people with pre-existing condition should avoid crowded areas or places, I am persuaded to find that her age in the prevailing circumstances is an exceptional circumstance for consideration in granting bail.

87. Turning into the issue whether the applicants are likely to substantially serve sentence by the time the appeal is heard and determined, again, this is a critical ground for consideration. The 2nd applicant was sentenced to a fine of 100,000/= in default serve one-year imprisonment for each of count I and II. The sentence herein was imposed on 25th June 2020. It is over 3months now leaving a balance of 9months. If we were to remove remission of 4months in the event she was to serve a full term, she will remain with 5months. Although the appeal has been admitted, it may probably take two to three months before it is heard and determined. That will leave a balance of 2 months out of 12 months. In my view, the sentence of 100,000/= fine in default to serve one-year imprisonment is such a short time that by the time the appeal is heard and determined, the 2nd appellant would have served substantially her sentence in respect of count I and II.

88. Unlike the 2nd applicant, the 1st applicant was sentenced to serve 3years imprisonment for each of count IV and V. If the appeal is heard and determined within 2 to 3 months from the date of this ruling, he could not have served substantial sentence. This ground is not available for him.

89. The other issue raised was the legality of sentences imposed. Its trite law that sentencing is a discretion exercised by the trial court unless proved that it was arrived at after considering wrong principles. In arriving at this finding, I am guided by the holding in the case of **Ogolla S/O Owuor Vs Republic (1954) EACA 270** Where the court stated that;

> **"The court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors''**

90. I do not wish to comment on the legality of sentence at this stage as it will prejudice the out-come of the main appeal. This is because, should the appellate court find that the amount obtained included money for breach of contract, loss of profit, interest and costs and therefore ought to be excluded from storage charges which was money acquired after presenting a forged invoice claiming the same, then the tabulation of mandatory sentence will most probably change. I leave the arguments of that ground for the main appeal.

91. Lastly, prosecution argued that the 2nd applicant is a flight risk given her history in absconding court proceedings before the trial court. The defence counsel argued that non- attendance of the 2nd applicant in court during some sessions was not deliberate as it was explained and the warrants of arrest lifted. A perusal of court record shows the 2nd applicant's non-attendance in court during some court sessions but the same were explained leading to the lifting of the warrants of arrest. All through until the date of judgment, the 2nd applicant was on bond. That therefore means, the 2nd applicant was suitable for bail pending trial. I do not find that to be a ground on its own not to grant bail pending appeal to the 2nd applicant.

92. The upshot of it all is that the applicants have met the threshold for grant of bail pending appeal and the interest of justice tilts in their favour. Accordingly, the application is allowed with orders that;

> **a) The applicants herein be and are hereby admitted to bail pending appeal.**
>
> **b) That the 1st applicant be and is hereby released on a cash bail of 10million in default a bond of 20million with one surety of similar amount.**
>
> **c) That the second applicant be and is hereby released on a cash bail of 20million in default a bond of 30million with one surety of similar amount.**
>
> **d) That in case of security deposit, the Deputy Registrar to assess and approve the same.**
>
> **e) That the applicants shall deposit in court their passports and or all travelling documents before being released.**
>
> **f) That the applicants shall not move out of the country until the appeal is heard and determined.**
>
> **g) That the applicants shall appear for mention before the Deputy Registrar once every month.**

h) That the appellants shall attend court at all times whenever their appeal is heard or mentioned for whatever reason.

i) That the appeal be fixed immediately for directions and hearing.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF SEPTEMBER, 2020.

J. N. ONYIEGO

JUDGE