



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 120 OF 2018

AHMED SAID BAKAR.....APPELLANT/APPLICANT

VERSUS

REPUBLIC..... RESPONDENT

RULING ON AN APPLICATION FOR BAIL PENDING APPEAL

1. The applicant, Ahmed Said Bakar on 28th November, 2018 filed an application under the provisions of Section 357 of the Criminal Procedure Code praying for the following orders:-

(i) That this Honourable Court be pleased to make an order to release the appellant/applicant and admit him to bail on such terms as the court may deem just and reasonable; and

(ii) That this Honourable court be pleased to make any further order it deems just and reasonable.

2. The application is anchored on the affidavit of Jared O. Magolo, Advocate and the grounds in support it. The Director of Public Prosecutions through Mr. Jami Yamina, Principal Prosecution Counsel filed grounds of opposition on 18th December, 2018.

3. The applicant's Counsel filed a list of authorities on 19th December, 2018. At the time of hearing of the application Mr. Magolo addressed factual issues and Mr. Kang'ahi Advocate elucidated on the authorities he had filed on behalf of the applicant. He also added a few submissions on factual issues.

4. Mr. Magolo started his submissions by informing this court that the applicant was out on bail pending the hearing of the case in the lower court. The first factual issue argued is that the applicant was arrested on 9th April, 2015 in Kilifi when driving motor vehicle registration No. KCA 698H, with 5 passengers on board. Counsel for the applicant further stated that drugs were found in the boot of the said motor vehicle in a briefcase which had the personal belongings of another person. It was submitted that the applicant herein was convicted because his driving licence was in the said brief case.

5. The second factual issue argued was that the trial court was not properly constituted for the reason that previously, Hon. Nang'ea had disqualified himself after an application had been made for the release of a motor vessel that was said to have been used to ferry the drugs. Mr. Magolo indicated that the said application was opposed and the Hon. Magistrate reserved the date for the ruling. However, before the ruling could be delivered, the said motor vessel was destroyed. Counsel pointed out that the Hon. Magistrate proceeded to recuse himself and gave a mention date for 27th October, 2016 for reallocation of the case to another Magistrate of concurrent jurisdiction. It was stated that Hon. Matheka, Chief Magistrate allocated the file back Hon. Nang'ea, whereas recusal was a judicial decision which could have been subjected to appeal or revision. It was therefore argued that Hon. Matheka's decision was a nullity as she had no revisionary powers to set aside the decision of another Magistrate. It was also submitted that proceedings taken thereafter by Hon. Nang'ea were a nullity thus the conviction against the applicant cannot stand as the said Magistrate had no jurisdiction to hear the case in the court below.

6. Thirdly, Mr. Magolo submitted that when the motor vessel was at Kilifi, it was subjected to a thorough search and nothing was found. She was then brought to Mombasa where 2 thorough searches were conducted. On 20th April, 2015, a 3rd search was done and drugs were found. It was submitted that Police and Security Officers had access to the said vessel at that time. It was also claimed that the prosecution declined to reveal the persons who had access to the vessel and the persons who were guarding it. It was stated that 3 white men who were referred to as Border Guard Officers took part in the search on the motor vessel and shouted bingo! and said they had found the drugs, they however did not testify. It was therefore submitted that in the said circumstances, a conviction cannot stand.

7. Fourthly, it was claimed that the applicant was not part of the crew of the motor vessel that was due to sail on 10th April, 2015, but was delivering food stuff to the Captain and Crew of the motor vessel. Counsel stated that the motor vehicle the applicant was driving had the food provisions.

8. Fifthly, it was stated that although the applicant had no passport, the Hon. Magistrate held that he had one and that he was due to sail.
9. The sixth factual point of argument was that the applicant was convicted because of his association with Bilal who was the owner of the boat (motor vessel). It was stated that Bilal was neither charged nor brought to court, yet his ownership of the motor vessel was not in doubt. It was therefore concluded by Mr. Magolo that the Hon. Magistrate treated the applicant with bias and that his other co-accused persons were acquitted. It was submitted that there were persons who were available to stand surety for the applicant. Counsel therefore prayed for the applicant to be released on bail pending appeal.
10. In his submissions, Mr. Kang'ahi reiterated the fact that the Border Police were said to have used scanners to assist in recovery of the drugs were not called to testify. He stated that it would have been imperative for the Trial Court to listen to the experts and find out the type of technology that was deployed in making the search. He cited the case of **Bukenya vs Uganda** (1972) EA 549 on the importance of calling material witnesses to testify and that in the instant case, the recovery made by the white Border Police led to proof in count 2 of the charge the applicant was facing.
11. It was submitted that PW2, who was one of the witnesses was arrested and released on 13th April, 2015 and the other guards were not called as witnesses. It was contended that their evidence was critical in substantiating the evidence in support of count I. Mr. Kang'ahi referred to the case of **Somo vs Republic** (1972) EA 476 and **Tom Omare Ogutu vs Republic** [2017] eKLR where the courts were guided by the decision in **Jivraj Shah vs Republic** [1986] KLR where the principles for grant of bail pending appeal were enunciated. He submitted that where an appeal is likely to be successful, bail would be granted.
12. In reference to page 38 of the Hon. Magistrate's Judgment, this court was informed that the said Magistrate found that Section 74A of the Narcotic and Psychotropic Substances Control Act was not complied with and that the Hon. Magistrate did not sign a destruction certificate for the drugs. It was stated that the said Magistrate found that the law was substantially complied with.
13. It was submitted that Regulation 5 of the Narcotic and Psychotropic Substances Control Act was not complied with in regard to the quantity, quality and identification of the substance that was recovered, thus the law was contravened.
14. Paragraph 95 of the lower court Judgment was referred to and it was stated that the Hon. Magistrate applied conjecture by holding that by the applicant's close association with the vessel and its owner, he must have known that there were narcotic drugs in the Yacht. He prayed for the application to be allowed.
15. Mr. Jami, Principal Prosecution Counsel opposed the application and submitted that the appellant's appeal had no overwhelming chances of success. On the issue of the appellant's appeal not being heard soon as was averred in the affidavit of Mr. Magolo, it was submitted that the applicant was convicted to a cumulative sentence of 22 years and as such, there is no danger that by the time the appeal is listed for hearing the applicant will have served sentence. Counsel for the respondent cited the case of **Farid Jamali Shebwana vs Republic** [2018]. Mr. Jami stated that it is in the court's discretion to allow the application and in the said case, the Hon. Judge directed for the Record of Appeal be compiled for disposal of the appeal.
16. On the issue of the applicant having persons who are willing to stand surety for him, Counsel relied on **RKT vs Republic** [2017] eKLR where the High Court cited the case of **Dominic Karanja vs Republic** [1986] KLR 612, to the effect that even a sole assertion, even if supported by sureties, that the applicant will not abscond is not a sufficient ground for releasing a convicted person on bail pending appeal.
17. It was submitted for the respondent that Hon. Matheka, Chief Magistrate declined to re-allocate the matter after the destruction of the drugs because Hon. Nang'ea had the opportunity to visit the Yacht and saw the drugs. Mr. Jami cited the provisions of Article 159(2)(d) of the Constitution of Kenya which states that justice shall be administered without undue regard to technicalities. It was submitted that Hon. Matheka clothed herself with supervisory jurisdiction and therefore the applicant remained under the jurisdiction of the said Magistrate. Mr. Jami urged this court to look at this matter critically at appeal stage but in his view, no miscarriage of justice had been occasioned.
18. With regard to the contended non-compliance with the provisions of Section 74A of the Narcotic and Psychotropic Substances Control Act, Mr. Jami cited the case of Moses **Banda Daniel vs Republic** [2016] eKLR where it was held that it is sufficient for the prosecution to produce a sample of the drugs and sampling certificate. He argued that in the instant case, if anyone was aggrieved by the destruction of the drugs, they had the right of appeal.
19. It was further submitted that the 3 white Border Control Officers never recorded statements and that PW1, PW8 and PW11 were present during the recovery of the drugs and they were subjected to cross-examination. It was argued that the prosecution was under no duty to call a superfluity of witnesses. Mr. Jami added that it is only when the evidence is barely sufficient to support the charge and witnesses are not called, that a court can draw an adverse inference.
20. Counsel for the respondent stated that the Hon. Magistrate visited the yacht when PW1 was testifying and the applicant was present when the drugs were recovered.
21. It was further submitted for the respondent that the applicant had control, access, care and keys for the yacht and acted for and on behalf of Mr. Bilal and the Captain of the yacht when dealing with the owners of the Kilifi Boat Yard. Counsel further stated that the applicant was present when the yacht was purchased and it was the said association that led the court to draw an inference that he knew what was going into and out of the yacht. It was stated that on the day he was arrested he had food supplies to take to the said yacht.
22. Mr. Jami submitted that some of the accused persons were acquitted because, in his view, they had no knowledge of the contents of the suitcase which had a concealed top and bottom. He added that the packages that were recovered in the yacht and the suitcase had been packaged in the same manner and the weight was almost the same to the drugs recovered in the motor vehicle the appellant was driving and that led the court into believing the prosecution's evidence that the applicant knew about the presence of the drugs in the yacht.

23. It was stated that Mr. Bilal was not called as a witness because he was at large but he was later arrested and charged in Mombasa Chief Magistrate's Criminal Case No. 628 of 2017, which was ongoing.

24. Counsel for the respondent wound up his submissions by urging this court not only to consider the interest of the applicant but of the public as well, as the case herein is of public interest. He prayed for the application to be dismissed.

25. In response to the foregoing, Mr. Magolo submitted that the person leading the search was a UK Officer and he had machines to detect the drugs whereas PW8 was a Police Officer. It was therefore argued that no other officer could own the search save for the UK Officer. With regard to the case referred to by Mr. Jami of **RKT vs Republic**, Mr. Magolo stated that the appellant therein had been convicted on his own plea of guilty and only his sentence was in issue.

ANALYSIS

The issue for determination is if the applicant has met the threshold for grant of bail pending appeal.

26. The applicant herein was convicted for two Counts. In the 1st Count he was charged with the offence of trafficking in narcotic drugs contrary to Section 4(9) of the Narcotic Drugs and Psychotropic Substances (Control) Act No. 4 of 1994. The particulars of the charge were that on the 9th day of April, 2015 at Kilifi Boat Yard in Mnarani area within Kilifi County, jointly with others not before court, trafficked by conveying a narcotic drug namely heroin weighing 2028 grams with a market value of Kshs. 6,084,000/= (Six Million Eighty Four Thousand Shillings) in motor (sic) registration No. KCA 698H make Toyota Raum, concealed in the false top and bottom of a black suitcase in contravention of the provisions of the said Act.

27. The 2nd Count was that of trafficking in narcotic drugs contrary to Section 4(a) of the Narcotic and Psychotropic Substances (Control) Act No. 4 of 1994. The particulars of the charge were that on the 20th day of April, 2018 at Kilindini Port within Mombasa County, jointly with others not before the court, trafficked by conveying narcotic drug namely heroin to weighting (sic) 7,600 grams with a market value of Kshs. 22,800,000/= (Twenty Two Million Eight Hundred Thousand Shillings) concealed under the water tank of BABY IRIS YACHT in contravention of the provisions of the said Act.

28. This court in the writing of this ruling must bear in mind that this is not an appeal and the important considerations to take into account are whether the appeal has overwhelming chances of success and if special or exceptional circumstances exist to warrant the granting of bail pending appeal. This court is guided by the decision in **Jivraj Shah vs Republic** [1986] KLR where the Court of Appeal held thus:-

“The most important issue here is if the appeal has such overwhelming chances of success that there is no justification for depriving the applicant of his liberty. The relevant minor considerations would be whether there are exceptional or unusual circumstances. The previous good character of the applicant and the hardship, if any, facing the wife and children of the applicant are not exceptional or unusual factors:

See Somo vs Republic [1927] EA 476. A solemn assertion by an applicant that he will not abscond if he is released is not sufficient ground, even with support of sureties, for releasing a convicted person on bail pending appeal.” (emphasis added).

29. PW1 No. 230129, Superintendent of Police, Vincent Egesa testified that on 20th April, 2015 he was on duty at Kilindini Port where he worked as the Officer in Charge of Narcotics Police Unit at Kilindini Port, Mombasa. On the said date he was informed by his boss from CID Headquarters that 3 officers from UK Border Police would visit him to search a yacht by the name MV Baby Iris that had been detained after being brought to Kilifi. PW1 indicated that the applicant and his co-accused persons accompanied the Police to the yacht. He further stated that the Border Police had specialized equipment for searching the yacht. The search started at the front cabin and that under a water tank, PW1 recovered 10 substances wrapped in polythene bags. The yacht was photographed. A search certificate was prepared as well as a seizure notice of the yacht and recovered substances. Copies of the said documents were given to the Captain of the yacht. Copies of the certificate of search were supplied to the other suspects who had declined to sign the same on the advice of their Advocate. PW1 produced the seizure notices for the yacht and of the substances that were recovered.

30. The following day the substances were taken to the Government Analyst for sampling and weighing which happened in the presence of the suspects. The substances were established to be heroin. PW1 took the court to where the MV Baby Iris was being guarded offshore and showed the Hon. Magistrate a blue water tank underneath which the drugs were recovered. The said motor vessel was produced in court as P. exhibit 4.

31. PW2 was James Bateman, a businessman in Kilifi and Botswana. He testified that in November, 2014 one Mike sold his boat called the MV Baby Iris to one Bilal who was with the applicant herein. PW1's company provided mooring services to the said yacht. He stated that the applicant herein was Bilal's representative when the yacht left its anchorage for an unknown destination. He learnt later that it was destined for Madagascar but it turned back due to unfavourable weather.

32. PW1 further testified that the applicant would at times make requisite payments as Bilal's representative and was a crew member of the yacht but again said that he did not know the applicant's capacity in the yacht after it was purchased by Bilal. PW1 indicated that the crew had custody of the key to the yacht. PW2 stated that he did not control the interior of the yacht.

33. It was PW2's evidence that in the year 2015 while away, he learnt that his Security Guards were arrested when illegal drugs were found in the yacht but they were later released.

34. PW3, Peter Onyango was a Security Guard at Kilifi Boat Yard Limited. He testified that on the night of 9th April, 2015 at 11:45 p.m., a

red motor vehicle registration No. KCA 698H drove into the boat yard at a high speed and rapidly made a U-turn. 5 occupants alighted from the car. PW3 stated that he was concerned by their conduct. They said they were suppliers of the MV Baby Iris and they were taking food to their customers as they were due to sail.

35. PW3 further testified that 3 other vehicles sped into the Boat Yard and surrounded the red car. The occupants introduced themselves as the Police and they were ordered to lie down. The Police inspected the red car and sought the keys for the yacht which they wanted to search for contraband goods. The keys could not be found and the motor vessel's padlock was broken.

36. One Matano, 2 occupants of the car and the Police proceeded to the yacht. They returned and started searching the red car. A black suitcase was removed from the boot. It was searched and a substance suspected to be a narcotic drug was found. All the persons were arrested but 3 others were released later. He identified the applicant as the Driver of the red motor vehicle.

37. PW4 was No. 80914 PC Samuel Kamuti who used to work at CID Kilifi. He gave evidence of how they received a tip off about some people who were traveling from Mombasa to Kilifi ferrying narcotic drugs to be delivered to Kilifi Boat Yard for transportation by sea. PW4 and other Police Officers laid an ambush. At midnight, a vehicle registration No. KCA 698H, Toyota Raum appeared. He stated that they trailed the said motor vehicle which they found at a Boat Yard. The occupants had alighted and were removing loads from the motor vehicle. They introduced themselves as CID Officers and ordered everyone to surrender. They arrested 9 men.

38. It was PW4's evidence that they found paper bags with assorted food stuff and a black traveling bag with a grey stripe along the zip. It contained assorted men's clothes. He testified that while sampling the clothes, he smelt a choking substance. At the bottom of the bag there was some brownish powder. He further stated that there were things stashed in the upper and lower linings of the bag. He tore the bottom lining to check the substance. He unzipped the upper lining and found 2 polythene bags which contained a whitish substance which he suspected to be narcotic drugs similar to the black polythene containing the same substance found at the bottom lining. He recovered some more substances in the bottom lining of the suit case. The polythene bags were 4 which he identified in court.

39. PW4 went on to say that the applicant herein was the Driver of the motor vehicle in issue. PW4 indicated that he recovered the applicant's driving licence in his possession. He also recovered the applicant's Thuraya phone, Thuraya phone permit, Thuraya phone package, 2 Samsung phones and ignition keys for the red motor vehicle,.

40. PW4 prepared an inventory of the recoveries made, dated 9th April, 2015. The applicant and his co-accused persons signed it, as well as some Police Officers.

41. PW4 further testified that they then moved to a motor vessel christened Baby Iris whose padlock they broke as the key was unavailable. They did not do a thorough search of the yacht as it had many compartments. They put it under 24 hours guard for a thorough search to be done later.

42. It was his evidence that the drugs which were recovered were weighed in the presence of the 5 accused persons. Police Officers from Nairobi took over investigations and all the exhibits including the motor vehicle were handed over to them. He produced the motor vehicle as an exhibit.

43. No. 231067 Chief Inspector George Mutiso testified as PW5. He was working at the Anti-Narcotic Unit Headquarters Nairobi as at 9th April, 2015. His evidence was to the effect that on the said date his boss instructed him and Corporal Kemei to proceed to Kilifi Police Station to meet the DCIO. They reached there and met the said DCIO who told them that they were holding suspects who were found in the possession of narcotic drugs. They were shown a red motor vehicle registration No. KCA 698H, a black medium sized suitcase, a brown powdery substance contained in 4 black polythene bags but at the time he was testifying in court, they had been wrapped in clear packages. All the exhibits were handed over to him. They issued the accused persons with seizure notices dated 9th April, 2015 in regard to the narcotic drugs. A seizure notice for the motor vehicle was issued to the applicant herein.

44. They issued a notice to render the material confiscated as evidence and served the suspects with the same. They did not sign the same. The motor vessel was moved to Kilindini Port and so were the suspects.

45. PW8, No. 73588 Corporal Ngale Samuel of Mombasa Police Anti-Narcotics Unit testified that on 9th April, 2015 he was instructed by his boss to travel to Kilifi to assist CID officers with investigations of narcotic drugs recovered there, he was accompanied by his colleague Benedict. On reaching there, they were informed of recovery of narcotic drugs concealed in a suitcase. PW8 was required to weigh the drugs using a machine. The suspects were present during the weighing exercise. He weighed 4 packages which contained substances weighing 2028g in total. He prepared a weighing certificate which he signed and so did all the 8 suspects. PW8's colleagues, PC Benedict and PC Corani from Malindi also signed the certificate which PW8 produced in evidence.

46. On 10th April, 2015, PW8 took the 4 packages to the Government Chemist for sampling and analysis, by way of an exhibit memo form, to establish if the packages were narcotic drugs. PW8 testified that the Government Chemist removed samples from each package in his presence. The expert prepared a sampling certificate which he and PW8 signed.

47. He testified that after the boat was moved from Kilifi Boat Yard to Kilindini Port, a search was done on 13th April, 2014 in the presence of the accused persons and Government agencies. On 20th April, 2015 the accused persons were taken to the yacht for a further search with the assistance of UK Officers and that one of the said Officers who was using a machine for the search said there were some substances under the yacht's water tank. They drained the water from the water tank and 10 packages were removed from the tank. PW8 prepared a search certificate but the suspects declined to sign it. He produced the search certificate in evidence.

48. It was PW8's evidence that on 21st April, 2015, he took the recovered packages to the Government chemist for weighing and sampling. He and the suspects witnessed the exercise. The exhibits were weighed and samples were taken from each package. He prepared a weighing

certificate which the accused persons refused to sign. The Government Chemist prepared a certificate of sampling which PW8 signed but the suspects refused to sign. PW8 produced the 2 exhibit memo forms and weighting certificates as evidence. PW8 indicated that a report of the analysis which was sent to the Police established that the samples tested positive for heroin, a narcotic drug. He further stated that the samples were released to the Police and the packages containing the drugs which had been recovered, were destroyed together with the yacht.

49. PW12 Yahya Hamisi a Government Chemist produced the Government Analyst's report as exhibits and certificates of sampling on behalf of Mr. John K. Njenga who had retired. The report confirmed that the drugs that were recovered from the yacht and red motor vehicle were heroin.

50. PW13, No. 65672 Corporal Kenneth Kemeli who used to work at the DCI Headquarters Nairobi Anti-Narcotics Unit, produced the exhibits that were recovered. He stated that the Government Chemist confirmed the packages contained heroin. The same were destroyed but samples had been taken which he produced in evidence. He also produced seizure notices.

51. PW14, No. 70534 Seargent James Ochola was on duty on 8th April, 2015 at the DCIO's Office Kilifi. His evidence corroborates that of PW1 in material particulars with regard to the arrest of the applicant herein.

52. PW14's evidence was that the 2nd accused in the lower court told them the clothes in the suitcase which contained the drugs were his and he had borrowed the suitcase from the applicant herein. PW14 testified that the applicant's passport and Driver's licence were found in the said suitcase.

53. He further stated that a search was made in the yacht where a satellite radio and foodstuff were recovered. Inventories were prepared of the recoveries and signed. He indicated that PC Ngatia and Mutie remained behind to guard the vessel. The drugs recovered were weighed in PW14's presence and that of the applicant and his co-accused. Investigations were then handed over to Nairobi Anti- Narcotics Office.

DETERMINATION

54. On the issue of the applicant having been on bail pending trial, it must not be forgotten that at this stage his release on bail pending appeal is not a matter of right but is at the discretion of the court when bearing in mind the principles that should be considered as outlined in the case of **Jivraj Shah vs Republic** (supra).

55. The Judgment of Hon. Nang'ea clearly indicates the reasons as to why he found the applicant complicit in the commission of the offence in count 1, in that he believed that the drugs recovered in the suitcase in the boot of the red car belonged to the applicant herein and that as at the time he picked his co-accused persons on the way to Kilifi Boat Yard, the suitcase was in the boot of the car. The applicant's driving license was found in the said suitcase. The Hon. Magistrate held that the applicant had knowledge of the existence of the narcotic drugs that were recovered in the said suitcase.

56. The issue of the constitution of the lower court was heard and determined by Hon. Nang'ea. Since the applicant herein willingly submitted to the jurisdiction of the trial court, the said issue is not a special or exceptional circumstance.

57. The failure by the prosecution to call the 3 UK Border Security Officers who assisted in the search of narcotic drugs aboard the yacht is an issue that will be best canvassed in full at appeal stage. At the said stage the applicant will have the opportunity to demonstrate the prejudice, if any, that was occasioned to him by failure on the part of the prosecution to call the said UK Border Security Officers, more so in light of the evidence of PW1 and PW8.

58. It was correct for Mr. Magolo to have stated that the applicant herein was not part of the crew of the yacht a fact which was established from the evidence of the Chief Immigration Officer, Malindi Border Control, PW6 who confirmed that the crew manifest of the yacht reflected that the crew members were Ahmed Hussein Said and Mohamed Sheriff Mzee whereas Clement Seige Bristol was the Captain of the yacht. Although the motor vehicle the applicant herein was driving had foodstuff that he said he was delivering to the yacht, he was arrested and charged in Count 1 for having been found in possession of narcotic drugs which were in a suitcase in the boot of said the motor vehicle.

In the determination of the lower court case, nowhere did the Hon. Magistrate find that the applicant had in his possession a passport and was ready to sail as was submitted by Mr. Magolo.

60. With regard to the recovery of drugs from the yacht, PW1 testified that the applicant had access to it. DW4, the Captain of the yacht said that the applicant had custody of the key to the yacht. PW1 testified that the applicant was Bilal's agent and the Hon. Magistrate's analysis of the evidence indicates that he believed the said evidence and found that the applicant had knowledge of the presence of narcotic drugs under the water tank in the front cabin of the yacht.

61. With regard to the alleged non-compliance with Section 74A of the Narcotic and Psychotropic Substances (Control) Act, the Hon. Magistrate addressed his mind to the said provisions and the case law that was cited by the Prosecuting Counsel and found that there was no material breach of the said provisions.

62. I have considered the submissions that were made, the authorities that were cited. As Mr. Jami stated, the submissions which were made were to a large extent not in tandem with the petition of appeal. What I am dealing with is an interlocutory application and not the appeal and as such, this court gave the applicant's Counsel the leeway to argue their client's case in the best way they could, without bringing in technicalities which would have curtailed the right to have the application herein heard.

63. Having done so, it is my finding that the applicant has not shown the existence of exceptional or special circumstances that would render

this court to exercise its discretion to grant him bail pending appeal. With regard to the appeal herein, it is an arguable one. In the case of **Mutua vs Republic** [1988] KLR 497 the Court of Appeal stated thus with regard to the exercise of the Court's discretion in an application for the release of an applicant on bail pending appeal:-

"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 or to set the applicant at liberty either from the point of view of his welfare or of the state unless there is a real reason why the court should do so."

64. As Mr. Jami stated, the lower court proceedings have been typed and certified. All that is left is for the Record of Appeal to be compiled and for directions to be given as to the hearing of the appeal.

65. The application dated 28th November, 2018 is hereby dismissed.

DELIVERED, DATED and SIGNED at MOMBASA on this 29th day of March, 2019.

NJOKI MWANGI

JUDGE

In the presence of

Mr. Magolo for the appellant/applicant

Ms Marindah, Prosecution Counsel holding brief for Mr. Jami for the DPP

Mr. Oliver Musundi – Court Assistant