



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION MILIMANI

ACEC APPEAL NO. 1 OF 2019

SALESIO KARANJA.....APPLICANT/APELLANT

VERSUS

REPUBLIC RESPONDENT

RULING

1. The appellant/Applicant herein Salesio Karanja together with 23 others were jointly charged with various charges ranging from conspiracy to commit an economic crime contrary to Section 47 (A) (B) as read with Section 48 (1) of the Anti- Corruption and Economic Crimes Act (Cap.65) Laws of Kenya (Count 1), abuse of office contrary to Section 46 as read with Section 48 (1) of the Anti Corruption and Economic Crimes Act (Counts 2 & 3), wilful failure to comply with law relating to procurement contrary to Section 45 (2) (B) as read with Section 48 of Anti-Corruption and Economic Crimes Act (Counts 4, 5 and 7), fraudulent acquisition of public property contrary to Section 45 (1) as read with Section 48 of the Anti-Corruption and Economic Crimes Act Cap 65(Counts 6) and fraudulent practice in procurement contrary to Section 40 as read with Section 137 of the Public Procurement and disposal Act 2005 (Count 8).

2. Out of the eight counts reflected in the charge sheet, only count 8 is relevant to the applicant's case. Particulars are to the effect that on or about 29th day of January 2015 at National Youth Service headquarters, within Nairobi County in the Republic of Kenya, being a person employed in the public service to wit supply Chain Assistant NYS, engaged in fraudulent act in a procurement namely inserting the name of Dama Services Ltd in the tender opening register for the procurement of training materials in the Automotive Engineering Faculty Tender No. NYS/RJ/29/2014-2015 whereas the said Dama Services Ltd had not been approved for the said tender.

3. Upon arraignment before court on 25th November 2016, the appellant/applicant pleaded not guilty to the charge. After the close of the prosecution case, the court delivered its ruling on 9th March 2018 thereby acquitting accused 1 to 23 in respect of counts 1, 2, 3, 4, 5, 6 and 7 under Section 210 of the CPC for lack of sufficient evidence to put them on their defence.

4. However, only the appellant herein (24th accused person) was put on his defence in respect of Count 8. After tendering his defence on oath without calling any witness, Hon. Bidali the presiding Magistrate found him guilty and convicted him accordingly. On 17th January 2019 Hon. L. Mugambi delivered the said judgment and sentenced the applicant on behalf of Hon. Bidali who had been transferred. The applicant was then sentenced to a fine of Kshs 4,000,000/= in default serve four years imprisonment.

5. Aggrieved by the said conviction and sentence, he filed a chamber summons of even date on 28th January 2019 seeking orders as hereunder:

(1) That pending hearing of this application interpartes, the honourable court be pleased to suspend the sentence imposed on the appellant by the Ethics and Anti-Corruption Court in ACC 26 of 2018.

(2) That the honourable court be pleased to grant an early hearing date for this application and issue a production order for the applicant to be produced at the date to be issued.

(3) That the honourable court be pleased to admit the appellant to a reasonable bail and or bond terms and or suspend the sentence imposed by the trial magistrate Hon. M.K. Mugambi pending the hearing and determination of the appeal herein.

(4) That the honourable court be pleased to grant any order it may deem fit.

6. Contemporaneously filed with the application is a petition of appeal citing 13 grounds inter alia: that the magistrate erred in law by delivering undated judgment contrary to mandatory provision of Section 169 of the CPC; failing to appreciate that the charge sheet was fatally and incredibly defective; failing to acknowledge glaring contradictions in evidence thus raising reasonable doubt; shifting the burden

of proof to the accused person and lowering the standard of proof to the appellants prejudice; failing to appreciate and take into account prosecution's failure to call competent and compellable witnesses without ascribing any reasonable explanation hence failed to draw an adverse inference; failure to post true issues for determination; failure to find that Dama Services bid was in the tender box; failure to accurately record the defence tendered by the appellant; failure to find that the appellant was discriminated again by being charged alone and finally; failure to take into consideration the mitigation on record thus meting out maximum sentence.

7. The application is predicated upon grounds set out on the face of it and a supporting affidavit sworn on 28th January 2019 by Anthony Mugo Gichuki counsel for the appellant. Principally, the stated grounds are a replica of the petition of appeal. It is Mr. Gichuki's averment that the judgment delivered by Hon. C. Mugambi on 17th January 2019 was signed but not dated by the presiding officer who did the judgment hence a fatal illegality and invalid. He further averred that the judgment is self contradicting and incoherent hence not supported by factual evidence.

8. It is further alleged that the charges facing the appellant are not known in law as the appellant is alleged to have committed a fraudulent practice by inserting a company called Dama Services Ltd in a tender opening register whereas the said company was not registered. Regarding the tendering practice, he contended that the duty to interrogate the bids and to apply laws and regulations and make a decision whether certain bid is competent or not is reposed on the tender evaluation committee which is a statutory body.

9. As concerns the legality of the charges, Mr Gichuki contended that the charge sheet was fatally and incurably defective in that prosecution cited wrong provisions of the law i.e. Section 40 instead of Section 41 of the Public Procurement Act.

10. Finally, Mr. Gichuki urged the court to find that the appeal has overwhelming chances of success to warrant release on bail pending appeal. Further, learned counsel stated that the appellant has a medical condition which presents an exceptional circumstance to warrant his release on bail.

11. In response to the application, the respondent filed 4 grounds of opposition namely:

- (1) The appeal has no overwhelming chances of success.**
- (2) There is no existence of exceptional or unusual circumstances demonstrated in this case.**
- (3) The appeal will not be rendered nugatory if the application is not heard.**
- (4) The application is an abuse of the court process and it should be dismissed.**

Hearing

12. During the hearing, Mr. Mugo Gichuki counsel for the appellant adopted the contents contained in the petition of appeal, grounds set out on the face of the application and affidavit in support. He submitted that the appellant's appeal has overwhelming chances of success and that there are exceptional circumstances to warrant his release on bail. Learned counsel urged the court to find that a signed but undated judgment is not a judgment thus contravening Section 169 of the CPC hence null and void.

13. In support of that proposition, counsel referred the court to the case of **South Sugar Nyanza Co. Ltd vs Elijah Ntabo (2011) eKLR** in which the court held that a judgment that is not dated, signed and delivered in open court is null and void. Counsel further referred to the case of **Geoffrey Asanyo and 3 others vs Attorney General (2018) eKLR** where the court stated that:

“This is crucial because ‘a judgment’ only becomes valid and binding when finally delivered in accordance with the law. It is also trite that for a judgment of the court to be valid, it must be dated, signed and delivered in open court”.

Similar position was held in **William Kinyanyi Onyango vs Independent Electoral and Boundaries Commission and 2 Others (2013) eKLR**.

14. Regarding the fatally and incurably defective charges, Mr. Gichuki faulted the court in finding the appellant guilty of a charge of fraudulent act by inserting Dama Line Services as one of the bidders in the tender box a charge which does not exist in law. Further, Mr. Gichuki submitted that the Section quoted as having been contravened is Section 40 and not 41 of the Procurement Act hence the appellant did not know what to respond to. To support his position, counsel quoted the case of **Ngure Kairu and Another vs Director of Public Prosecutions (2018) eKLR** where the court held that;

“...where a person is charged for committing an offence unknown to the laws of the land, such person is as a matter of right, entitled to move this court to protect his constitutional liberties by discharging the yoke of undeserved criminal proceedings i.e. DPP cannot then say that the trial court will determine whether such an offence exists. In fact it is an affront to the rule of law for the DPP to charge a person with a non-existent offence and require the person to undergo a full trial and for the trial court to hold that the charge is not premised on any law. In such an instance, this court will hold that the DPP has abused the legal process thus acting in contravention of Article 157 (1) of the Constitution”.

15. It was Mr. Gichuki's submission that the evidence relied on to convict the appellant was below the standard required. Lastly, learned counsel urged the court to consider the medical condition of the appellant which he claimed cannot be managed in prisons. He referred the court to a medical referral note attached to the supporting affidavit marked as SK.3 showing that the appellant was being treated for backache with the X-ray showing early signs of spondylosis hence referred for physiotherapy.

16. In response to the application, M/s Sigei for the state opposed the application relying on the aforesaid grounds of opposition and the written submissions dated and filed on 6th March 2013. M/s Sigei submitted that prosecution had proved that the appellant had committed the act of fraudulent practice in conformity with Section 3 of the Public Procurement and disposal Act and that Section 143 of the Evidence Act allows prosecution to call any number of witnesses to prove a fact.

17. Learned counsel further submitted that prosecution had adduced sufficient evidence through PW3 and PW10 who confirmed that when the tender box containing the bids in respect of tender No. NYS/RT/29/2014-2015, only 5 bids were removed and the emergency of the 6th bid by the name of Dama Services Ltd was a creation of the appellant who unilaterally inserted it later and recorded it as one of the bidders a practice that was fraudulent and contrary to the law.

18. As regards the undated judgment, counsel submitted that the judgment was written by Mr. Bidali who signed it and sent it to Mr. Mugambi who delivered it in open court and signed. Learned counsel however urged the court to find that failure by Mr. Bidali to date the judgment was not fatal. Concerning exceptional circumstances, counsel opined that the ground of sickness alone without proof or evidence that the ailment cannot be managed by the prisons facility is not good enough on its own to warrant release on bail.

19. To support her, learned counsel relied on the case of Cr. Appeal No. 34/17 Kericho High Court.

Analysis and Determination

20. I have considered the application herein, supporting affidavit, grounds of opposition and submissions by both counsel. The application herein is predicated upon Section 357 of the CPC which provides for suspension of a sentence pending appeal. Unlike bail pending trial where an accused person is presumed innocent until proved guilty (Article 49), bail pending appeal is guided by a totally different set of factors. It is actually subject to the discretion of the court as the accused is already a convict. **(See Yusuf Salat Mohamed vs R (2018) eKLR).**

21. In considering an application for bail pending appeal, a presiding judge is guided by the application of certain known legal principles or parameters inter alia; proof by the applicant that his or her appeal has overwhelming chances of success; that the hearing and determination is likely to take long hence posing a likelihood of serving full sentence or substantial sentence thus rendering the appeal useless or nugatory and; proof of the existence of special or exceptional circumstances **(See Jivraj v R (1986) KLR 608).**

22. The above principles have consistently been applied by superior courts as a yard stick to grant bail pending appeal. Other than the presiding magistrate/ judge delivering a judgment written by another magistrate/judge, a distinction must then be drawn as to whether a date indicated by the magistrate/Judge delivering the same on behalf of another would serve the interest of a dated judgment. Considering this aspect against section 200 of the CPC which provides for signing and delivery of a judgment on behalf of another magistrate/Judge who has left the station which is the case here, and further having evaluated the entire evidence on record, prima facie, it is my holding that at this stage that ground cannot stand until the main appeal is heard and determined.

23. What is critical here is whether prima facie the appeal has overwhelming chances of success. From the record of the lower court, it is true that the judgment was signed by the presiding magistrate but not dated although the date of delivery of judgment is indicated and signed by the delivering magistrate.

24. According to Section 169 of the CPC a valid judgment must be dated, signed and delivered by the presiding judge. The provision does not envisage a magistrate getting transferred before delivering the judgment. However, that Section must be read together with Section 200 (1) (a) of the CPC which adequately covers the scenario in this case.

25. The second ground is that the charge as framed does not disclose any offence known in law and that the evidence is contradictory with some witnesses stating that the bid of Dama services Ltd was contained in the tender box as at the time the bids were opened hence the applicant did not secretly insert it in the list of bids after official opening of tenders.

26. I am alive to the fact that at this stage the court is only obligated not to delve into the merits of the appeal lest I jeopardise the outcome of the appeal. In the case of **Dominic Karanja vs R (1986) KRL 612** the court of appeal had this to say:

“The most important issue here is, if the appeal has high chances of success that there is no justification for depriving the applicant of his liberty. The minor relevant 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”.

27. From the evidence of PW3 and PW10, the tender bid by Dama services was added to the list of bidders by the appellant after official opening. Prima facie, a fraudulent act is reflected. At this stage this court can not in detail evaluate and dwell on the credibility aspect of those two witnesses lest I jeopardise the outcome of the main appeal.

28. Regarding existence of unusual or exceptional circumstances on account of age and sickness, the court is duty bound to evaluate such circumstances together with other factors. The appellant herein has stated that he is suffering from diabetes, high blood pressure and backache. In a number of authorities, superior courts have consistently stated that sickness alone without proof that such ailment cannot be managed by the available prisons facilities is not sufficient to grant bail pending appeal **(See Dominic Karanja vs R (Supra))**. In any event, the medical reference note (SK3) attached to the affidavit in support does not show anything serious other than backache and signs of spondylosis requiring physiotherapy.

29. I have seen a letter dated 18th January 2019 written by prisons Doctor marked Ex. SK.4 indicating that the appellant is sick suffering

from hypertension and spondilitis due to nerve compression which is coupled to old age. The age of the applicant is not stated on either medical reports. It is not clear how old the appellant is. It can only be assumed that he is over 60 years having retired from service. The prisons doctor's letter does not state whether the medical services rendered including referral facilities are incapable of managing his condition. Should courts condone sickness as an automatic ground for release of convicts on bail, then everybody 'will be sick' and therefore every sick convict will be released on bail. If this were to happen, then, it will amount to a mockery of justice especially against the complainants whose interest must be catered for as well.

30. As concerns the duration the appeal is likely to take to be finalised, the same was admitted on 6th March 2019 and it is therefore ready to be heard any time after delivery of this ruling. The applicant therefore is not likely to serve substantially the sentence imposed. That ground is therefore not applicable.

31. For the above reasons stated, there is no proof of exceptional circumstances or unusual situation to warrant release on bail.

32. Accordingly, application herein is dismissed and immediately the matter be fixed for hearing of the appeal.

Order accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI ON THIS 27TH DAY OF MARCH, 2019.

J.N. ONYIEGO

JUDGE