



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 2 OF 2019

JOSEPH MURIITHI NJOKA.....APPELLANT/APPLICANT

V E R S U S

REPUBLIC.....PROSECUTOR

RULING

1. The appellant Joseph Muriithi Njoka was convicted for the offence of Conspiracy to defraud contrary to **Section 317 of the Penal Code** and making a false document without authority contrary to **Section 357(a) of the Penal Code**. He was sentenced to serve 1 year imprisonment on each count which sentence was to run concurrently and has now filed an application for bail pending appeal dated 29/01/2019.

The appeal is based on the following grounds:-

- a) That the appellant was convicted and sentenced to serve 1 year imprisonment on 7th January, 2019 vide the Resident Magistrate's Criminal Case No. 415 of 2013, Gichugu.***
- b) That the appeal has high chances of success.***
- c) That the appellant is apprehensive that she will have served a substantial part of her sentence by the time this appeal is heard and determined.***

Section 357(1) of the Criminal Procedure Code provides:

After the entering of an 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:

2. When considering an application for bail pending appeal, the court has discretion in the matter which must be exercised judicially taking into consideration various factors as follows:

- a) Whether the appeal has overwhelming chances of success.***
- b) There are exceptional or unusual circumstances to warrant the court's exercise of its discretion.***
- c) There is a high probability of the sentence being served before the appeal is heard.***

3. The leading authority on this subject is **Somo –VS- Republic**. In refusing to grant bail the High Court, held that the most important ground in deciding whether or not to grant bail is whether the appeal has an overwhelming chance of being successful and that there were no exceptional or unusual circumstances to justify the grant of the bail.

4. In an application of this nature, an applicant is required to satisfy the existent of one or a combination of the conditions mentioned in the above cited authority.

1. Overwhelming chance of being successful

In order to ascertain whether the appellant's appeal has chances of success, one needs to go through the evidence adduced before the trial

court and the judgment delivered by the learned trial magistrate but without going into any detail in order not to prejudice the court which will eventually hear the appeal.

5. As per the proceedings, 1st accused sold land to the complainant. However, the said land was fraudulently transferred in favour of the Phyllis and the appellant and the consent was found not to be genuine. In addition, the said transaction does not appear in the minutes of the Land control board. According to the appellant, he testified that his friend Danson Njogu informed him he wanted to buy land in Meru. His wife had land they were succeeding but she wanted to exchange it with another. They were informed that the 1st accused was selling his land therefore they went to advocate, an agreement was prepared and money paid. They went to Land Control Board and later heard that there were other people who had purchased land from the 1st accused. They had the land registered under his wife and 1st accused daughter's names. Later the 1st accused wanted cash to refund complainant therefore the land belonging to his daughter was sold to Abel Bundi and Ann Muthoni and they signed agreement. He denied that he conspired with the 1st accused to defraud the complainant since she was not in the picture when he transacted.

6. My view is that the evidence is weighty and the appeal cannot be said to have overwhelming chances of success.

7. When considering release of the appellant on bail pending appeal, where the appeal has no chances of success, the court should not give bail to avoid situations where the appellant maybe sent back to prison to finalise his sentence. Bail pending appeal is discretionary unlike bail pending trial which is a constitution right. There is a presumption that the appellant is lawfully convicted and serving a lawful sentence. Having considered the record and the Judgment, I find that this is not a proper case for bail pending appeal.

8. The second consideration is whether there are –

2) unusual or exceptional circumstances. The health is deteriorating as he is not being supplied with proper medication. That he was convicted with his wife and they have young children who are school going.

9. I have considered the ground. The appellant has not annexed any documents to prove that he is on medication. The ground has not been expounded. It is also not supported by any evidence. For the applicant to advance this ground and for the court to rely on it, it must be supported by cogent evidence which I find has not been availed. Mere allegations of deteriorating health is not sufficient and has not satisfied the ground for unusual or exceptional circumstances.

3) Finally the other consideration is whether there is a possibility of the sentence being served. The applicant was sentenced to serve one year imprisonment.

10. I have noted that he has obtained the proceedings and Judgment. In determine the application, the court must do a balancing act on the rights of the accused and the public interest which is that wrongs where they are proved should be punished. This ensures confidence in the judicial system. I have said this appeal against the appellant cannot be said to have overwhelming chances of succeeding. The scales of justice in the circumstances fall in favour of the wider public interests that wrongs when proved should be punished appropriately. My view is that though the applicant was sentence to serve a short stint of imprisonment, the appeal can be fast tracked. I find that the application has not met the threshold for the grant of bail pending appeal. I decline the application.

Dated at Kerugoya this 18th day of March 2019.

L. W. GITARI

JUDGE