



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL APPEAL NO. 21 OF 2019

LEMOMO OLE NTEKENSE.....1ST APPELLANT

TUPET KAUWET MURRE.....2ND APPELLANT

PASHILE OLENEIPU.....3RD APPELLANT

SAMUEL SOPON PARASHURU.....4TH APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The significant orders sought in the chambers summons dated 16th April, 2019 are:-

a) (Spent)

b) THAT the appellants/applicants be granted bail/bond pending the hearing and determination of the appeal in Kajiado HCCR Appeal No 21 of 2019.

c) THAT the bail/ bond terms of Kshs 500,000/- or surety of the same amount applicable in Criminal Case No 77/17 be deemed sufficient bail/bond terms in this Appeal and Apply accordingly.

2. The chamber summons is expressed to be brought under Section 356 and 357 of the Criminal Procedure Code (CAP 75) Laws of Kenya and any other enabling provision of the law.

3. The grounds upon which the chamber summons is grounded are set out in the application and the joint affidavits sworn by Lemomo Ole Ntekese, Tupet Kauwet Murre, Pashile Oleneipu and Samuel Sopon Parashuru. Their main arguments are that they were convicted and sentenced on 12.4.2019 by the Chief Magistrates Court at Kajiado and sentenced to two years imprisonment and or pay a fine of Kshs 2,000,000/- on four counts of conspiracy to defraud contrary to Section 317 of the Penal Code and that they are dissatisfied with the judgement and have preferred an appeal that they view has high chances of success on the grounds that the conviction and sentence was based on insufficient evidence hence erroneous. The deponents aver that they are apprehensive that they shall have served a substantial part of the sentence by the time the appeal is heard and they have polygamous families who depend on them. Further, that as officials of Partimaru Group Ranch, their serving time will cripple the official affairs of the Group Ranch. The deponents averred that they have medical conditions that are declining and that during the trial of Kajiado Cr Case No. 77/17, they were granted bail and bond terms and they were released and still they attended court during the trial and they undertake to attend court during the hearing and determination of the appeal.

4. There is no opposition to the application.

5. Counsel for the appellants submitted before the court that the appellants are elderly persons and they have filed an appeal that has high chances of success. Further that the appellants were out on bond and had not absconded and are willing and ready to abide by the conditions of bond pending appeal.

6. On the other hand, counsel for the respondent conceded to the application and he submitted that the Appeal has high chances of success and that the appellants may serve a substantial part of the sentence before the appeal is heard. Counsel submitted that the language that was

used in trial appears not to have been indicated and hence the appellants might have suffered prejudice and their right to proper interpretation was violated. Further that the trial magistrate sentenced the appellants and failed to indicate whether the sentences shall run concurrently or consecutively and this has a bearing on whether or not they shall serve a substantial part of their sentence before the appeal is heard.

7. In rejoinder, counsel for the applicants submitted that no exhibits were produced to prove the alleged conspiracy and thus the application should be allowed.

8. The issue for determination is ***whether the appellants should be granted bail/bond pending the hearing and determination of this appeal.***

9. Section 357 (1) of the Criminal Procedure Code provides for admission to bail pending appeal and it states that:

“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.”

10. In order to be granted bail pending appeal, the applicants should therefore satisfy the threshold of law set out in the case of **Dominic Karanja v. Republic [1986] KLR 612** that:

a). The... appeal had such overwhelming chances of success, there is no justification for depriving the Applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances.

b). The previous good character of the applicant and the hardships, if any, facing his family were not exceptional or unusual factors. Ill health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners.

c). A solemn assertion by an 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.

d). upon considering the relevant material in this case, there was no overwhelming chance of the appeal being successful.

11. In the case of **Jivraj Shah -vs- Republic [1986] KLR 605**, the court observed inter alia:

“1. The principal consideration in an application for bail pending appeal is, the existence of exceptional or unusual circumstances upon which the court of Appeal can fairly conclude that it is in the interests of justice to grant bail.

2. If it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on an account of some substantial point of law to be urged and the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail will exist.”

12. A quick glance at the grounds of appeal show that the appeal raises issues of application of legal principles and also the application attests to the fact that the appellants are of good character by attending the trial when out on bond in the trial court. Further the exceptional circumstance that the appellants have been sentenced to two years warrants a grant of bail pending appeal because the appellants may serve a substantial part of their sentence before the appeal is heard and determined and this shall occasion injustice and prejudice to them. Further the appeal appears to have some overwhelming chances of success as it is arguable.

13. Applying the test of law, I am satisfied that this is a proper case to warrant grant of bail pending appeal. Consequently the Appellants application dated 16th April 2019 is allowed in the following terms:

a). Each of the Appellants is released on bond of Kshs 500,000/ plus one surety of similar amount.

b). The sureties shall be approved by the Deputy Registrar.

c). Upon release, the appellants are directed to ensure they attend court on all the scheduled dates without fail and in default their bonds shall stand cancelled and the sureties called to account.

d). Matter shall be mentioned before the Presiding Judge at Kajiado High Court on **2nd May 2019** for further directions.

It is so ordered

Dated, signed and delivered at Machakos this 18th day of April, 2019.

D.K. KEMEI

JUDGE