



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL APPEAL NO 27 OF 2019

SAMMY KASAINO OLE KANTAI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the original conviction and sentence dated 4th May 2019 in the Chief

Magistrate's Court at Narok in Criminal Case No 1808 of 2014, Republic v Sammy Kasaine Ole Kantai)

RULING

The case for the appellant

1. The appellant has applied for bail pending appeal pursuant to the provisions of section 357 of the Criminal Procedure Code (Cap 75) Laws of Kenya; following his conviction and sentence of 18 months imprisonment in respect of stealing contrary to section 275 of the Penal Code (Cap 63) Laws of Kenya.
2. The appellant seeks to be released on bail pending the hearing and determination of the appeal. His application is brought under the provisions of section 357 of the Criminal Procedure Code, articles 159 and 259 of the Constitution of Kenya. The application is supported by both seven grounds that are set out on the face of the notice of motion and **a 14 paragraphs supporting affidavit**.
3. The major grounds in support thereof are as follows. The appellant was aggrieved by the judgement in the above case. The appellant has stated that the appeal has overwhelming chances of success. And that given the nature of the sentence and the time it will take to hear the appeal, the appeal will be rendered nugatory. Additionally, the appellant has also stated that there is a possibility of substantial delay in the hearing and determination of the appeal considering that the lower court proceedings are yet to be typed and preparation of the record of appeal. Finally, the appellant has stated that he religiously complied with the conditions of his bail during the trial in the lower court.
4. In his affidavit, the applicant has replicated the grounds that are set out in the notice of motion.

Submissions of counsel for the appellant.

5. Mr. Kamwaro, counsel for the appellant filed written submissions in support of the application. He submitted that the appeal has overwhelming chances of success. He cited *Somo v. R. (1972) EA 476* in support of his submissions. Counsel further submitted that it is a failed land sale transaction that gave rise to the criminal proceedings, which resulted in the conviction of the applicant. He further submitted that the purchase money in the sum of Shs 300,000 is still with the seller of the land. Counsel further submitted a further sum of Shs 72,000 was paid for survey of the land. The land sale agreement and the failed attempt to revoke the agreement were annexed to the application. The seller did not sign the attempted revocation of the agreement.

The case for the respondent.

6. Mr. Omwega for the respondent conceded the application on the basis that the dispute between the appellant and the complainant is of a civil nature.
7. I have considered the affidavit evidence and the submissions of both counsel in the light of the applicable law. Having done so, I find the following to be the issues for determination.

1. whether or not the appeal has overwhelming chances of success.

2. Whether or not there are exceptional or unusual circumstances in the appeal.

ISSUE 1

8. According to *Somo v. R, supra*, the major consideration in an application for bail pending the hearing and determination of an appeal is whether the appeal has overwhelming chances of success. The other consideration is whether or not there are exceptional or unusual circumstances in the appeal.

9. Furthermore, it is upon the applicant to demonstrate the appeal has overwhelming chances of success or there are exceptional or unusual circumstances in the appeal.

10. The fact that the applicant was on bail during the trial and that he religiously complied with his bail terms in that court is not a relevant factor to be considered. The fact that the applicant was not convicted of a crime involving personal violence is also not a relevant consideration. The reason is that during trial there is a presumption of innocence, which operates in favour of the applicant in terms of article 50 (2) (a) of the 2010 Constitution. And by virtue of the conviction, that innocence becomes inoperative. Hence the shift of the burden of proof to the applicant.

11. The evidence in this regard is that the seller of the land (Parsale Ole Sialala, DW 2) testified as a defence witness. He testified that he did not refund the purchase money to the applicant.

12. After considering the evidence of the applicant, I find that purchase money is still with the seller. I therefore find that the applicant has demonstrated that his appeal has overwhelming chances of success.

13. I also find Mr. Omwega rightly conceded the application, for the dispute appears to be of civil nature.

ISSUE 2

14. Whether or not there are exceptional or unusual circumstances in the appeal in now a moot or an academic issue, in view of my finding in issue 1. I therefore find it not necessary to pronounce myself on this issue, since it is not part of the duties of this court to make findings on moot issues. See *Attorney General v. Ally Kleist Sykes (1957) EA 257 at page 258 paras. F, G.*

15. The upshot of the foregoing is that the application succeeds with the result that the applicant is hereby released on a bond of Shs 100,000 with a surety of a similar amount to be approved by the deputy registrar of this court, pending the hearing and determination of his appeal.

Ruling dated, signed and delivered in open court at Narok this 24th day of July, 2019 in the presence of Mr. Kilele holding brief for Mr. Kamwaro for the appellant and Mr. Omwega for the state.

J. M. Bwonwonga

Judge

24/7/2018