



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

HIGH COURT CRIMINAL APPEAL NOS. 7 & 8 OF 2017

NDARE OLE KOSHAL.....1ST APPELLANT

JULIUS KITUBER SOPIA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal from the conviction and sentence dated 23/1/2018 in Criminal Case No. 35 of 2015 in Chief Magistrate's Court at Narok. Republic v. Ndare Ole Koshal and Julius Kituber Sopia]

RULING

1. In these two consolidated applications the applicants have applied for bail pending hearing and determination of their appeals, which applications are brought under Sections 356 (i) and 357 (i) of the Criminal Procedure Code [Cap.75] Laws of Kenya, by way of notice of motion.
2. The applicants were convicted in count two, which charged them with being in possession of wildlife trophy namely two pieces of elephant tusks weighing 10kgs with a street value of one million shillings (Kshs.1,000,000) without a permit contrary to section 95 of the Wildlife Conservation and Management Act No.47 of 2013 and were sentenced to a fine of twenty million shillings (Ksh.20,000,000) in default to serve imprisonment for life. They were acquitted on count one, which charged them with dealing in the two ivory tusks.
3. In support of his application, the 1st applicant (Ndare Ole Koshal) has supported his application with seven (7) grounds that are set out on the face of the notice of motion and his 12 paragraphs supporting affidavit.
4. In his grounds in support of his application the applicant has stated the following major matters. He has stated that his appeal raises special and unique circumstances, and is not frivolous. The applicant has also stated that he is aware that should he lose the appeal, he shall be sent back to prison to complete his life sentence. Finally he has stated that he is not a flight risk and that he complied with his bail conditions throughout the trial.
5. Furthermore, the applicant in his supporting affidavit has deponed to the following major matters. First, he has deponed that he has lodged an appeal in this court, being Criminal Appeal No.7 of 2018, in which he has challenged both his conviction and sentence.
6. Second, he has deponed that his appeal raises unusual circumstances in that his conviction was not based on evidence tendered before the trial court. Third, he has also deponed that he did not contravene the conditions of his release on bail during trial. He has further deponed that he is of good character and that there may be substantial delay in the hearing and determination of his appeal.
7. Counsel for the applicant has filed written submissions, in which she cited *Peter Hinga Ngatho V. Republic (2015) eKLR*, in which this Court (Mativo, J) differently constituted released the applicant on bail pending appeal, because the trial court erred in law in proceeding with the applicant's trial without complying with the mandatory provisions of Section 200 of the *Criminal Procedure Code [Cap.75] of the Laws of Kenya*.
8. Ms. Nyaroita for the respondent has opposed the application and has filed written submissions in support thereof. She has cited *Somo V. Republic. (1972) E.A. 476* and *Karanja V. Republic (1986) KLR 12* in which the court held that an applicant for bail pending appeal has to demonstrate that his appeal has high chances of success. I have considered the affidavit evidence and the rival submissions of both counsel, in the light of the applicable law.
9. As a result, I find that the major factor to be considered in applications of this nature is that the applicant has to demonstrate there are overwhelming chances of success in terms of *Somo v. R supra*. I may add that in the alternative to the foregoing factor, an applicant for bail may also be granted bail if he can demonstrate that his appeal involves exceptional or unusual circumstances to warrant the grant of bail

pending appeal.

10. The reason for the foregoing is that the constitutionally guaranteed presumption of innocence in terms of Article 50 (2) (a) of the 2010 constitution is made extinct by virtue of the conviction and sentence. As a result of the said conviction and sentence the burden shifts to the applicant to demonstrate overwhelming chances of success in the appeal or upon a showing of the existence of exceptional circumstances in the appeal.

11. I have considered affidavit evidence and the rival submissions of both counsel in the light of the applicable law.

12. As a result I find that the major factor to be considered in applications of this nature is that the applicant has to demonstrate that there are overwhelming chances of success of the appeal in terms of *Somo v. R.*, *supra*.

13. The foregoing are the major considerations that are taken into account in granting or refusing an application for bail pending appeal. Circumstances, such as the good character, that the applicant was on bail during trial and the offence with which the applicant is convicted does not involve personal violence do not constitute exceptional circumstances to warrant the grant of bail pending appeal. They also do not constitute overwhelming chances of success of the appeal to warrant release on bail pending hearing and determination of the appeal.

14. In view of the foregoing I find that the applicant has failed to demonstrate that his appeal has overwhelming chances of success. He has also failed to demonstrate that there are exceptional circumstances in his appeal that warrant release on bail pending appeal.

15. The upshot of the foregoing is that the 1st applicant's application fails. It is hereby dismissed for lacking merit.

16. It is for those same considerations that the 2nd applicant's application also fails and is hereby dismissed for lacking merit.

Ruling delivered in open court this 18th day June, 2018 in the presence of Ms. Nyaroitia for the state and Ms. Cheptoo for both appellants.

J. M. BWONWONGA

JUDGE

18/6/2018