



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 7 OF 2018

MAURICE SHOVOKHOLO AMITA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The appellant/applicant was in the lower court convicted of the offence of defilement and sentenced to serve life imprisonment. He has filed an application dated 5th June, 2018 seeking to be granted bond/ bail pending appeal and secondly for the court to allow him to file a proper appeal as the one in record is incurably defective as it was filed by an advocate without a practicing certificate.

The application was premised on the grounds on the face thereof and the supporting affidavit of the appellant. The grounds in support of the application are that **Mr. Gilbert Imbwaga Imbenzi**, the advocate who purported to represent the applicant in the lower court and in this appeal is an advocate not licenced to practice law and has not obtained a practicing certificate since the year 2012. The applicant also says that he is sickly and is suffering from hypertension, diabetes, arthritis and a heart disease. Further that the appeal has a high chance of success as it raises weighty legal issues which could turn the appeal in his favour.

The appellant annexed the following documents in support of the application: a copy of the practicing status and CPD compliance for **Gilbert Imbwaga Imbenzi** as obtained from the Advocates Search Engine for the Law Society of Kenya, a letter from Dr. J.H. Miima of Medimax Clinic in Kakamega and prescription for medicine as prescribed by his doctor.

The state did not oppose the application but stressed that the appellant is a convict and called for stringent bond terms.

The advocate for the applicant Mr. Malalah submitted that the entire criminal trial is a nullity as it was conducted by an advocate who does not possess a practicing certificate. That the memorandum of appeal filed by the said advocate is incompetent.

The advocate further submitted that courts have held that proceedings conducted by an advocate without a practicing certificate are invalid. He cited the holding of Majanja J in **Abraham Mwangi Njihia Vs Independent Electoral and Boundaries Commission and 2 others (2013)** eKLR where the learned Judge held that pleadings drawn, signed and presented by unqualified persons cannot stand and ought to be struck out.

The advocate further submitted that the appeal has high chances of success. That the court can grant the applicant bail on health grounds. That he has no criminal record. That he has a family and children and is ready to abide by any bond terms.

The court has powers under section 357 of the Criminal Procedure Code to grant a convict bond pending appeal. The principles applicable in an application for bond pending appeal are that the applicant has to demonstrated to the court that:

- (1) There exist exceptional circumstances to warrant grant of bail/bond.
- (2) The appeal has overwhelming chances of success.

In Somo Vs Republic (1972) EA 476 the Court of Appeal held that the most important ground is that the appeal has an overwhelming chance of being successful, in which case there is no justification for depriving the applicant of his freedom.

These principles were re-stated by the same court in **Jivraj Shah Vs Republic (1980) eKLR** where the court stated that:

(a) 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 interest of justice to grant bail.

(b) If it appears prima facie from the totality of the circumstance that the appeal is likely to be successful on account of some substantial point of law to be argued and that the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail exists.

(c)The main criteria is that there is no difference between overwhelming chances of success and a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed and the proper approach is the consideration of the particular circumstances and weight and relevance of the points to be argued .

Section 9 of the Advocates Act Cap 16 laws of Kenya states that:

Subject to this Act, no person shall be qualified to act as an advocate unless-

- (a) he has been admitted as an advocate; and
- (b) his name is for the time being on the roll (of advocates); and
- (c) he has in force a practicing certificate; and
- (d) he has in force an annual licence.

Section 34(1) states that:

No unqualified person shall, either directly or indirectly, take instructions

or draw or prepare any document or instrument -

- (a) – (e)
- (f) relating to any other legal proceeding.

The applicant has adduced prima facie evidence that indicates that Mr. Gilbert Imbwaga Imbenzi has not possessed a practicing certificate since the year 2012. He is therefore an unqualified person in terms of section 34(1) of the Advocate’s Act. The said person is the one who represented the applicant during the proceedings in the lower court. He is the one who has drawn the memorandum of appeal in this appeal. The law is clear that an unqualified person cannot draw a document relating to any legal proceedings. The memorandum of appeal herein was therefore drawn by an unqualified person. The document is therefore invalid.

I have considered the entire application and I have perused the proceedings in the lower court. The application raises weighty issues as to whether proceedings conducted by an unqualified advocate are a nullity. The court cannot go into the merits of this issue at this stage. Suffice is to say that the application is not frivolous. There are unusual circumstances in that the person who represented the applicant in the lower court did not have a practicing certificate. The appeal has high chances of succeeding. It is in the interest of justice to grant the applicant bail and to grant him leave to file a proper appeal.

In the foregoing the court makes the following orders:

- (1) The applicant is granted bond of Kshs.200,000/= with one surety of similar amount.
- (2) The appellant is given leave to file a proper appeal to replace the one in record.
- (3) Case to be mentioned on 5th July 2016 for directions.

Delivered, dated and signed in open court at Kakamega this 14th day of June 2018.

J. NJAGI

JUDGE

In the presence of:

..... for Applicant

..... for State

.....Court Assistant

Accused

In the foregoing the court makes the following orders:

(1) The applicant is granted bond of Kshs.200,000/= with one surety of similar amount.

(2) The appellant is given leave to file a proper appeal to replace the one in record.

(3) Case to be mentioned on 5th July 2018 for directions.

Delivered, dated and signed in open court at Kakamega this 14th day of June 2018.

J. NJAGI

JUDGE

In the presence of:

Malalah for Applicant

Ngetich for State

George Court Assistant

Accused present