



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERICHO**

**CRIMINAL APPEAL NO.23 OF 2017**

**EZEKIEL KIPKOECH CHIRCHIR.....APPELLANT**

**VRS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The appellant was charged with the offence of fraudulent practice in procurement proceedings contrary to section 41 (4) as read with section 137 of the Public Procurement and Disposal Act No.3 of 2005 and abuse of office contrary to section 46 as read with section 48 (1) of the Anti-corruption and Economic Crimes Act No.3 of 2003. He was tried and convicted as charged, and was sentenced to 5 years imprisonment without the option of a fine. He states that he was charged under count 4, 5, 6 and 7 jointly with 5 other co-accused, but all the others were acquitted.

2. Dissatisfied with both the conviction and sentence, he has filed the present appeal. Simultaneously with his appeal, the appellant has filed the present application in which he seeks bail pending appeal. The grounds on which bail is sought are set out on the face of the application.

3. The appellant's Learned Counsel, Mr. Orina, submitted that the appellant/applicant's appeal raises weighty issues and has overwhelming chances of success. He enumerated such issues as including ground 16 under which the appellant raises the question of the composition of the Ethics and Anti-corruption Commission (EACC). He argued that the investigations relating to the charges against the applicant were conducted when the EACC was not properly constituted. He relied on the decision of the Court of Appeal in **Eng. Michael Sistu Mwaura Kamau vs EACC & 5 Others** for the proposition that any trial conducted from investigations conducted while the EACC was not properly constituted is a non-starter.

4. It was his submission further that the appellant was convicted and sentenced to 5 years imprisonment without the option of a fine. Counsel cited the Sentencing Guidelines published under the Judicial Service Act, No.1 of 2011 under Gazette Notice No.2970 of 29th April 2016 which are to the effect that unless there are aggravating circumstances which would require that a court gives a custodial sentence, a non-custodial sentence should be the first option, more so when the accused is a first offender.

5. It was his argument also that it may take a while to prepare the record of appeal, by which time the applicant would have served a considerable proportion of the sentence, thus rendering the appeal nugatory. The applicant also submitted that he had a back problem which had been under medical attention, which may not be available while he is in custody. He therefore urged the court to allow his application and grant him bail on reasonable terms.

6. The state did not oppose the application. In his submissions, Assistant Deputy Director of Public Prosecutions, Mr. Jacob Mutai, stated that he had considered the authorities relied on by the applicant, particularly the decision of the Court of Appeal in **Eng. Michael Sistu Mwaura Kamau vs the EACC**, and would therefore be leaving the matter to the discretion of the court. He however, urged the court to grant bail on terms that take into account the fact that the accused has already been convicted and is serving sentence, and that he has been convicted of an economic crime which, in the ADPP's view, called for stringent terms to ensure that he attends court.

7. In his reply, Mr. Orina pointed out that during his trial, the applicant had been out on a cash bail of Kshs 50,000. He had nonetheless appeared in court and had never at any one time failed to appear. It was

also his submission that the applicant is a civil servant who will not abscond.

8. I have considered the application before me as well as the documents in support. I have also considered the submissions of Counsel for the applicant, and noted the fact that the state does not oppose the application for bail.

9. It is not in dispute that a person who has been convicted of an offence may be granted bail pending appeal on certain terms. This is expressly provided for under sections 356 and 357 of the Criminal Procedure Code. Further, various decisions of this and the Court of Appeal have set out the principles applicable when determining whether or not to grant bail. In considering whether or not to grant bail, the court may take into account, *inter alia*, the character of the applicant, whether he is a first offender, whether the offence of which the offender was convicted involved personal violence, and whether the appeal is not frivolous and has reasonable chances of success. See in this regard the case of **Peter Hinga Ngatho vs Republic – Nyeri High Court Criminal Appeal Number 2 of 2015**.

10. In the case before me, the applicant is a first offender, a civil servant. He is convicted of fraudulent practices in procurement processes when he was a member of the tender committee and the Director of Procurement of Bomet County Government. The state has not opposed the applicant, save to note that the appellant has been charged and convicted of an economic crime.

11. I have further considered the grounds of appeal relied on by the applicant. In particular, I note the decision of the Court of Appeal in **Eng. Michael Sistu Mwaura Kamau vs Republic-Nairobi Court of Appeal Civil Appeal No. 102 of 2016**. In that decision, the Court of Appeal allowed the appeal on the technical ground that the Ethics and Anti-Corruption Commission was not properly constituted at the time it completed the investigations and forwarded its report and recommendations to the DPP, which resulted in the charges against the appellant. That decision is binding on this court and the trial court. It may well be that the appellate court may find that the trial against the accused was not proper on account of the investigations conducted, which led to the preferment of the charges against him.

12. In the circumstances, I find that the justice of the case demands that the application be allowed. The applicant may be released on a bond of Kshs 200,000 together with a surety of a similar amount.

13. It is so ordered.

**Dated, Delivered and Signed at Kericho this 27<sup>th</sup> day of July 2017.**

**MUMBI NGUGI**

**JUDGE**