



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 89 OF 2017

(From Original Conviction and Sentence in Criminal Case No. 147 of 2015 of the CM's Court at Kwale: Hon. Doreen Mulekyo CM)

TOM OMARE MAGUTU.....APPELLANT/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING OF THE COURT

Application

1. By an application brought before this Court by way of a Notice of Motion dated 2nd June, 2017 under Articles 22,48,50,51 and 159 of the Constitution of Kenya and Sections 123, 124 of the Criminal Procedure Code Cap 75, Laws of Kenya, the Applicant herein seeks the following orders:

- a) **THAT** this Honorable Court be pleased to grant Bond/Bail terms to the Appellant/Applicant pending the hearing and determination of the appeal proffered herein.
- b) **THAT** this Honorable Court be pleased to issue such other/further orders in the interest of justice.
- c) **THAT** the costs of this application be provided for.

The application was supported by the affidavit of **TOM NGARE MAGUTU** sworn on 2nd June, 2017.

2. The Applicant alleges that he was convicted and sentenced in **CMCC Kwale No. 147/2015** to a fine of Kshs. 640,000 in default three and half years in prison on a charge of **CORRUPTLY SOLICITING FOR A BENEFIT CONTRARY TO SECTION 39 (3) (a) AS READ WITH SECTION 48 (1) OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT NO. 3 OF 2003**. The Applicant further alleges that he was aggrieved and devastated by the conviction and sentence and consequently lodged this appeal (a copy of the Petition of Appeal is annexed to the affidavit of **TOM OMARE MAGUTU** sworn on 2nd June, 2017 and marked as "TOM 2").

3. The Applicant alleges that the appeal proffered before this court has overwhelming chances of success and thus his application for Bond/Bail pending appeal.

4. The Applicant further alleges that he is not a flight risk as he has a physical address and residence at known places and that he is a family man with five children and one grandchild being **B M**- 10 years, **H M**- 13 years, **D M**- 17 years, **M P M**- 14 years, **K M**- 19 years and **R F**- grandchild respectively, whom the Applicant claims will be rendered destitute by virtue of his custodial sentence as he has separated from his wife and is the sole provider for the children.

5. The Applicant alleges that he has several financial obligations including a loan facility taken out at Kenya Commercial Bank which if not serviced shall culminate in the proclamation and attachment of his property which the Applicant's family depends on. The Applicant further alleges that he has worked with the Judiciary for seventeen (17) years and has no other financial support for his family.

6. The Applicant's case is that he has parental responsibilities under the Children's Act No. 12 of 2012 and other financial obligations and thus prays that this court grants him Bail/Bond pending appeal.

Response

7. The Respondent herein did not respond to the application.

Hearing

8. The application came up for hearing on 19th June, 2017. Mr. Egunza, learned counsel appeared for the Applicant while Mr. Muteti, learned counsel appeared for the Respondent.

9. Mr. Egunza submitted that the Applicant had satisfied the checklist for grant of Bond/Bail pending appeal stating that the Applicant was not a flight risk, and will not interfere with witnesses as they have already testified and the Applicant has a public address and has been a public servant.

10. Counsel submitted that the appeal has a high chance of success and urged the court to look at the Petition of Appeal which was annexed to the affidavit of **TOM OMARE MAGUTU** sworn on 2nd June, 2017 and marked as "TOM 2". Counsel further submitted that the Applicant was convicted without a voice recognition certificate to confirm the alleged conversation between the Applicant and the complainant.

11. Mr. Egunza submitted that the Kshs. 20,000 treated money that was given to the complainant, **ALBERT MUTUKU** by the Ethics and Anti-Corruption Commission was never found in the person of the Applicant. Counsel further submitted that there were no compelling reasons why the Applicant should be denied Bond/Bail pending appeal as there was no affidavit sworn by either the Investigating Officer or the Director of Public Prosecutions offering reasons to deny bail. Counsel urged this court to grant Bail and referred the court to Section 357 of the Criminal Procedure Code which counsel submitted, gave this court the final word on the issue of bond. Counsel cited the cases of **Samuel Macharia Njagi versus Republic [2013] eKLR** and **Dennis Yobesh Ombogo & Another versus Republic [2014] eKLR**.

12. Mr. Egunza submitted that the Applicant was a single parent with parental responsibilities and who is willing to adhere to any terms and conditions imposed by this court and urged this court to grant Bail pending appeal.

13. Mr. Muteti, counsel for the state opposed the application and submitted that the principles governing grant of bail pending appeal are first, a demonstration by the Applicant that the appeal has overwhelming chances of success and second, proof of exceptional circumstances that apply. Counsel submitted that the Applicant had not met these grounds and further that no compelling reasons have been given for grant of bail.

14. Mr. Muteti submitted that Article 49 of the Constitution applies to rights of arrested persons and that once conviction has taken place that is a sound reason to deny bond. Counsel further submitted that no compelling reasons had been given as to why the Applicant has not complied with the fine imposed. Mr.

Muteti also submitted that if the Appellant faces ill health he should prove the same so as to be released on exceptional circumstances.

15. Mr. Muteti submitted that the appeal is weak and has no chances of success as the trial court did not only rely on the evidence of voice recording but also took into account money recovered from the Applicant, a transcript of the conversation and the evidence of witnesses.

16. Mr. Egunza responded to Mr. Muteti's submissions stating that the exceptional circumstances in this case were that the Applicant was convicted on a charge sheet which had another co-accused, and which charge sheet was neither withdrawn nor amended hence it was defective. Counsel further submitted that the Applicant was fined Ksh. 640,000/= which was harsh and unreachable and that in considering whether to grant bail it did not matter whether the Applicant was a convict or not.

Determination

17. Having carefully considered the application and the oral submissions of the parties I find that the only issue for determination is **whether the Applicant should be granted bail pending appeal.**

18. Section 357 (1) of the Criminal Procedure Code provides admission to bail pending appeal, 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.”

19. In the case of **Jivraj Shah versus Republic [1986] KLR 605** the principles for grant of bail pending appeal were established as:

i. The existence of exceptional or unusual circumstances upon which the Court of

ii. If it appears prima facie from the totality of the circumstances 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.

iii. 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 the weight and relevance of the points to be argued.

These grounds can be narrowed down and stated as whether the appeal has overwhelming chances of success and whether there are exceptional circumstances warranting the release of the Appellant on bail pending appeal.

20. It is important to note that the case of an Appellant under sentence of imprisonment seeking bail lacks some of the elements that may be available to an accused person seeking bail before trial which is the presumption of innocence but the law however recognizes that there is a possibility that the conviction may be erroneous or the punishment excessive. See the case of **Chimambhai versus Republic [1971] E.A. 343.**

21. In this case the Applicant through his learned counsel, Mr. Egunza argued that the appeal has overwhelming chances of success. Mr. Egunza has filed a Petition for Appeal dated 2nd June, 2017 in which he raises nine (9) grounds for appeal. It is trite law that it is not for the court to delve into the merits of each ground but it should suffice that all the grounds are examined, and a conclusion is made

that *prima facie* the prospects of success are dim or high.

22. I have carefully examined the grounds of appeal raised by the Applicant. The Applicant/Appellant raises serious issues such as:

“THAT the learned Trial Magistrate erred in law and fact in proceeding to sentence and convict the appellant based on a defective charge sheet.

THAT the learned Trial Magistrate erred in law and in fact in proceeding to sentence and convict the Appellant based on evidence that had glaring omissions, gaps and was not clear (most importantly lack of a voice recognition certificate).

THAT the learned Trial Magistrate erred in both law and fact in disparaging the Defence offered by the Appellant hence shifting the burden of proof to the Appellant.”

23. I have also carefully perused the proceedings and Judgment in **CMCC Kwale No. 147 of 2015** and found that the trial magistrate did not address the above issues raised by the Appellant and only considered the transcript of the recorded conversation between the appellant and the complainant therein. Therefore the appeal as evidenced by the grounds filed in the Petition of appeal has a chance of success.

24. The second limb for grant of bail pending appeal is whether there are any exceptional circumstances to warrant the Appellant to be admitted to bail pending appeal. Mr. Muteti, counsel for the state submitted that the Applicant had not proved any exceptional circumstances to warrant grant of bail pending appeal. Mr. Egunza, on the other hand submitted that the exceptional circumstance was that the Appellant had been convicted on a charge sheet that was defective and that the Appellant was fined Kshs. 640,000/= which was a harsh punishment and unreachable. Mr. Egunza also submitted that the Appellant was previously out on a cash bail of Kshs. 25,000/= during the trial. In the case of **Peter Hinga Ngatho versus Republic [2015] eKLR** which cited the case of **Krishnan versus The People** it was held that the fact that the Applicant did not breach the bail conditions in the court below, is not an exceptional circumstance which can warrant a decision to admit an Applicant to bail pending appeal.

25. I find that the Appellant has not proved existence of exceptional circumstances warranting grant of bail pending appeal. However, I note that the Appellant was fined Kshs. 640,000 in default three and half years in prison. It is evident that the Appellant had begun serving the sentence before the order issued by this court on 19th June, 2017 granting bail of Kshs. 100,000 pending this Ruling. If bail is not granted and delay is occasioned in determining the appeal herein, then the Appellant may have served a substantial part of his sentence and if the appeal is successful the Appellant will be prejudiced. I find this to be an exceptional circumstance warranting grant of bail pending appeal.

26. The Respondent herein has also not offered sufficient reasons to show that the Appellant will abscond if granted bail. For the foregoing reasons I will allow the application dated 2nd June, 2017 and accordingly order that:

- a) The Applicant be released on a bond of Kshs. 300,000/= with one surety of similar amount pending the hearing and determination of the appeal herein.
- b) The cash bail of Kshs. 100,000/= paid by the Applicant shall be refunded to the Applicant.
- c) The costs of the application be in cause.

Dated, Signed and Delivered in Mombasa this 27th day of July 2017.

E. K. O. OGOLA

JUDGE