



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL APPEAL NO. 46 OF 2017

WYCLIFFE WAMALWA BARASA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An application for bail pending appeal from the decision of C. Obulutsa, Chief Magistrate, in Criminal Case No. 2034 of 2013 at Eldoret dated 17th March 2017]

RULING

1. The appellant was adjudged guilty on two counts of *uttering a document with intent to defraud* contrary to section 357 (b) of the Penal Code; and, *obtaining money by false pretences* contrary to section 313 of the Penal Code. He was sentenced to *three years* imprisonment on *each* count. The sentences were to run *concurrently*.
2. The offence under the first count was committed on 8th January 2013 at Eldoret Township, Uasin Gishu County. The appellant uttered a title deed number Eldoret Municipality/Block 21 (King'ong'o) 2147 to Kibitok Tanui purporting it to be a genuine title issued by the Land Registrar, Eldoret. Regarding the other count, the appellant, jointly with another, obtained Kshs 1,000,000 from the complainant pretending that he was in a position to sell the land.
3. The appellant has preferred an appeal against the conviction and sentence. The petition of appeal was filed on 5th April 2017. It raises *twenty one* grounds. Pending the hearing and determination of the appeal, the appellant has presented a notice of motion dated 5th April 2017 praying for bail. It is supported by a deposition sworn by the appellant on even date.
4. The appellant contends that the appeal has overwhelming chances of success. The appellant's learned counsel submitted that the appellant was not positively identified. For example, different documents produced at the trial contained different names of the appellant; and, the documents were not submitted to a forensic examination. It was submitted further that the charge sheet was defective; and, that there was variance between the charge sheet and the particulars. Lastly, it was submitted that unless bail is granted, the appellant will serve the whole or a substantial part of the sentence. In a synopsis, the appellant's case is that there are exceptional circumstances that warrant grant of bail.
5. The application is contested by the Republic.
6. The legal parameters in an application of this nature were well stated by the Court of Appeal in *Jivraj Shah v Republic* [1986] KLR 605-

“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 urged, and that the sentence or a substantial part of it, will have been served by the time the appeal is heard, conditions for granting bail will exist. The decision is Somo v Republic [1972] EA 476 which was referred to by this court with approval in Criminal Application No. NAI 14 of 1986, Daniel Dominic Karanja v Republic where the main criteria was stated to be the existence of overwhelming chances of success does not differ from a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed.”

7. It would be prejudicial to comment about the merits of the appeal or the veracity of the evidence presented at the trial. I would be pre-empting the hearing of the appeal. However, I note that PW8 was an advocate. He prepared the sale agreement for the land in the presence of the appellant and the complainant. There were other witnesses present. The seller went by the names *Richard Okuno*. However, the report of the fingerprints submitted by PW10 indicated that *Richard Okuno* was the same and only one as *Wycliffe Wamalwa Barasa*, the appellant.

8. The sum of Kshs 1,000,000 was paid in the presence of counsel by the complainant. It is unclear from the evidence of PW8 who received the money. The evidence in the lower court showed that the appellant was not the owner of the land. It will now be the duty of the first appellate court to re-evaluate the evidence of identification; and, determine whether it was reliable; and, whether the appellant or an accomplice obtained the money by false pretences. The less I comment about the matter, the better.

9. I agree that the points raised in the petition of appeal are *arguable*. Like I have stated, it will be the true province of the appellate court to re-evaluate all the evidence. But I am not persuaded that there are *exceptional grounds* or that a *substantial point of law or evidence* has been urged to sway the court to grant bail pending appeal.

10. The appellant was sentenced to *three years* imprisonment on *each* count; the sentences to run *concurrently*. It will be for the appellate court to determine whether the sentences were lawful considering all the circumstances of this case; and, the fact that the appellant was a *first offender*. On the face of it, the sentence handed down is not *illegal*. It is true that a *substantial part* of the sentence will be served *before* the appeal is heard and determined. But from what I have stated, I am *not* persuaded that the appeal has an *overwhelming* chance of success. See Somo v Republic [1972] EA 476, Jivraj Shah v Republic [1986] KLR 605.

11. It is true that the appellant was admitted to bail during his trial. But the *presumption* of innocence no longer holds *pure*. The appellant has been *convicted*. The considerations for grant of bail at this stage are thus markedly different.

12. In the end, there are no *exceptional* circumstances to warrant grant of bail pending appeal. It follows that the notice of motion dated 5th April 2017 is devoid of merit. It is hereby *dismissed*.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET this 21st day of September 2017.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of-

Appellant.

Mr. Mwaka for the appellant.

Ms. B. Oduor for the Republic.

Mr. J. Kemboi, Court Clerk.