



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NUMBER 129 OF 2017

EDWARD KABIU NJAU.....APPLICANT

VERSUS

REPUBLICRESPONDENT

RULING

Edward Kabuu Njau, herein the Applicant, filed the present application by way of Notice of Motion dated 25th September, 2017. He sought the prayers that he be admitted to bail pending the hearing and determination of the appeal on such terms as the court may deem just and fit in the circumstances and that the court be please to apply the cash bail of Kshs. 500,000/- paid and held by the Judiciary vide receipt number 012321 dated 15th July 2013 in Milimani Criminal Case No. 1021 of 2012(Republic v. Edward Kabuu Njau) to be utilized as bail herein pending appeal.

The application was based on the grounds that the Applicant was charged and convicted in Milimani Criminal Case 1021 of 2013 and subsequently sentenced to serve seven months imprisonment. That the appeal has a great and overwhelming chance of success as it raises weighty issues. That the section under which the offence is charged provides for a fine and conviction and in this case the alternative of a fine was never granted. Further, that the appeal would take a while to be concluded and if he succeeds in his appeal he will have unduly served the sentence which would greatly prejudice and compromise his right to a fair trial. Finally, that a myriad of issues were not considered when sentencing him which meant that the sentence in question was a classic case of an unfair exercise of discretion.

The Application was supported by an affidavit sworn by the Applicant in which he set out the grounds of his appeal which were basically predicated on the defence he tendered at the trial the basis on which he opines the appeal has a high chance of succeeding. He depones that he was informed by prison authorities that his sentence would likely lapse by December 2017 when remission is accounted for, and that given the facts that the appeal may not be heard by this date, the failure to grant him bail would render the appeal nugatory. Further, that throughout his trial he did abide by the bond terms granted and faithfully and dutifully attended court. He deponed that he had a myriad of responsibilities that he had to cater to including providing for his family which he submitted made him a fit and proper candidate for bond pending appeal. Further, that the Judiciary was still in possession of Kshs. 500,000/- he paid as cash bail according to the terms set by the trial court and he wished that the same to be applied as his cash bail. He concluded by urging the court to allow the application.

The application was canvassed on 10th October, 2017 with Mr. Mogusu representing the Applicant whilst Ms. Aluda acted for the Respondent. Mr. Mogusu reiterated the averments mirrored in the supporting

affidavit. Ms. Aluda did not oppose the application for similar reasons. She added that granted that the Applicant used to work with the Immigration Department he was unlikely to abscond.

DETERMINATION

I have considered the application. The law is now settled on the factors the court should consider in an application for bail pending appeal. They were enunciated by amongst others, Trevelyan J. in **Somo v Republic**[1972] EA 476 had this to say:

“There is little, if any, point in granting the application if the appeal is not thought to have an overwhelming chance of being successful, at least to the extent that the sentence will be interfered with so that the Applicant will be granted his liberty by the appeal court. I have used the word “overwhelming” deliberately and for what I believe to be good reason. It seems to me that when these applications are considered it must never be forgotten that the presumption is that when the Applicant was convicted, he was properly convicted. That is why, where he is undergoing a custodial sentence, he must demonstrate, if he wishes to anticipate the result of his appeal and secure his liberty forthwith, that there are exceptional and unusual circumstances in the case. That is why, when he relies on the ground that his appeal will prove successful, he must show that there is an overwhelming probability that it will succeed...”

What of other grounds? I do not doubt that such matters as the Applicant’s good character, delay in the hearing of his appeal and hardship are for the weighing in the balance in favour of the grant of the application. But they can only avail the Applicant if, on the facts presented, unusual or exceptional circumstances are shown to exist.”

The Applicant herein has submitted that the appeal in question will succeed both against the sentence and conviction. On sentence, the Applicant was sentenced to serve seven months imprisonment and has submitted that the same was improper as conviction for the offence in question should attract a fine in the alternative. He was charged with unlawfully permitting a prohibited immigrant entry to Kenya contrary to Section 56(3) as read with Section 56(1)(a) of the Kenya Citizenship and Immigration Act, 2011. The penalty for the offence is provided under Section 56(3) which clearly grants the trial court the option to impose a fine not exceeding Kshs. 100,000/- or to imprisonment for a term not exceeding three years or both. I state that sentencing is a discretion of the trial court. An appellate court will not upset a sentence unless it is established that the trial court was not guided by the legal principles governing sentencing or took into considerations factors it ought not to have considered or that the sentence is too low or too high in the circumstances. For purposes of this application, it is clear that the trial court acted within the law in imposing a custodial sentence. The court did also give a lengthy ruling justifying the custodial sentence. I am however of the view that since the Applicant was a first offender, the custodial sentence imposed without the option of a fine was harsh and excessive. This is good reason on which the appeal is likely to succeed. On this note, the sentence imposed was too short. If the Applicant is not granted bail, he is likely to have served a substantial part of it or the entire sentence by the time the appeal is heard and determined.

With regards to the Applicant’s conviction I am of the view that the appeal is likely to succeed. This is raised by his defence that his computer was broken down on the afternoon in question as a result of which he could not verify that the client was a prohibited immigrant. This is vindicated by the fact that he had reported the issue of the computer breakdown and recorded it in the office Occurrence Book (OB). He also is the person who informed the authority on the following day that he had let in a prohibited immigrant on noticing the mistake. Obviously the offence most likely occurred in an honest manner. All the same, the court will still reevaluate the evidence afresh and arrive at an independent finding. As such, the comment by this court at this stage may not necessarily influence the outcome of the appeal.

Needless to say then is that the application herein is not made in vain. Prima facie, the appeal is likely to succeed as a result of which the orders prayed for shall be granted. I admit the Applicant to bail pending appeal. The bail terms shall be similar to those granted by the trial court. The sum of Kshs. 500,000/- being held as cash bail in Milimani Criminal Case 1021 of 2013 vide receipt number 0120321 shall be

applied as the cash bail in this matter subject to the satisfaction of the Deputy Registrar as to its existence. It is so ordered.

Dated and Delivered at Nairobi This 30th October, 2017.

G.W.NGENYE-MACHARIA

JUDGE.

In the presence of

1. Applicant absent

2. M/s Sigei the Respondent.