

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.148 OF 2016

STEPHEN A. MUSINA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Stephen A. Musina was convicted of two (2) counts preferred against him under **Section 42(1)(a) and (b)** as read with **Section 48** of the **Anti-Corruption and Economic Crimes Act**. He was sentenced to serve 2½ years imprisonment without an option of a fine. The Applicant was aggrieved by his conviction and sentence. He has filed an appeal to this court. Pending the hearing of the appeal, he has applied to be released on bail pending appeal. The Applicant contends that the grounds that he has raised in support of his appeal raise substantial grounds which have an overwhelming probability of success. During the hearing of the application, Mr. Wandugi for the Applicant expounded the reasons why he thought the Applicant’s appeal had overwhelming chances of success. He submitted that prior to the Applicant being charged before the Anti-Corruption Court, no consent had been obtained from the Director of Public Prosecutions as required under **Section 35** of the **Anti-Corruption and Economic Crimes Act**. He stated that the requirement was mandatory. Failure to obtain the requisite consent rendered the entire proceedings a nullity. He further submitted that the trial court had, without any justifiable reason, shifted the burden of proof to the Applicant and thus prejudiced him. He reiterated that the circumstances under which the trial court shifted the burden of proof to the Applicant did not fall within the exceptional circumstances under which such burden of proof may be shifted. He urged the court to take into consideration the fact that the Applicant was a single parent and should therefore be released on bail pending appeal. He submitted that the Applicant was willing to abide by any terms that the court may impose for his release on bail pending appeal.

Ms. Aluda for the State opposed the application. Whereas she conceded that the Applicant may have an arguable ground of appeal when he states that the consent of the Director of Public Prosecutions was not sought before the Applicant was charged, she was of the view that that did not constitute an overwhelming reason that would make an appellate court allow the appeal. She submitted that the trial court properly shifted the burden of proof on the Applicant because he was the only one who could answer to the facts that had been placed before the trial court by the prosecution. She explained that the facts placed before the court did not raise any exceptional circumstances that would persuade this court to exercise its discretion to release the Applicant on bail pending appeal.

This court has carefully considered the rival argument made by counsel to the parties to this application. The court has also had the benefit of perusing through the proceedings and the judgment of the trial court. The principles to be considered by this court in deciding whether or not to release the Applicant on bail pending appeal were set out by the Court of Appeal in **Jivraj Shah –vs- Republic [1986] KLR 605** at page 606:

“There is not a great deal of local authority on this matter and for our part such as we have seen and heard tends to support the view that the principal consideration is if there exist exceptional or unusual circumstances upon which this court can fairly conclude that it is in the interest of justice to grant bail. 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 in

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 in Somo –vs- Republic [1972] E A 476 which was referred to by this court with approval in Criminal Application No.NAI 14 of 1986, Daniel Dominic Karanja –vs- 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. The proper approach is the consideration of the particular circumstances and the weight and relevance of the points to be argued. It is almost self-defeating to attempt to define phrases or to establish formulae. There is a helpful passage in Archbold, Criminal Pleading Evidence and Practice, 41st Edition page 783, paragraph 7 – 86.”

In the present application, it was clear to this court that the Applicant established (and this fact has been conceded by the prosecution), that his appeal raises a substantial question of the law. That question is whether the trial court properly proceeded with the case when the consent of Director of Public Prosecutions had not been sought and obtained under **Section 35** of the **Anti-Corruption and Economic Crimes Act**. This court cannot therefore at this stage dismiss the Applicant’s appeal as being frivolous or without merit. This court cannot also make a finding that the Applicant’s appeal has overwhelming chances of success without the benefit of further arguments that shall be presented before it during the hearing of the appeal.

However, in the circumstance of this application, this court is of the view that the Applicant put forward reasonable grounds as regards the success of his appeal to warrant this court to exercise its discretion to release the Applicant on bail pending appeal. Another issue of concern to this court was the fact that the trial court sentenced the Applicant to serve a custodial sentence without an option of a fine. The trial court had discretion to pass such sentence. However, where the law specifically provides that the sentence of a fine is an option, it behooves the court to provide for such option as an alternative to custodial sentence. This court is of the view that the Applicant has a case when he says that he was sentenced to serve a harsh sentence.

In the premises therefore, this court holds that the Applicant’s application has merit. He is hereby released on bail pending appeal on the following conditions:

- I. He shall deposit cash bail of Kshs.500,000/- or post a bond of Kshs.1 million with one surety of the same amount.
- II. If the Applicant exercises the first option of depositing cash bail, then the sum of Kshs.300,000/- that was deposited (subject to verification) in the trial court, shall be taken into account as part of the cash bail.
- III. The Applicant shall be required to prepare, file and serve the record of appeal within sixty (60) days of today’s date.
- IV. This matter shall be mentioned on 20th July 2016 to confirm compliance. The court shall fix the hearing date of the appeal on that date.

It is so ordered.

DATED AT NAIROBI THIS 17TH DAY OF MAY 2016.

L. KIMARU

JUDGE