



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
COURT MARTIAL CRIMINAL APPEAL 5 Of 2016.

BETWEEN

No. 87058 SPTE ALLAN OMONDI ANYANGA.....APPLICANT

AND

REPUBLIC.....RESPONDENT.

RULING.

No. 87058 Spte Allan Omondi Anyanga, the Applicant herein, filed a Notice of Motion application on 9th August, 2016 under the provisions of Section 357 and Article 51 of the Constitution. He sought admission to bail pending the hearing and determination of the appeal. The application was premised on ground that the appeal had a high chance of success and further that the appeal may take long to be determined which would prejudice the applicant. He submitted that he was ready to comply with any bail/bond terms imposed by the honourable court.

The application was supported by an affidavit sworn by the applicant. In it he deposed that he was aggrieved by the fact that the court martial had not properly evaluated the evidence on record before preferring the conviction. Further that the court had overlooked serious issues particularly the fact that no replacement was ever sent to Kahawa Barracks but supplies were still received in Nanyuki. He submitted that there were gaps left by the evidence on record which meant that his appeal had high chances of success. He submitted that the evidence spoke for itself about the fact that he was sent to Kahawa to relieve Sgt. Halowe. He submitted that the summing up by the Judge Advocate was one sided and concentrated mainly on the prosecution's case. He concluded by submitting that the offence of desertion amounted to a labour dispute and as such the jurisdiction to hear the matter lay with the Employment and Labour Relations Court.

The respondent, represented by learned State Counsel, Ms. Sigei opposed the application. She relied on Grounds of Oposition filed on 7th December, 2016 namely, that the appeal's chances of success were not overwhelming, no exceptional circumstances existed that would justify a grant of bail and finally that there was no reason to anticipate a delay in the hearing of the appeal.

The application was canvassed before me on 7th December, 2016. The Applicant's counsel in court Mr. Omollo entirely relied on the application whilst Miss Sigei made oral submissions. Miss Sigei submitted that the Applicant sought a chance to be on push up duties to take care of his mother. That is how he was sent to Kahawa Barracks. The prosecution demonstrated that the Applicant was recalled to Nanyuki Barracks because he did not have the qualifications to handle push up duties. And further that he failed to

return to Nanyuki as was required of him. A board that was formed to investigate his conduct found him a deserter. There was therefore no chance that the appeal would succeed.

It is trite that bail pending appeal is not a right and certain conditions must be satisfied before the same is granted. See the case of **Somo v. Republic**[1972] EA 476, in which **Trevelyan, J** delivered himself as follows;

“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 if his appeal and secure his liberty forthwith, that there are exceptional or 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. That the appeal has not summarily been rejected, taken in isolation, is of no account in the view of what I have said. ... Nor is the fact that the appeal is not frivolous of any consequence on its own in support of the application...

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 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.”

In the present case, the Applicant was charged with deserting duty. There is no doubt that he was sent to Kahawa Barracks for push-up duties. There were marked contradictions on how he was recalled to Nanyuki. Although the prosecution advance a case that he could not go to Kahawa because he was not qualified to do the push up duties, there was no evidence indicating that that communication was relayed to him. The same case applies on his purported recall to Nanyuki. These are issues that cannot be wished away as frivolous as they are core to the proof of the prosecution case. I find in the circumstances that, prima facie, the case has high chances of succeeding.

The upshot of my finding is that I allow the application. The Applicant shall deposit a cash bail of Ksh. 50,000/-. In the alternative, he can deposit a surety bond of Ksh. 100,000/- to be assessed by the Deputy Registrar of this court.

Dated and Delivered at Nairobi This 21st December, 2016.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of;

1.*for the Applicant.*
2.*for the Respondent*