



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
MISC. CRIMINAL APPLICATION NO.317 OF 2015

SSGT PETER MASAI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, SSGT Peter Masai was convicted of two (2) counts under the **Kenya Defence Forces Act, 2012**. He was charged under **Section 121** of the **Act** for performing a conduct that was prejudicial to the good order and discipline. The particulars of the offence were that in the month of September 2014, the Applicant deliberately obtained the sum of Kshs.100,000/- from a civilian Mrs. Mary Rose Kataki Mbidyo under the pretext that he would recruit her nephew Lewis Nyongesa Ogola to join the Kenya Defence Forces, an act he knew or ought to have known constituted an offence. He was further charged under **Section 77(1)** of the **Act** for leaving DOD CAU to Embakasi Garrison in military uniform using a civilian vehicle, an act he knew or ought to have known constitutes an offence. In respect of the 1st count, he was sentenced to serve eighteen (18) months imprisonment. In respect of the 2nd count he was sentenced to serve six (6) months imprisonment. The Applicant was demoted to the rank of Senior Private and dismissed from the Kenya Defence Forces. The Applicant was aggrieved by his conviction and sentence. He has filed an appeal to this court. The appeal is yet to be heard and determined.

Pending the hearing of the appeal, the Applicant has applied to this court pursuant to **Section 357** of the **Criminal Procedure Code** to be admitted on bail pending appeal. The Applicant states that he has an arguable appeal with high chances of success. He was apprehensive that if he is not released on bail pending appeal, by the time the appeal is heard, he may have served his sentence. The Applicant was ready to abide by the any terms that this court may impose in order to secure his release on bail pending appeal. The application is supported by the annexed affidavit of the Applicant. The Respondent did not file any papers in opposition to the application. However, that fact does not distract this court from considering the application on its merits.

The principles to be considered by this court in determining whether or not to release the Applicant on bail pending appeal are well settled. 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, there are certain facts that incline this court to grant the Applicant bail pending appeal. This court is unable at this stage of proceedings to assess whether or not the appeal filed by the Applicant has a high or overwhelming chance of success. However, there are exceptional circumstances that works in favour of the Applicant. The first reason is that the Applicant, if not released on bail pending appeal, is likely to serve the custodial sentence that was imposed on him by the time the appeal will be heard. It would thus render the appeal nugatory. Secondly, this court noted, from the proceedings that the Applicant was in remand custody for six months before he was convicted. It is likely that this court, on appeal, may take into account that period pre-conviction detention in determining the custodial sentence that will ultimately be meted on the Applicant. Thirdly, it was apparent that the Applicant surrendered the said sum of Kshs.100,000/- to his superiors for onward transmission to the complainant. That act will work in his favour during the hearing of the appeal.

The upshot of the above reasons is that the Applicant established a case for this court to grant him bail pending appeal. He is released on bail pending appeal on condition that he deposits a cash bail of Kshs.30,000/-. The Applicant shall be required to appear before the Deputy Registrar of this court for Mention of this case once every two months until the hearing and determination of his appeal. It is so ordered.

DATED AT NAIROBI THIS 29TH DAY OF OCTOBER 2015

L. KIMARU

JUDGE

G.W. NGENYE – MACHARIA

JUDGE

DATED