



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
MISC.CRIMINAL APPLICATION NO. 379 OF 2015

MARTIN ESAKINA PAPA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

By Notice of Motion dated 22nd October, 2015, brought under Sections 123, 347 and 357 of the Criminal Procedure Code as read with Articles 23 and 24 of the Constitution and all other enabling provisions of the Law, the Applicant prays that he be admitted to bail pending the hearing and determination of Criminal Appeal No. 106 of 2015.

The application is premised on grounds that the Applicant is suffering from various illnesses which condition continues to deteriorate while in prison and that the appeal has a high likelihood of success. It is supported by the affidavit of Martin Esakina Papa the Applicant herein sworn on 22nd October, 2015. It is deposed that the appeal has high chances of succeeding.

The application was canvassed before me on 10th December, 2015. Learned counsel Mr. Nyangayo submitted that the Applicant was ailing from High Blood Pressure and his condition was getting worse due to the bad prison conditions. Furthermore, he had been released on bail pending trial and he never absconded. In addition, he submitted that the appeal has a high chance of succeeding in that the conviction was based on documentary evidence that was not subjected to forensic examination. In that respect, the document examiner's report was never produced in court in support of the prosecution's case. Furthermore, the evidence of PW1 – 4 was that in order for an employee to collect a salary on behalf of another employee, the authority of the principal had to be sought. They admitted they transmitted the money to the Appellant in the sum of Kshs. 700,000/= but no documents were adduced in prove of the transmission. In any case, it was their evidence that they had not received any authority from the principal to transmit the money. It was the onus of the prosecution to discharge its burden beyond reasonable doubt. However, the prosecution had not discharged this burden in prove of the actual amount that was lost. The learned trial magistrate despite convicting the Applicant in the judgment was doubtful on how much was lost. That, of itself meant that she was shifting the burden of proof on the Applicant to prove his innocence.

Learned state counsel Mr. Atina for the Respondent did not oppose the application. She submitted that the Applicant was sentenced to 3 years imprisonment on 19th June, 2015. There was a likelihood that by the time the appeal was heard and determined, he would have served the entire or a substantial part of the sentence.

The principles to be considered in an application for bail pending appeal were annunciated in the case of **Jivraj Shah vs Republic [1986] eKLR** in which the court held that:

1. *The principle consideration in an application for bail pending appeal is the existence of exceptional or unusual circumstances upon which the Court of Appeal can fairly conclude that it is in the interests of justice to grant bail.*
2. *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 substantial part of it will have been served by the time the appeal is heard, conditions for granting bail will exist.*
3. *The main criterial is that there is no difference between overwhelming chances of success and a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed and the proper approach is the consideration of the particular circumstances and weight and relevance of the points to be argued.”*

The same principles were reiterated in the case of **MUTUA VS REPUBLIC [1985] KLR 497** in which it was held as follows.

1. *The main problem was whether the appeal had overwhelming chances of success for if it did not, then this court would not grant bail pending the appeal by virtue of the Court of Appeal Rules Rule 5(2)(a).*
2. *The test was whether there were exceptional or unusual circumstances, the most important ground being whether the appeal had overwhelming chances of being successful.*
3. *It must be remembered that an Applicant for bail has been convicted by a properly constituted court and is undergoing punishment because of that conviction which stands until it is set aside on appeal. It is not wise to set the Applicant at liberty either from the point of view of his welfare or of the state unless there is a real reason why the court should do so.*
4. *There was no overwhelming probability that the sentence would be reduced since the appellate court could not deal with the issue of sentence, and on the other grounds, it was not apparent as matter of law that the appellant would succeed.”*

I have looked at the record of proceedings. The Applicant was charged with stealing contrary to Section 275 of the Penal Code. The particulars of the offence were that on various dates between 20th May, 2004 and 28th September, 2007, at CID Headquarters in Nairobi within Nairobi area stole a sum of Kshs. 1,285,000/= the property of the Republic of Kenya. He was convicted and sentenced to 3 years imprisonment. An overview of the evidence of the prosecution witnesses shows that, prima facie, the appeal has a chance of succeeding. That of itself is sufficient ground why this application should succeed. However, regarding the existence of exceptional or unusual circumstances, the court finds the application as unmeritorious because the mere fact that the Applicant is suffering from hypertension or is a family man or did not abscond from the trial do not necessarily constitute exceptional and unusual circumstances that would warrant the grant of bail pending appeal. On whether the Applicant will have served a substantial part of the sentence by the time the appeal is heard and determined would only constitute a plausible ground in granting bail pending appeal if, on evaluation of the entire evidence, the appeal has a chance of succeeding. In the present case, I have already found that the pending appeal, prima facie, was likely to succeed and for that reason, the latter ground would also bail out the Applicant.

In sum, I allow the application. The Applicant shall execute a bond of Kshs. 500,000/= with one surety of a similar amount or pay a cash bail of Kshs. 100,000/=. The surety shall be assessed by the Deputy Registrar of this court. It is so ordered.

DATED and DELIVERED this 23rd day of December, 2015.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

- 1. Ngangayo for the Applicant*
- 2. Muriithi for the Respondent.*