



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Miscellaneous Application 418 of 2012**

**PATRICK LUMUMBA AGHAN.....APPLICANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**RULING**

The applicant, **PATRICK LUMUMBA AGUAN**, was convicted for the offence of Fraudulent Acquisition of Public Revenue **contrary to section 25A of the Anti-Corruption and Economic Crimes Act, 2003**. He is said to have acquired Kshs.1,469,900/- being part of the money paid to him as imprest intended for coordinating a workshop on Capacity Building for instructional material in Secondary Schools.

He was also convicted for the offence of Knowingly Deceiving Principal **contrary to Section 41 (2) as read with section 48 of the Anti-Corruption and Economic Crimes Act**. The particulars were that the appellant knowingly gave to the Ministry of Education a false imprest surrender voucher and attached documents which he knew to be false and misleading.

Finally the applicant was convicted for the offence of False Accounting by a Public Officer **contrary to section 331 of the Penal Code**. He was found to have knowingly furnished a false imprest surrender voucher for Kshs.1,790,256/-, to which he had attached hotel receipts, payment schedules for facilitation and transport reimbursement forms, which documents he knew to be false.

For the offence of Fraudulent Acquisition of Public Revenue, the applicant was sentenced to one (1) year imprisonment. In addition, he was fined Kshs.2,939,800/-; in default of the fine he was ordered to serve one (1) year imprisonment.

And for the offence of False Accounting by a Public Officer, the applicant was fined Kshs.500,000/-, in default, one (1) year imprisonment.

The learned trial magistrates ordered that if the applicant failed to pay the fines, the default sentences would run consecutively. By my calculations, the applicant was to serve a total of 4 years in prison, if he did not pay the fines.

The applicant has now moved this court for Bail pending the hearing and determination of his appeal.

He submitted that his appeal had overwhelming chances of success. He also argued that because the case was yet to go to the highest court in Kenya, it cannot be said that the case had been finally determined.

Whilst he was pursuing his right of appeal, the applicant believes that he was entitled to bail pending appeal.

Mr. Awino, the learned advocate for the applicant, submitted that the evidence on record was insufficient to sustain conviction, especially considering that essential witnesses did not give evidence at the trial.

In any event, the sentences handed down were described as very severe.

Meanwhile, the applicant drew this court's attention to his medical condition. He said that he had previously sustained serious injuries in an accident, in 2005. As his spine was injured, the applicant described his condition as one of permanent disability. He made available some medical records to verify his said medical condition.

The applicant's father died in May 2000: And his mother is said to be terminally ill. He says that it is he who is responsible for his mother's medication and transport to the clinic. Her life would be precarious, in the applicant's absence.

The applicant was also supporting his three (3) children financially. One of the children was due to join the university.

And the applicant was also undertaking a Master's Degree course at the University of Nairobi.

As he could not continue the Degree Course or his support for his children and his mother when in custody, the applicant urged the court to grant him bail.

The respondent opposed the application. Miss Aluda, learned state counsel, submitted that the appeal had no chances of success.

It was the contention of the respondent that the evidence on record was sufficient to sustain conviction. Indeed, the respondent believed that all material witnesses testified during the trial.

As regards the health of the applicant, the respondent said that the Prisons Department had sufficient funds to look after those who fell ill whilst in their custody.

Meanwhile, the failure to pursue further education was described as a consequence of imprisonment, which is meant to curtail the freedom of convicted persons.

In a brief reply, the applicant pointed out that the prison authorities were unable to provide him with the necessary medical attention. In his view, persons who were in prison should not be subjected to un-necessary suffering.

Pursuant to **Article 51(1) of the Constitution of Kenya;**

***“A person who is detained, held in custody or imprisoned under the law, retains all the rights and fundamental freedoms in the Bill of Rights, except to the extent that any particular right or a fundamental freedom is clearly incompatible with the fact that the person is detained, held in custody or imprisoned.”***

I do therefore agree with the applicant that even though a person should be in prison, he should not be subjected to un-necessary suffering.

But, in the same vein, deprivation of an opportunity for further learning, or the inability of the prisoner to continue providing for his family, are not, of themselves, forms of un-necessary suffering.

If a prisoner cannot continue pursuing further education at the university, or if he is unable to

provide for his family, that is a direct consequence of imprisonment.

In any event, the document made available to this court shows that the applicant was a student at the University of Nairobi from the year 2007. The Provisional Transcript was dated 10th February 2010, and it suggested that the applicant was due to proceed to the stage of Project Paper Writing.

There is no evidence before me, about what transpired between February 2010 and 20th July 2012, when the applicant was convicted.

As regards the applicant's children, I note that there is a loud silence regarding their mother. I cannot therefore conclude that just because the applicant was behind bars, the children's education would be in jeopardy.

The applicant has provided the court with a medical report from The Karen Hospital. It is dated 10th November 2009. In effect, the current medical status of the applicant has not been disclosed.

It would have helped this court to make a better-informed decision if the current medical records were provided. Such records could have been obtained from the medical personnel attending to the applicant in prison, as well as the medical personnel who attended to him more recently.

I find and hold that the applicant has failed to demonstrate any exceptional reasons about his circumstances, to warrant a positive consideration by the court.

I also find that although the appeal appears arguable, it cannot be described as having overwhelming chances of success. For those reasons, the application for bail pending the hearing and determination of the appeal, is without merit. It is therefore rejected.

**Dated, Signed and Delivered at Nairobi, this 29th day of November, 2012.**

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**FRED A. OCHIENG**

**JUDGE**