



IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 246 OF 2010

(From original conviction and sentence in Court Martial Case No.2 of 2010 of Lanet KMA – Court Martial)

ROBERT MORARA

NYAKUNDI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The application dated 15/10/2010 seeks two prayers as follows:-

2. (Spent)
3. That the applicant be granted leave to appeal against the conviction and sentence of the Lanet Court Martial on 2/8/2010 and the appeal be admitted to hearing;
4. That the court do grant bail to the applicant pending determination of the appeal.

The application is brought pursuant to **Section 116** of the **Armed Forces Act**, **Sections 356(1)** and **357(1)** of the **Criminal Procedure Code**, **Order 50 Rule 1** of the **Criminal Procedure Rules** and **Section 50** of the **Constitution**. It is grounded on the affidavit of Robert Morara Nyakundi dated 15/10/2010 and grounds found on the face of the application. The applicant was a serviceman in the Kenya Armed Forces since 1992. He was charged with three offences in Lanet Court Martial No. 2/2010 along with others; Sgt Isaiah Onyango and Spte Simon Kariuki. The counts that related to the applicant are as follows'

Count 8 - An act to the prejudice of good order and service discipline contrary to Section 68 of the Armed Forces Act, that he lied about the movements and whereabouts of his sentry mate, 72044 Spte Isaiah Lule Onyango.

Count 9 – Sleeping at his post when on guard duty contrary to Section 22(1)(a) of the Armed Forces Act, that he slept while on guard duties at his sentry post.

Count 10- Neglect to the prejudice of good order and service discipline contrary to Section 68 of the Armed Forces Act he failed to report the absence of his sentry mate Spte Isaiah Lule Onyango from the guard post.

The applicant was convicted of counts 9 and 10 and sentenced to one year imprisonment on each count. They were ordered to run concurrently. He was acquitted of count 8. The applicant deponed that on 4/2/2010, he was on guard duties at the armoury at LMA, Lanet at 9.00 a.m. with his colleague Spte Isaiah Lule Onyango for 24 hours. There were intervals when they went for meals. At 9.00 p.m., his colleague went for supper. On the same night, his rifle was found by Administration Police at a petrol station at Kiti at a scene of robbery and on the next day the applicant was arrested, placed in cells till 17/5/2010 when the Court Martial resumed. After his conviction/sentence, his lawyer immediately lodged an appeal against both conviction and sentence (RMN2). It was filed on 16/8/2010, 14 days after conviction and sentence. Thereafter, an application was made for the proceedings of the Court Martial vide the letter dated 9/8/2010 and reminders followed but they were not forthcoming till about 24/11/2010 when counsel received the proceedings. The applicant's counsel Mr. Ndubi's submitted that the prayer for leave to appeal is procedural. That the time was required to be filed within 14 days and the applicant did comply with that requirement. He urged that for bail pending appeal to be granted, the cardinal considerations are:-

- 1. Whether there are unusual circumstances upon which the court can grant bail.**
- 2. Whether in its totality, the appeal has overwhelming chances of success.**

The counsel relied on the case of **SOMO V. R (1972) EALR 476**. He submitted that the offence with which the applicant was charged with is minor. The applicant was in cells for 4 months and has now been in jail for 8 months and is likely to serve the full term before the appeal is heard and determined. Counsel made lengthy submissions trying to establish that there was no evidence to support the 9th and 10th counts that the applicant was asleep at work and failing to report absence of his colleague from duty.

The appeal was opposed and Mr. Nyakundi, the State counsel submitted that the applicant has not demonstrated that the appeal has overwhelming chances of success or that there are special circumstances to merit the appeal or that there will be a delay in the hearing and determination of the appeal.

The applicant was convicted on 2/8/2010 and the appeal was filed on 16/8/2010 which is within the time allowed. The delay in having this application prosecuted is due to the Court Martial proceedings having not been availed by the Armed Forces Headquarters. They were not availed till about 24/11/2010. The applicant did move with speed and has shown keenness in challenging the decision of the Court Martial.

In the case of **JIVRAJ SHAH V. REP (1986) KLR 605** the court considered when bail can be granted pending appeal. It said:-

“... the principal consideration is if there exist exceptional or unusual circumstances upon which the court can fairly conclude that it is in the interest of justice to grant bail if it appears prima facie that 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 for a substantial part of it will have been served by the time the appeal is heard, conditions for granting bail will exist.”

The same principles were espoused in **SOMO V. REP (supra)** the principal considerations for grant of bail are:-

- 1. Whether there are exceptional or unusual circumstances.**
- 2. Whether the appeal has overwhelming chances of success and there is no justification for depriving the applicant of his freedom.**

The court needs to establish whether the above conditions exist. In the instant case the applicant was sentenced to serve one year on each count. So far the appellant has been incarcerated for the last 5 months or so.

Mr. Ndubi submitted that no evidence was adduced to support the charge that the appellant was found asleep on guard duties. He urged that the only relevant evidence in support of the charge was that of PW1, Sgt Mathenge who said he went to the armoury at 5.30 a.m. and found Spte Onyango asleep but the appellant was leaning on the table.

As respects the 10th count, counsel also drew this court's attention to the evidence in support thereof and contended that there was totally no evidence to support the charge that the applicant failed to report absence of his colleague at work.

So far I find that the applicant has not raised any point of law to be considered at this stage, that can warrant the grant of bail. The court has to guard against pre-empting the appeal by going into the detail of the evidence adduced and the grounds raised in this application. By inviting the court to consider the evidence this court will need to go into the detail of the evidence adduced by the 24 witnesses who testified in the case, the defence and submissions. This court is being invited to analyse the evidence at this stage which should not be the case. The submission on whether or not the case was proved beyond any doubt as required is a ground for appeal. In the cases cited by counsel, evidence of good character, or one being a first offender or that there may be a delay in hearing and determining an appeal were said not to constitute an exceptional circumstances to warrant release on bail unless there were other factors in

addition. I find that no unusual or exceptional circumstances have been shown by the applicant nor has it been demonstrated that on the face of it the appeal has overwhelming chances of success.

The applicant has now obtained the proceeding from the Court Martial. If the record of appeal is prepared with speed, it is unlikely that the hearing of the appeal will be delayed. For the above reasons, I find no good reason to grant the application for bail. I will however, grant the first prayer that the appeal be admitted to hearing. Since the proceedings of the Court Martial are before the court, let the counsel prepare the record of appeal and the court will be prepared to give an early hearing date. In the result, prayer 2 is allowed but prayer 3, seeking bail is declined.

DATED and DELIVERED this 21st day of January, 2011.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Ndubi for the applicant.

Mr. Nyakundi for the respondent.

Kennedy – Court Clerk.