



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KERICHO

Misc. Crim. App. 2 of 2009

GEORGE ONYANGO ATHEMBO.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

I: Procedure

1. The applicant was charged with the offence of soliciting for benefit contrary to **Section 39(3)** as read with **Section 48(1)**

of the Anti-Corruption and Economics Crimes Act **No. 3 of 2003**.

2. The particulars of the offence being that on 16th September, 2005 the applicant, then an employee in the public body of weights and measures department as an inspector solicited for a benefit of cash 80,000/= from **Girish Shah and Grace Mingira** as an inducement to forbear from charging them in a court of law.

3. The applicant was found guilty convicted after trial and sentenced to a term of 3 years imprisonment. An application for bail pending appeal was declared by the trial magistrate. Two magistrates heard the subordinate court case.

4. The applicant appealed against the main charge. He then reapplied to the High Court for bail pending appeal. That application was heard before G.B.M Kariuki J and a ruling resumed to be delivered at a further date. Due to unforeseen circumstances G.B.M Kariuki J was not able to deliver the ruling. He had held the original files and the application.

5. To get around this, the applicant withdrew the application that was pending for ruling and brought this current application for hearing.

6. The challenge that faced the applicant, the prosecution and this court is that the original files and proceedings was never available. This court managed to be shown a set of proceedings and judgment that was left in a skeleton file. Rather leave the applicant in difficulties, this court proceeded with the hearing of the application.

II: Application for leave to be admitted to Bail pending appeal.

7. Augments put forward by the applicant was based on the case law of **Lambert Hourareau V R {1957}**

E.A 414 a case whereby the appellant had been convicted on two counts under the Unseaworthy Vessel Ordinance Cap 205 and duly fined Rs. 700 or in default, 4 months imprisonment. The appellant did not pay the fine but instead applied for bail pending appeal. This application was rejected. On appeal to the court of appeal, it was held by that court that where a punishment imposed was a fine “ *with imprisonment only in default then the main consideration on an application for bail pending appeal should be whether the intended appeal {was } frivolous or vexatious*”.

“ if the appeal was not frivolous or vexatious (then) the court is to consider whether the application is made to delay or if the appeal has reasonable prospects” “Applicant unable to pay the fine without loss or damage security for payment of fine or makes himself available

8. The state opposed the application.

III: Findings

9. For an application of bail pending appeal, there must be an appeal filed. I was reassured in this case that an appeal was indeed filed.

10. Therefore the issue before me is whether the appellant should be granted bail pending appeal.

11. In the case law of **Girdha Bhanji Masrani VR {1960} EA 320**, it was held that bail pending appeal must be granted only in exceptional circumstances (Sheridan J). The case law relied on by the applicant, deals with where the sentence was one of a fine. That four/three elements must be established:-

i) That leave to appeal has been granted

ii) There is a strong likelihood success.

iii) The risk that if bail is not granted the sentence will have been served by the time the appeal is heard.

12. The applicant states that his sentence of three years would soon be over if not granted trial.

13. I am aware that the appellant was not fined but was sentenced to a term of imprisonment. To my mind that if someone is sentenced to imprisonment without a fine he must be able to demonstrate that he has an exceptional circumstance to be permitted to bail. The courts would not apply the standard required for one on a fined sentence but cannot raise the fine.

14. I accordingly find that there has been no exceptional circumstances to warrant the applicant be placed or admitted to bail. The offence convicted of is very serious.

15. I would nonetheless direct that the appeal be heard as quickly and or priority basis.

The application stands dismissed.

Dated this 4th day for March, 2009 at **Kericho**

M.A. ANG’AWA

JUDGE

Advocate

F.O. Koko advocate instructed by M/S Obondo Koko & Co. advocates for Applicant/Appellant – present

R.K. Koech – senior state counsel instructed by the Attorney General for the Respondent – Republic – present

Applicant/Appellant - present