



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT MERU**

**Criminal Appeal 29 of 2009**

**REPUBLIC.....RESPONDENT**

**VERSUS**

**GODFREY MBAABU**

**MOSES MATI ESAYA**

**EDWARD MATI ESAYA.....APPLICANTS**

**CRIMINAL PROCEDURE AND PRACTICE**

**: Bail/Bond – pending appeal**

**: Principles upon which bail/bond will be granted**

**RULING**

By separate but identical applications brought by way of Notice of Motion dated 2<sup>nd</sup> March 2009, the applicants –

(1) Godfrey Mbaabu vs Republic

(Criminal Appeal No. 29 of 2009)

(2) Moses Mati Esaya vs Republic

(Criminal appeal No.30 of 2009)

and

(3) Edward Mati Esaya vs Republic

(Criminal Appeal No. 31 of 2009)

sought to be released on bail/bond pending the hearing and determination of the respective appeals.

Before the applications were heard Mr. Omayo learned Counsel for the appellants applied for consideration of the three appeals, and there being no opposition from Mr. Kimathi learned State Counsel, the three appeals were by order of Court made on 5.03/2009 consolidated, and the Appeal Record would run on Appeal file no.29 of 2009.

The appellants were each charged and convicted on four counts of stealing from a person C/C 279 (b) of burglary C/S 304 (2), stealing C/S 229 (b) and malicious damage to property C/S 332 all of the Penal Code, (Cap 63, Laws of Kenya), and were respectively sentenced to fines of Kshs.20,000 in respect of the 1<sup>st</sup> & 2<sup>nd</sup> Counts or 6 months imprisonment: and fines of Kshs.10,000/= each in respect of Counts 3 and 4 and in default, 3 months imprisonment and the sentence run consecutively.

Mr. Omayo learned Counsel for the appellants submitted that the appeal had overwhelming chances of success because the trial court ordered the sentences to run consecutively rather than concurrently. The second ground for the submission that the appeal had overwhelming chances of success was failure by the trial Court to comply with the provisions of section 211 of the Criminal Procedure Code, to explain to the accused again the substance of the charge and advise him of his right to give evidence on oath from the witness box, and be subject to cross-examination, if he does so, or to make a statement not on oath from the dock, and ask him whether he has any witnesses to examine or other evidence to adduce in his evidence, and then hear the accuse and his witnesses and other evidence (if any).

On those grounds Mr. Omayo submitted the Appellants had overwhelming chances of success, and since they were on bond in the lower Court, they were ready to abide by the terms which the court would impose.

Counsel prayed that these submissions equally applied in respect to Appeals No.30 to 32 of 2009 as outlined above.

Although Mr. Kimathi learned State Counsel submitted that he opposed the applications for bail/ bond pending appeal, he conceded that he had some difficulty in respect of justifying the failure by the trial magistrate to comply with the requirements of Section 211 (1) of the Criminal Procedure Code. He asked the Court to specifically make a finding that where an accused person is represented by Counsel, failure by the trial magistrate to comply with the requirements of the said Section 211(1) was not fatal to the proceedings.

On the question of the order for sentences to run consecutively, Counsel submitted that the accused would still have to serve sentence even if the sentences were to run concurrently.

Those were the respective Counsel's arguments. The principles upon which a convicted person may be granted bail/bond are now settled. An appeal must have overwhelming chances of success, whether there are any unusual and exceptional circumstances warranting the grant of bail pending appeal. In **DOMINIC KARANJA VS REPUBLIC [1986] K. Ltd 612**, the Court of Appeal held that in granting bail pending appeal -

**: the most important issue was whether an appeal had overwhelming chances of success, there was no justification for depriving the applicant of his liberty and the minor relevant consideration were whether there were exceptional and unusual circumstances,**

**: that good character of the applicant and hardships if any, facing his family were not exceptional or unusual factors. Ill health per se would not constitute an exceptional circumstance where there existed medical facilitator for prisoners.**

Considering the matters in this case, the Applicant's greatest weapon or argument on appeal is that their rights under Section 211(1) of the Criminal Procedure were not explained to them. This is indeed so, Section 211 (1) of the Criminal Procedure Code (Cap 75 Laws of Kenya) constitutes part of the

fundamental rights of an accused person to a fair trial as envisaged in Section 77 (9) of the Constitution, to a fair hearing within a reasonable time. The accused's rights under Section 211 (1) were summarized by the Court of Appeal in **NJOKA VS REPUBLIC [2001] K.L.R. 175, and P.179** as –

**“(a) the right to remain silent and saying nothing at all;**

**(b) the right to make an unsworn statement from the dock in which event the accused is not liable to cross-examination, by the prosecution;**

**(c) the right to give sworn evidence from the witness box in which event the accused person becomes liable to cross-examination by the prosecution if the prosecution wishes.**

**(d) the right to call witnesses if accused so wishes,”**

These are as stated above fundamental rights of the accused in a trial. They are meant to ensure a fair trial. Once explained to an accused person he responds by electing, to proceed as he wishes. His response must be taken down and must appear on the Court record. It is only after that he is called upon to proceed in whichever way or manner he has elected.

In this case, the record of the court at p.21, shows a Ruling finding no case to answer in respect of Count 5 of the **Charge of Assault and consequently acquitting the accused of that charge, but finding the accused having a case to answer in respect of Counts 1-4 inclusive.**

**There is no record that the trial Court explained to the accused his rights under Section 211 (1) of the Criminal Procedure Code. The issue therefore is whether that failure is such an irregularity which vitiates the fair trial of the accused or as in these appeals, of the appellants. Ordinarily this would have been such a breach that would vitiate the fair trial of the accused. Although it is the duty of the court (and not the Defence Counsel) to explain to the accused his rights, where an accused person is represented, it is not unreasonable to suggest that the Defence Counsel would already have discussed with his client the accused, the strategy for conducting his defence if ever the trial Court found a case for him to respond to, or to answer in his defence.**

**In this case, the appellants had able Counsel representing them. He is learned in the law. He knows the requirements of Section 211 (1) in relation to his client and where Counsel as in this case says -**

**Accused 1, accused 2, accused 3 and accused 4 will be giving sworn testimonies and we will not be calling witnesses”**

**it is clear that the Counsel had already considered the effect of a finding that the accused had a case to answer, and therefore their rights to either give sworn testimony, and be liable to cross-examination, or give unsworn statement and escape cross-examination, or just keep silent and have the prosecution prove their case, and the Court to write its judgment ultimately had already been considered. In circumstances such as the ones prevailing in these appeals, it cannot be said that failure to explain to the applicants the charges facing them, and their rights as aforesaid, in any way prejudiced their trial. I would therefore have serious doubts as to chances of their appeal having overwhelming chances of success on the ground that their rights under section 211 (1) of the Criminal Procedure Code were violated.**

**I would also doubt the chances of the appellants appeal on the other major ground that the sentences were to run consecutively. Section 14 of the Criminal Procedure Code provides that when a person is convicted at one trial of two or more distinct offences, the Court may sentence him, for these offences, to the several punishments prescribed therefor which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the Court directs that the punishments shall run concurrently.**

**The only exception is Section 14 (3) of the said Code. The subordinate court cannot impose consecutive sentences of imprisonment which amount in the aggregate to more than fourteen years, or fines which amount in the aggregate to more than twice the amount, which the court is competent to impose.**

**There was no suggestion by Counsel for the appellants either that the sentences or the fines imposed, are in the aggregate in excess of fourteen years, or that the fines imposed are in the aggregate, in excess of twice the amount which that subordinate court could impose.**

**For those reasons, I am unable to accede to the Appellants'/Applicants applications for bail/bond. The same are accordingly dismissed. I direct that the lower court file be called up urgently and be placed before a judge for perusal and admission or otherwise.**

**There shall be orders accordingly.**

**Dated, delivered and signed at Meru this 24<sup>th</sup> day of April 2009.**

**M. J. ANYARA EMUKULE**

**JUDGE**