



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)
Misc Crim Appli 776 of 2007

B.H.O. OMONDI..... APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

The applicant, who apparently has filed appeal No. 660 of 2007, *B.H. Omondi v. Republic*, moved this Court under certificate of urgency, by Chamber Summons dated and filed on 5th November, 2007. He was seeking *bail pending appeal*.

The general grounds in support of the application are, firstly, that the trial Court failed to address its mind to the question of bail pending appeal as it ought to have done; secondly, that the applicant is entitled to bail pending appeal as a matter of *right*; thirdly, that the applicant was on bond throughout the trial period, and he did demonstrate by conduct, that if he is granted bail he *will* abide by the terms attached to the same, by the Court; fourthly, that the applicant *is* a law-abiding citizen; fifthly, that the applicant's appeal has *overwhelming chances of success*; sixthly, that the conviction entered by the trial Court did not fall in tandem with that Court's *findings on evidence*; seventhly, that there was no basis in law for the imposition of a *prison term*, without the option of fine.

The applicant in his supporting affidavit, avers that he had attended the hearing of the case against him consistently, up to judgement stage. He depones that the prison term imposed upon him is detrimental to his health, which is already poor, on account of gun-shot wounds in his abdomen which led to cardiac complications. He attaches to his affidavit a brief health document from the Nairobi Remand Prison Health Centre, which advises that he be referred to Kenyatta National Hospital in connection with "post-operation complications." The applicant undertakes to abide by any terms and conditions of bail/bond such as may be ordered by this Court.

Learned counsel *Mr. Agina*, who came to urge the application before me, founded his argument on the applicant's *state of health*, on *rights to bail*, and on the contention that the pending appeal has *overwhelming chances of success*.

Learned State Counsel *Mrs. Obuo*, however, disputed the contention that the appeal would have overwhelming chances of success, as there was the evidence of PW1 who witnessed the applicant receive Kshs.200,000/= from PW2, and which fact constituted the reason for the charge under s.39(3)(a) as read

with ss.39(1)(a) and 48(1)(a) of the *Anti-Corruption and Economic Crimes Act, 2003 (Act No.3 of 2003)*. Mrs. Obuo submitted that the applicant had demonstrated no *exceptional circumstances*, to warrant grant of bail pending appeal.

Learned State Counsel urged that, reliance on *medical records* could not strengthen the applicant's case for bail pending appeal; because there was a *valid judgement* of the trial Court committing him to jail, notwithstanding his health condition.

While not disputing the fact that the applicant had enjoyed bond *during trial*, counsel urged that such bond would *now* be inappropriate, as the jail sentence already pronounced would constitute an *incentive to abscond*. Counsel urged that the application be dismissed.

Learned counsel Mr. Agina contended that the applicant, who is not a public servant, had been charged under a provision which relates to public servants, and therefore prosecution of the applicant was defective in law.

Mr. Agina contested the claim that the applicant, if released, will abscond; for the respondent had not brought before the Court an affidavit on the factual aspects of such a claim.

On the question regarding the propriety of the charge which had been brought against the applicant, learned State Counsel, Mrs. Obuo contended that this was a *new argument* which had not been placed before the trial Court. She urged that the application of the Anti-Corruption and Economic Crimes Act, 2003 was not restricted to one category of persons, namely public servants; and that the applicant who ran a Non-Governmental Organisation by the name, Citizens' Alliance Against Corruption, had used the said entity to extort the money which was the subject of the charge.

Although learned counsel has represented to the Court that there is a pending appeal, being Criminal Appeal No.660 of 2007, the memorandum of appeal has not been attached with the application herein; this omission renders it difficult for the Court to form any *prima facie* impressions on the *quality of the appeal*, as a motion that would carry any particular probabilities of success. Yet, the fact of an appeal having *high chances of success* is the most material consideration before a Court which has the task of deciding whether or not to grant bail pending appeal. The foregoing point is to be regarded as a cardinal *legal principle* to be observed by parties seeking bail pending appeal: because the sentence which will have been imposed by the trial Court, following the decision to convict, is always to be regarded *prima facie* as lawful and imperative, save where it has been represented to have been *illegal*, and a *revision* has been sought, on the basis of the supervisory jurisdiction of the High Court.

The application and the supporting affidavit, moreover, have not set out the essential point in the appeal-material which would predispose this Court, on *prima facie* perceptions, to attribute high chances of success to the pending appeal.

Reading the trial Court proceedings and the judgement, from which an appeal has been lodged, I see clear indications, just as learned counsel Mrs. Obuo urges, that the appeal may *not*, after all, be so clear-cut as to lead to the inference that it has *overwhelming chances of success*. The crucial question is whether the applicant did, at all, attempt to extort a bribe from PW2. On appeal, the answer to that question will depend on whether or not the learned Chief Magistrate assessed the *evidence* correctly. But, at this point in time, it is not possible to say that the trial Court's interpretation was wrong. From my reading of the judgement nothing transparently wrong or illogical, in the trial Court's assessment of evidence, is perceptible at this interim stage.

I have taken note of the following passages in the Chief Magistrate's judgement:

(i) [at p.4] –

“[The] accused further claimed to have other evidence of corruption against [the] Hon. Tuju [PW2] which he threatened to make public unless he was paid off. [The] accused also told PW1 and PW2 that his

organization and [he] were planning to hold an International Press Conference at which they would denounce [the] *Hon. Tuju* as corrupt. PW2 realised that this was an attempt to extort money from him and he reported the matter to the Kenya Anti-Corruption Commission.”

(ii) [at p.5] –

“PW1, PW2 and [the] accused conversed for a while and it was during this conversation that [the] accused intimated that, being an official of the NGO which had sued PW2, he was in a position to have the case withdrawn and prevent the intended press conference if PW2 gave him a benefit.”

(iii) [at pp.5-6] –

“A reading of [the transcript of the conversation among the accused, PW1 and PW2 – which was played before the trial Court] indicates clearly that the accused was looking to cut a deal with [the] *Hon. Tuju*.”

Evidence tending to validate the learned Chief Magistrate’s conclusions of the kind excerpted above, is generously set out on pages 5, 6, 7 and 8 of the judgement.

It is not, in these circumstances obvious and capable of being taken at a *prima-facie*-impression stage such as this, that the intended appeal has high chances of success. What this Court is able to say *prima facie*, in those circumstances, is that the judgement pronounced, and the sentence meted out by the trial Court, have a *good basis in law*. Once the Court comes to that conclusion, it follows that the *legal duty* resting upon the Court, is to *uphold and sustain* the trial Court’s judgment, pending a ventilation of merits *on appeal*.

A state-of-health question has been raised, as a ground in support of the application for bail pending appeal. Given that a core mandate of the Court is *to do justice*, and that the demands of justice will always be lodged on the *facts* of a particular case, I would not be in agreement with learned counsel *Mrs. Obuo*, that ill-health must always be perceived as irrelevant to the Court’s decision, in a case such as this one. However, only a detailed *factual account* on an applicant’s state of health, would provide a basis for the Court to grant bail pending appeal in a case, such as this one, in which, on a *prima facie* basis, the propriety of the trial Court’s decision cannot be questioned.

As already noted in this Ruling, the applicant has made no case of illness on so grave a level, as to warrant for it a place in the Court’s mind, in disposing of the application.

There is no *legal basis*, therefore, for allowing the application for bail pending appeal.

Consequently, I hereby dismiss the application of 5th November, 2007.

DATED and DELIVERED at Nairobi this 21st day of November, 2007.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Applicant: Mr. Agina

For the Respondent: Mrs. Obuo