



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA**

Criminal Appeal 77 of 2007

DENNIS WESONGA MASANGALA APPELLANT

V E R S U S

REPUBLIC RESPONDENT

R U L I N G

In the application by Notice of Motion dated 17-9-1007, the Appellant, Dennis Wesonga Masangala sought an order for bail pending appeal. His application was premised on sections 356 and 357 of the Criminal Procedure Code, Cap 75, of the Laws of Kenya. The more germane provision of the law in this application which vests jurisdiction in this court to grant bail pending appeal is section 357 (supra) because the appeal was in place at the time the application was made. Under the said section, the court may order release of an applicant on bail with or without sureties or suspend at the applicant's request the execution of the sentence or order appealed against.

The granting of bail pending appeal is predicated on the premise that it is unnecessary to keep an appellant in jail if his conviction will eventually be quashed and sentence set aside. The rationale in the grant of bail pending appeal is that where an appellant will in all probability be successful in his appeal, there would be no reason or rhythm in holding him in prison during the pendency of the appeal only to quash the conviction or set aside the sentence appealed from for the simple reason that the exercise may become academic if the appeal were heard after the sentence has been substantially served.

The principles on which the court exercises its discretion to grant bail pending appeal under section 357 (supra) have been stated in many cases. These include firstly, where the appeal has substantial merit or chances of success, secondly, where there is the likelihood of the appellant completing sentence before the appeal is heard and thirdly, where there is existence of exceptional or unusual circumstances upon which the court can conclude that it is in the interest of justice to grant bail pending appeal.

In the instant appeal, the appellant was convicted on one count of obtaining money by false pretences contrary to section 313 of the Penal Code Cap 63, and one count of stealing contrary to section 275 of the Penal Code. The particulars of Count I were:-

“Denis Wesonga Masangala: On the 14th and 19th of July, 2006 at Kencom House Kenya Commercial Bank branch and Co-operative Bank Kimathi Street Branch at Nairobi area, with intent to defraud obtained from ISAAC O. ONYANGO KShs.30,000/= by falsely pretending that he is selling to him genuine shares knowing that it is not genuine shares or it was acquired in an illegal way.”

The particulars of Count II were:

Denis Wesonga Mangala: On the month of September, 2004 at Mumias trading center in Butere/Mumias District within Western Province stole ordinary share certificate No. 0005400 belonging to JOHN M. NYENDE (deceased).

The appellant was fined Shs.30,000/= or in default 6 months imprisonment on Count I and to six months imprisonment on Count II.

In his Memorandum of Appeal, the appellant contends in grounds 1, 2 and 3 as follows:-

- (1) That the trial judge erred in law and fact by failing to take into account material contradictions and inconsistencies in the testimonies of testimonies of key prosecution witnesses which rendered unsafe the conviction of the appellant.***
- (2) That the trial magistrate erred in law in failing to find that the prosecution had failed to establish its case against the appellant to the required standard of proof beyond reasonable doubt.***
- (3) That trial magistrate erred in law by dismissing off hand the appellant's defence which defence raises the possibility that the complainant was motivated by malice.***

Mr. Amasakha, learned counsel for the appellant, urged the court to admit the appellant to bail pending appeal and submitted that, while the appellant was likely to complete his sentence before the appeal was heard and determined, the conviction could not stand not least because the trial court failed to consider the appellant's defence and the contradictions in the prosecution evidence.

Mrs. Anne Kithaka, Senior Principal State Counsel while opining that the prosecution case was foolproof conceded that the appellant might serve the sentence before the appeal is heard and determined.

I have perused the application and the record of appeal. I have observed that although various documents intended to be produced were marked for identification, they were not produced. Without production of these documents as exhibits, the prosecution case could not stand. I have also observed that the trial court did not give sufficient consideration to the appellant's defence. It is my finding that the appeal has substantial merit and in view of the sentence meted out, the appellant, unless released on bail pending appeal, may very well serve the entire sentence, before the appeal is heard and determined.

For these reasons, I allow the application. I admit the appellant to bail on the terms that he shall sign a personal bond of Shs.30,000/= without more.

Dated at Kakamega this 1st day of November, 2007.

G. B. M. KARIUKI

J U D G E