REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KERICHO

Crim Misc Appli 15 of 2006

JOSEPH MULEWA……...……..….APPLICANT

VERSUS

REPUBLIC……..…….RESPONDENT

RULING

The applicant was charged with two counts of corruption contrary to Section 39(3)(a) as read with Section 48(1) of the Anti-Corruption and Economic Crimes Act number 3 of 2003. the first count was that on 16th August 2005, at Kilgoris Law Courts of Trans-mara District in Rift Province, being a person employed in the public body to wit Kenya Police Force as a court prosecutor, corruptly agreed to receive a sum of Kshs.5,000/- from Kipkemoi Wilson Koech as an inducement for him to terminate Kilgoris Criminal Case No. 645 of 2004, a matter in which the public body was concerned. Count two was that on 16th August 2005, at Kilgoris Law Court of Trans-mara District in Rift Valley Province, being a person employed in the public body, to wit the Kenya Police Force as a court prosecutor, corruptly received Kshs.2,000/- from Kipkemoi Wilson Koech as an inducement for him to terminate Kilgoris Criminal Case No.645 of 2004 in which the public body was concerned.

After a full trial, the applicant was found guilty and convicted of the first count and on 5th September 2006 was sentenced to serve four years imprisonment. The trial court rejected the second count under **Section 89(5)** of the **Criminal Procedure Code** for being a duplication of count one.

He was aggrieved by the said conviction and sentence and preferred an appeal to this court. He also filed an application by way of notice of motion brought under **Section 357(1)** of the **Criminal Procedure Code**. He prayed that he be granted bail pending the hearing and determination of his appeal. In the alternative, he urged the court to order stay of execution of the sentence that was pronounced by the trial court pending the hearing and determination of the appeal.

In the petition of appeal, he set out twelve grounds of appeal. I will not set down all the grounds but I will refer to some of them which were highlighted by Mr. Ogutu in his submissions when he argued the application for bail pending appeal.

The application was made on the grounds that the applicant's appeal had overwhelming chances of success and that the applicant was likely to serve a substantial portion of his sentence before his appeal was finalised in which event he stood to suffer substantial loss if the appeal was successful.

Mr. Ogutu raised several issues in an attempt to show that the applicant's appeal had overwhelming chances of success. He submitted that the trial magistrate misdirected himself as far as the burden of

proof was concerned in that he shifted the same to the appellant. He referred to the judgment, paragraphs 2 and 3 of page 19. I wish to reproduce those two paragraphs and see whether indeed there is any truth in the assertion that was made by counsel. Paragraph 2 reads as follows:-

"***I will now turn to the defence. The defence need only create about over the prosecution case to get an acquittal. (I think there was a typographical error). Their burden of proof is not beyond a reasonable doubt and I will not in any manner purport to expect the defence to the discharge a burden that is legally laid at the doorsteps of the prosecution (sic) but the duty to be truthful lies on both the prosecution and the defence side."***

Paragraph 3 was worded as follows:-

"***The accused told the court that he was with one Stella, a police at Kilgoris hotel and that he left PW2 at that hotel said to be 70 metres away from Kilgoris court, yet he did not call that Stella to fortify his assumption that he was only asking for a message on behalf of someone else."***

I do not agree with Mr. Ogutu's submission that the above quoted paragraph showed that the learned trial magistrate shifted the burden of proof to the applicant. My understanding of what the trial magistrate was stating in paragraph 2 of page 19 of the judgment is that the applicant only needed to create reasonable doubt regarding the prosecution evidence whereas the burden of proof on the part of the prosecution was beyond reasonable doubt. In paragraph 3, the learned trial magistrate was commenting on what he perceived as untenable defence that was advanced by the applicant in that he failed to call a witness who would have been important for his case if at all the applicant was truthful in what he had told the court. I believe the learned trial magistrate appreciated that the burden of proof lay squarely on the prosecution.

Mr. Ogutu further submitted that the trial court erred in convicting the appellant on a non existent offence known as "***corruption"*** in terms of **Section 39(3)(a)** of the **Anti-Corruption and Economic Crimes Act No. 3 of 2003**. He submitted that there was no such an offence created by that section of the law. **Section 39(3)** provides as follows:-

"***A person is guilty of an offence if the person –***

(a) Corruptly receives or solicits, or corruptly agrees to receive or solicits, a benefit to which this section applies or

(b) …"

Section 48 of the said **Act** prescribes the penalty for offences which fall under **part V** of the **Act** and that includes the aforesaid **Section 39(3).** In my view therefore, it would be wrong to argue that the offence of corruption is non existent and is not difined by **Section 39(3)(a)** as was stated in the charge sheet.

Thirdly, the applicant's counsel submitted that the trial court misapprehended the law as far as the provisions of **Section 89(5)** of the **Criminal Procedure Code** were concerned. He stated that the charges as drawn were bad for duplicity. In his view, it was wrong for the learned trial magistrate to reject count two and leave count one since they were not alternative counts. The trial court could not exercise a right of election, that could only be done by the prosecution, he argued. **Section 89(5)** of the **Criminal Procedure Code** states as follows:-

"***Where the magistrate is of the opinion that a complaint or formal charge made or presented under this Section does not disclose an offence the magistrate shall make an order refusing to admit the complaint or formal charge and shall record his reasons for the order."***

I have carefully perused the judgment and in page 15 of the judgment, the learned trial magistrate explained his reasons for rejecting count two and I am in agreement with him. In my view, there was nothing that would have forced him to reject count one as well. I do not think that he assisted the prosecution by electing to proceed with count one only.

Mr. Ogutu also submitted that **Sections 34** and **35** of the **Anti-Corruption and Economic Crimes Act** require that all investigations by the Kenya Anti Corruption Commission be forwarded to the Attorney General for his recommendation before any charge can be preferred against an offender. In this case, the Kenya Anti Corruption Commission did not forward its file to the Attorney General's office before the applicant was arraigned in court, counsel submitted. I do not think whether there was any basis in stating so. Although I did not have the benefit of having the proceedings before the trial court, from my reading of the judgment which sets out in considerable details all the issues that were canvassed, it does not appear to me that the defence counsel raised that issue before the trial court. It is therefore not possible to tell whether the Attorney General gave his consent or not. However, it must be remembered that all criminal prosecutions in this Country are conducted by the office of the Attorney General and it can safely be assumed that the Attorney General gave his consent for the applicant to be prosecuted. I therefore reject that submission.

The principles for grant of bail pending appeal were considered in **SOMO VS R [1972]EA 476**. For one to be granted bail pending appeal, exceptional or unusual circumstances must be shown to exist. I do not think whether any such special or exceptional circumstance was demonstrated in this matter. It was alleged that the applicant is diabetic although no evidence was adduced to that effect. If indeed the applicant is diabetic, he is entitled to receive medical attention while in custody but that cannot in itself entitle him to release on bail pending appeal. Secondly, it was not demonstrated that the applicant's appeal has overwhelming chances of success. Thirdly, the applicant is serving a four year jail term and there is no reason why his appeal cannot be heard expeditiously. All in all, I do not find merit in the applicant's application for release on bail pending appeal and I reject the application.

DATED, SIGNED and DELIVERED at Nakuru this 26th day of October, 2006.

D. MUSINGA

JUDGE

Ruling delivered in open court in the presence of Mr. Ogutu for the applicant.

D. MUSINGA

JUDGE