



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

Misc Crim Appli 243 of 2005

SAMUEL SANE LESIAPPLICANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

Misc Crim Appli 244 of 2005

JAMES SALAU KUYAN.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

Misc Crim Appli 245 of 2005

TENTUAN T, OPIARAPPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

This is a Notice of Motion Application brought under **Section 357** of the **Criminal Procedure Code**. It was filed by **P.C. ONDUSO & CO. ADVOCATES** on behalf of the Applicants SAMUEL SANE LESI (1st Applicant), JAMES SALAU KUYAN (2nd Applicant) and **TENTUAN TOPIAR** (3rd Applicant).

Their Applications were consolidated being similar and having arisen out of the same trial. The Applicants seek to be admitted to bond or bail on such terms as this court deems fit, pending the hearing and termination of their Appeals. The Appeals have already been filed. The Applicant is opposed.

MR. LOGADIRU argued the Applications on behalf of all three Applicants. He basically repeated all the averments in the Affidavits of one **PAUL ONDUSO**, an Advocate seized of the matter on behalf of the Applicants herein, filed in all three applications.

The first material averment is that the Applicants have served a substantial part of their 3 years imprisonment sentence having completed one year. That the cause of justice will not be met if they are not released. The other averment is that their appeals which they have already filed raises substantial issues of law in all counts. The final important averment is that the Applicants are willing to comply with any terms and conditions the Court may impose for bond.

MISS NYAMOSI, learned counsel for the State opposed the Application. It was her submission that the Applicants had failed to demonstrate any exceptional circumstances. She further submitted that the Applicants had also not submitted that there was no overwhelming evidence that the learned trial magistrate relied on when convicting them. **MISS NYAMOSI** submitted that the learned trial magistrate in his judgment had given good reasons why he found the Appellants guilty in counts 3 and 4 of the charge. That the trial magistrate had not erred and therefore the Appeal had not merit.

It is now well settled that to succeed in an Application such as this one, an Applicant must demonstrate either, one, that the Appeal filed has an overwhelming chance of success or, two, that exceptional or unusual circumstances do exist which would persuade the Court to grant bail. There are other grounds that the Applicant may prove but these by themselves are not strong enough to warrant the Court to grant bail. These include the grounds argued by the learned counsel **MR. LOGADIRU**, that the Applicants have served a substantial part of their sentence. I shall consider each one. On the appeal having overwhelming chances of success, **MR. LOGADIRU** did not substantiate this claim. Neither has **MR. ONDUSO** done so in all three Supporting Affidavits sworn on behalf of each Applicant by himself. All that **MR. ONDUSO** averred in his Affidavits was that substantial issues of law would be raised in the Appeal. It is not the duty of the Court to examine the record of proceedings to try and fill in gaps for an Applicant.

I have however perused the proceedings. Having done so, I do not find that there are overwhelming chances of the appeal succeeding. The appeal may raise legal issues for determination. However there is nothing on the face of the proceedings that demonstrates that the appeal has overwhelming chances of success.

The Applicants did not annex a copy of their Petitions of Appeal. However, I went out of my way to call for and peruse them. Having done so, I find that they do not change the position already arrived at. The Applicants did not attempt to demonstrate that the Appeal may succeed as is their duty to do. The record of the proceedings and their Petitions of Appeal as filed did not assist them either.

I also considered the other grounds raised. The Applicants advocate submitted that the Applicants have served a substantial part of their sentence and that that entitles them to be granted bail. The correct manner of addressing this issue is to consider it against the possibility of the appeal succeeding. Since the appeal has no overwhelming chances of success, it would be wrong to release the Applicants on bond just because they have served part of the sentence.

Besides, I do not agree that the Applicants have served a substantial part of the sentence. They have served less than 11 months of the 3 years facing them. That cannot be described as substantial by any standards.

I am also aware of the dates available for single judges' appeals such as these ones. The Applicants will be able to get dates in the next one or two sessions of the High Court. That is not long from now. The upshot of these Applications is that the same fail. The Applicants are therefore dismissed accordingly.

Dated at Nairobi this 6th day of June 2005

LESIIT

J. JUDGE