



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
CRIMINAL APPLICATION NO. 926 OF 2002

COL JOSEPH NAMBASI LUKHOBA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

The applicant herein was convicted by the court martial of several criminal charges and sentenced to four (4) years imprisonment. Soon thereafter, he lodged an appeal against both the conviction and sentence and there is now before me an application for bail pending the hearing of the said appeal.

The application being for bail after conviction faces the usual difficulty to establish exceptional circumstances. It is freely accepted that the onus is upon the applicant to show exceptional circumstances. A dimension that has now taken root is that, the applicant has the duty to demonstrate that the pending appeal has overwhelming chances of being successful. [see Somo -v- Republic (1972) E.A. 476.].

Before I address the merits of this application, I deem it necessary to put to rest an issue that has been raised by the learned counsel for the respondent. This related to the competence of the application itself in view of the provisions of the Armed forces Act Cap 114 Laws of Kenya, in view of section 86 of the Constitution which would appear to deny the applicant the relief sought.

The learned counsel for the respondent cited Misc. Appn. No. 363 of 1998 Lt Col. J.K. Gatobu & Another –v- Chief of General Staff and Commander of Kenya Army and MISC APPN. No. 1326 of 1999. Cpl Clyde Manuni –v- the Chief of General Staff and Others. This court had occasion to deal with this issue in this same application when the then learned counsel for the Respondent raised a preliminary objection.

In my ruling delivered and dated 7th November 2002, I dismissed the objection for reasons contained therein and do not intend to reiterate the same herein. Suffice is to say in passing that, even the two cited cases are distinguishable from the present and, in any case, they are not binding on me.

The applicant has taken the court through the available proceedings, that have been presented by the respondent. He has in the process pointed out the shortcomings that show, he says, his appeal has high chances of success. I have related these to his petition of appeal on record.

I must observe, with respect, that the respondent has not adequately or at all, provided answers in law, that would contradict the submission by the applicant.

Be that as it may, bearing in mind that the appeal is yet to be heard, it may be prejudicial to both parties, that is, the applicant and the respondent, to delve any deeper into the contentious issues. That notwithstanding, some salient points ought to be brought to light to justify the orders that may be made hereinafter.

There is the issue of the defective Convening Order which may not have been made in accordance of the mandatory provisions of the Armed Forces Act aforesaid. The other matters relate to uncorroborated evidence adduced by the several prosecution witnesses.

There was what would appear to be deliberate destruction of evidence which could hardly be attributed to the applicant, casual handling of massive funds, and apparent lack of internal audit. I can only say there is more than meets the eye in the entire case.

Another officer testified that he saw the applicant write and sign some cheques. In his summing up, the Judge Advocate said, if that were true, that was direct evidence and does not need to be corroborated by expert evidence, in this case that of a document examiner. The applicant having denied the offences, the burden of proof rested upon the prosecution to prove the case beyond any reasonable doubt.

The summing up aforesaid may have related to only one or a few of the charges. Whatever the case, it was a grave misdirection which may have resulted in some miscarriage of justice.

The foregoing being the case, justice dictates that bail be granted. I order that the applicant may be released on bail pending the hearing of his appeal upon the following terms:

- (a) he deposits his passport with the Registrar of this court.
- (b) upon executing his own bond of shillings one million (Kshs)
- (c) upon one surety of one million shillings or
- (d) Two sureties of Kshs. 500,000/- each. Orders accordingly.

Dated and delivered at Nairobi this 26th day of November 2002.

**A. MBOGHOLI MSAGHA**

**JUDGE**