



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPLICATION NO.245 OF 2001

(In the matter of an intended appeal)
-Between-

BANAMI GAGLIANDI ERCOLANI..... APPLICANT

VERSUS

REPUBLIC RESPONDENT

RULING

The application before me is a Chamber Summons dated 2nd April, 2001 filed by R.M. Mutiso & Co., Advocates for NABAMI GAGLIARDI ERCOLANI (the applicant), seeking an order that the applicant be admitted to bail pending appeal.

There is an omission to cite the statutory provisions under which this application is brought. In exercise of my inherent powers, I shall invoke the provisions of section 357(1) of the Criminal Procedure Code and deem this application to have been filed under this section, which provides:-

“After the entering of an appeal by a person entitled to appeal the High Court, or the subordinate Court which convicted or sentenced that person, may order that he be released on bail”

Initially this application was supported by the affidavit of a man known as GAGLIARDI ERCOLANI GIACONO, who claimed to be the applicant’s husband. Mr. Mutiso has however now filed, and relies substantially on, an affidavit of the applicant herself. It was necessary to have the applicant’s affidavit on record because of her personal averment that she is not conversant with the English and Kiswahili languages, which are the official languages of the Court. For it is provided under section 198(4) of the Criminal Procedure Code.

“S.198 (4) The language of the High Court shall be English, and the language of a subordinate Court shall be English or Swahili”

There is, however, provision for interpretation of evidence to accused or his advocate under section 198(1) (2) and (3) of the Criminal Procedure Code which read: S.198

1 Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open Court in a language which he understands.

2. If he appears by advocate and the evidence is given in a language other than English

and not understood by the advocate, it shall be interpreted to the advocate in English.

3. When documents are put in for the purpose of formal proof it shall be in the discretion of the Court to interpret as much thereof as appears necessary”

The applicant has deponed to in her supporting affidavit that she is a Congolese from Democratic Republic of Congo, conversant with Lingala and French Languages only, that she is not very conversant in the Kiswahili/English languages. Consequently her plea of guilty entered by her on the 16th March, 2001 was not unequivocal and the learned Magistrate had erred in taking and accepting a plea which was equivocal, a matter which she has raised in her appeal against conviction and sentence, being High Court Criminal Appeal No.445 of 2001.

The applicant is simply saying that the taking of her plea was faulty because it was taken in a language she did not understand very well and therefore she should be admitted to bail pending the hearing and determination of her appeal.

The applicant was arrested on the 15th March, 2001 and was charged in the Senior Principal Magistrate's Court, Kibera, on the 16th March, 2001 in Criminal Case No.1673 of 2001 with the offence of obtaining money by false pretences contrary to section 313 of the Penal code in which the particulars were that: on the 26th January, 2000 at Kirichwa flats in Nairobi, jointly with another not before court, with intent to defraud obtained 3000 US dollars from Jackline Mujawayesu by pretending that she was in a position to secure a resettlement visa abroad, a fact she knew to be false or untrue.

The record of the proceedings of 16th March 2001 show that the applicant appeared before Mrs W. Karanja (Senior Principal Magistrate), the Court prosecutor was IP Kemboi and Mr. Muia was the Court Clerk who was doing the interpretation into English/Kiswahili. The substance of the charge and every element thereof was stated by the Court to the applicant who, being asked whether she admits or denies the truth of the charge, replied: ***“It is true. I obtained the money from her by false pretence”***. The Learned Senior Principal Magistrate then entered a plea of guilty, the prosecutor stated the facts in support of the charge, those facts were put to the applicant who accepted them as true.

Pausing here for a while, the learned Senior Principal Magistrate cannot be faulted in the manner she recorded the proceedings before her and in the steps she took in the recording of the applicant's plea up to that stage. She did ensure that there was an interpreter who was doing the interpretation of the proceedings in English/Kiswahili to the applicant. The record does not show that the applicant raised any complaint that she was not following those proceedings. Indeed Mr. Mutiso conceded before me that the applicant does speak English and Swahili but not very well. This was not told to the Senior Principal Magistrate.

I am satisfied that the applicant understood the nature of the charge and the language in which the court proceedings were conducted.

It follows that, up to the stage when the applicant accepted as true the facts stated by the prosecution, the Learned Senior Principal Magistrate's manner of recording the proceedings before her and the steps taken in recording the plea of guilty from the applicant conformed with the already established legal guidelines on the manner of recording of a plea of guilty and the steps to be taken thereon namely:- that the charge and all the essential ingredients of the offence are to be explained to an accused person in his language or in a language which he understands; that the accused person's own words are to be recorded and if they are an admission, a plea of guilty is then to be recorded; that the prosecution is then to state the facts in support of the charge and the accused must be given an opportunity to dispute or to explain those facts or to add any relevant facts. See, KATO V. REPUBLIC 1971 E.A 543, ADAN V REPUBLIC 1973 E.A. 445 AND LEBIRINGIN V.R. 1974 E.A. 103

The most important step to be taken by a trial Court after an accused has accepted as true the facts stated by the prosecution, is to record a conviction for the offence the accused is charged. This is a Mandatory Statutory requirement under section 207(2) of the Criminal Procedure Code which reads:-

“If the accused person admits the truth of the charge his admission shall be recorded as nearly as possible in the words used by him AND THE COURT SHALL CONVICT HIM and pass sentence upon or make an order against him unless there appears to it sufficient cause to the contrary”

The sole purpose of a criminal trial is to determine the guilt or innocence of an accused person. If guilt is admitted by an accused person or guilt proved by the prosecution on the required standard, beyond reasonable doubt, the law demands that a conviction must be recorded. On the other hand, where guilt of an accused has not been established, the law also demands an order of acquittal must be recorded unless there is statutory provision not to record it.

This is further clearly brought out in section 215 of the Criminal Procedure Code which reads:-

“215. The court, having heard both the complainant and the accused and their witnesses and evidence, shall either convict the accused and pass sentence upon or make an order against him according to law, or shall acquit him”

It is true that by virtue of the Statute Law (Miscellaneous Amendments) Act 1974 a new proviso was added to section 207(2) of the Criminal Procedure Code requiring the complainant (through the prosecution) to outline to the Court facts upon which the charge is founded and to do so after conviction but before sentence. The practice which has now assumed a force of law, as outlined in ADAN V.R. 1974 E.A. 445 (supra) is to outline the facts upon which the charge is founded before a conviction is recorded.

In the case of LUSITI V.R. {1977} K.L.R. 143 at page 144-145, SACHDEVA J. (as he then was) had this to say of this proviso-

“However, in our view this proviso does not lessen the need to ensure that an accused person wishes to plea guilty unequivocally. On the contrary, it enhances the necessity of being certain that an accused person wishes to admit without any qualifications each and every essential ingredient of the charge, especially if he is not asked to admit or deny the facts outlined by the prosecutor”

So what happened in the present case before me? After the applicant had accepted as true the facts stated by the prosecutor, the Learned Senior Principal Magistrate omitted to record a conviction and proceeded to receive mitigating facts from the applicant and to pass sentence. I have confirmed this to be the position from perusing the Learned Senior Principal Magistrate’s original handwritten proceedings. No conviction was recorded against the applicant for the offence which she was charged with and which she pleaded guilty to. This omission was fatal and is incurable by section 382 of the Criminal Procedure Code.

The Principle to be applied in an application for bail pending appeal under section 356 and section 357 of the Criminal Procedure Code is that bail pending appeal should be granted for exceptional and unusual reasons, neither the complexity of the case nor the good character of an applicant or an alleged hardship to his dependants justifies the grant of bail. See RAGHBIR SINGH LAMBA V.R. 1958 E.A.337.

It must be shown that there are overwhelming chances of the intended appeal succeeding. In this case, chances of the intended appeal succeeding are overwhelming. However, where there is a like-hood of an applicant absconding bail pending appeal will be denied. See ABDULLAHI V.R. 1971 E.A.346. I have given the facts of this case serious consideration. The Criminal Proceedings before the Learned Senior Principal Magistrate giving rise to this application are fatally defective for lack of conviction. There is likely to be an application for retrial of the applicant and this court will give the Director of Public Prosecutions time to reconsider this course of action.

The applicant is a Congolese, from the Democratic Republic of Congo. Her husband is also foreigner. If the applicant is admitted to bail pending the hearing and determination of her appeal, which

invariably will lead to the annulment of the Criminal Proceedings in Cr. Case No.1673 of 2001 Kibera, and result in a re-trial, there is a like-hood that the applicant will abscond. I will therefore not admit the applicant with bail pending appeal.

I will however, make the following orders:-

1. This application for bail pending appeal is hereby dismissed.
2. High Court Criminal Appeal No.445 of 2001 be placed before a Judge on 30/4/2001 for admission and hearing.

Orders accordingly.

Dated and delivered at Nairobi this 27th day of April, 2001

A.G.A. ETYANG

JUDGE