



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION

CORAM: MUMBI NGUGI J

ACEC MISC. NO E005 OF 2021

CONCELIA AOKO ONDIEKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an application for bail pending appeal from the conviction and sentence in Chief Magistrates Anti-Corruption Court at Nairobi Anti-Corruption Case No. 11 of 2010 (Hon. L.N Mugambi (CM) dated 11th February 2021)

RULING

1. The applicant has filed two applications dated 16th February and 23rd March 2021 respectively. In the first application, she seeks to be released on bail pending appeal. The application is expressed to be lodged under section 357 of the Criminal Procedure Code (CPC) and all other enabling laws. The applicant states in the grounds in support of the application that she was convicted and sentenced to a total of 42 months in prison without the option of a fine in Anti-Corruption Case No. 11 of 2010.
2. She was dissatisfied with the judgment and sentence and has lodged an appeal against the entirety of the judgment and sentence vide High Court Criminal Appeal No. E001 of 2021. Her appeal has overwhelming chances of success as it is founded on substantial evidentiary lapses ignored by the trial court as well as the trial court's erroneous application of sections 21 and 331(1) of the Penal Code as well as section 200 (3) of the CPC. She further states that the trial court failed to consider her defence and thereby shifted the burden of proof to her.
3. The applicant further states that in its judgment, the trial court unusually advanced the position held by the prosecution thereby constituting itself as a witness for the prosecution. She contends that there is a high probability that the appeal will be rendered nugatory if successful given the time it will take to hear the appeal and the nature of the sentence. She is aged and has underlying medical conditions, including diabetes and hypertension, which could exacerbate (sic) if she continues to remain in prison especially given the prevailing Covid-19 pandemic. She is a widow and the sole provider for two school-going children whose livelihood would be seriously undermined if she continues to remain in prison during the pendency of her appeal. She has always attended court when required and will always continue to do so if released on bail pending appeal.
4. In her second application dated and filed on 23rd March 2021, the applicant seeks orders for her release on bail on medical grounds pending the hearing and determination of her application dated 16th February 2021 and her appeal. In addition to the grounds set out in her first application, she states in the grounds in support of this application that she is currently incarcerated at Lang'ata Women Prison, where she has contracted COVID 19. Her life is now in mortal danger, hence her plea to be admitted to bail on medical grounds so she can get proper medical attention.
5. Both applications, which were canvassed on 24th March 2021, are supported by affidavits sworn by the applicant and her Counsel, Mr. Mark Omuga. The affidavits are essentially in the same terms save that Mr. Omuga deposes on the basis of information from the applicant.
6. The depositions by the applicant and her Counsel are that the applicant was charged with the offences of false accounting by a public officer contrary to section 331(1) as read with section 331(2) of the Penal Code and fraudulent acquisition of public property contrary to section 45(1) as read with section 48 of the Anti-Corruption and Economic Crimes Act. She was convicted on both counts and sentenced to 42 months' imprisonment to run consecutively. She was not given the option of a fine. She was aggrieved by her conviction and sentence and has filed an appeal against both conviction and sentence. Her appeal has overwhelming chances of success as it is founded on substantial evidentiary lapses as well as erroneous application of sections 21, 200(3) and 331(1) of the Penal Code.
7. The applicant contends that she is apprehensive that if she is not granted bail, her appeal, if successful, may be rendered nugatory as she

will have served most of her sentence by the time the appeal is heard and determined. She further contends that she is a widow and the sole provider for her two school-going children whose livelihood continues to be compromised if she remains in prison during the pendency of her appeal. She suffers underlying medical conditions, namely diabetes and hypertension, which require that she sees a specialist and follows a strict diet, which facilities are not readily available at the prison. She has always attended court when required and will continue to do so if released on bail pending appeal. The applicant refers in her affidavit to a medical report marked as “CAO-1”, but the said medical report is not annexed to the affidavit.

8. In the affidavit in support of the application dated 23rd March 2021, Mr. Omuga avers that upon visiting the applicant at the Lang’ata Prison where she is incarcerated, he had been informed by the Prison Warden that the applicant had contracted COVID 19 and was in isolation. Given that the applicant suffers from chronic illnesses including diabetes mellitus and hypertension which usually compromise immunity and exposes patients to fatal attacks by COVID 19 infections, he was extremely worried about her health condition in jail as she has always been on a special diet and medication to manage her condition. He annexes to his affidavit as proof of the applicant’s underlying medical conditions a copy of the medical report which had been referred to in the affidavit sworn in support of the application dated 16th February 2021. The report is dated 29th January 2021 and is signed by a Dr. E.R.J Anam.

9. The applicant submits that her applications raise two issues for determination. The first is whether her appeal has overwhelming chances of success, while the second is whether there are exceptional circumstances to warrant the grant of the prayers that she seeks.

10. Regarding the first issue, the applicant cites the case of **Pauline Ruguru Kithumbu v Republic (2019) eKLR** in which the court held that:

“The main criteria is that there is no difference between overwhelming chances of success and a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed and the proper approach is the consideration of the particular circumstances and weight and relevance of the points to be argued.”

11. She submits that in determining whether her appeal has overwhelming chances of success, the court should consider whether the petition of appeal outlines a set of circumstances which disclose substantial merit. She relies on the decision in **Jivraj Shah vs Republic (1986) KLR 605** for the submission that substantial merit is disclosed if it appears *prima facie* that the appeal is likely to succeed on account of some substantial point of law to be argued. This, she contends, is disclosed in that the trial court failed to appreciate that the doctrine of common intention as envisaged in section 21 of the Penal Code was not established by the prosecution, yet in the charge sheet, count 1 was a joint charge.

12. The applicant cites the case of **John Ouma Awino v Republic (2014) eKLR** in which the Court of Appeal provided guidance in analysis of joint charges. Her submission is that the court had held that the prosecution must prove that there was a pre-arranged plan by two or more parties, and that common intention must not be too readily applied when there is no direct evidence of such common intention. She contends that the trial court misdirected itself on the question of common intention, noting that in its judgment, the court paid no regard to whether there was common intention between the 1st and 2nd accused persons. She submits further that the trial court made no reference or analysis in the manner outlined by the Court of Appeal in **John Ouma Awino vs Republic** (supra).

13. The second argument advanced by the applicant is that the trial court misdirected itself in application of section 331 of the Penal Code. She submits that section 331(1) provides two categories of offences to be punished, namely a false return of money or property received or entrusted to one’s care or a false return of money or property under one’s control. The applicant contends that the trial court paid no regard to the distinction drawn under section 331 and convicted her under section 331(2) when the evidence adduced was in regard to section 331(1).

14. The applicant submits, thirdly, that the trial court convicted and sentenced her on the basis of evidence adduced against her co-accused. She invites the court to look at the judgment of the trial court with regard to four exhibits which she submits were adduced against the appellant’s co-accused.

15. Regarding the existence of exceptional circumstances to warrant her release on bail pending appeal, the applicant relies on the case of **Republic vs Kanji (1946) 22 KLR** in which De Lestang Ag. J observed that ***“a factor which may of itself not constitute an exceptional circumstance may become exceptional or unusual when considered together with other factors.”*** She further places reliance on the case of **Somo v R (1972) EA 476** where it was held that:

“...the single fact of having been two identical applications with one allowed and the other being refused was, of itself, an unusual and exceptional circumstance”.

16. The applicant notes that the trial court granted the option of a fine to the 2nd accused while denying her benefit of such an option under similar circumstances on the basis that she was a repeat offender. The applicant wonders whether one can be considered a repeat offender when the previous conviction occurred in the same course of events and the same set of facts as the current impugned conviction. She poses the question whether it can be said that she committed an offence the second time if the prosecution embarked on a piecemeal prosecution of offences based on the same set of facts, with the trial challenged in this application having begun earlier than the trial that resulted in the former conviction. It is her submission that the trial court erred in treating her case differently from that of the 2nd accused on this basis, and in her view, such treatment constitutes an exceptional circumstance.

17. The applicant submits that her second application is based on the affidavit evidence of her Advocate that she has contracted Covid 19 in prison. It is submitted that she is suffering from previous medical conditions as indicated in the medical report placed before the court. She asks the court to take judicial notice of the prevailing pandemic as an unusual circumstance as well as the risk that it poses to aged persons such as herself with underlying medical conditions.

18. In opposing the two applications, the respondent filed grounds of opposition dated 23rd February 2021 in which it argues, first, that the application lacks merit as the appeal does not have overwhelming chances of success since the prosecution proved its case beyond reasonable doubt. The DPP argues, secondly, that the applicant has not demonstrated the existence of unusual or exceptional circumstances on the basis of which the court can fairly conclude that it is in the interests of justice to grant bail pending appeal.

19. The DPP submits that the appeal is not arguable as the applicant was tried, convicted and is serving a lawful sentence. The trial court had made a detailed analysis of the evidence adduced by the prosecution and the defence before making a finding that the applicant and her co-accused were guilty.

20. With regard to the challenge to the conviction on the basis that the trial court misdirected itself on the doctrine of common intention in that it failed to refer to it in its analysis of the evidence, the respondent submits that from the entire evidence on record one can make an inference that there was indeed common intention between the applicant and her co-accused. It is the DPP's submission that the various principles quoted in **John Ouma Awino & Another v Republic** (supra) which defines what common intention is, should guide the court. Further, that the trial court elaborately analysed the evidence on common intention even though there was no reference to it.

21. Regarding the applicant's submissions relating to section 331(1) and 331(2), the respondent submits that given the detailed analysis of the ingredients of the offence by the trial court, there is no omissions by the trial court in arriving at the conclusion that the applicant committed the offence as charged.

22. To the applicant's contention that her ill health was an exceptional circumstances entitling her to bail pending appeal, the respondent relied on the case of **Salesio Karanja v Republic (2019) eKLR** and **Dominic Karanja v Republic (1986)eKLR** in which the court held that ill health is not an exceptional and unusual circumstance to warrant the grant of bail. The respondent further notes that the applicant has only attached a report dated 29th January 2021 from a private doctor as opposed to a prison doctor. She had not demonstrated any lapses by doctors at the welfare department of the prison who could refer her to Kenyatta National Hospital. The applicant did not therefore, in the respondent's view, qualify for release on bail, and her application should be dismissed.

Analysis and Determination

23. I have considered the two applications, the affidavits in support and the submissions of the parties from which two issues arise for determination. The first is whether the appeal has overwhelming chances of success while the second is whether the applicant has demonstrated that there are unusual or exceptional circumstances to warrant the grant of bail pending appeal.

24. The applications have been lodged under section 357(1) of the Criminal Procedure Code which provides as follows:

“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 with or without sureties, or, if that person is not released on bail, shall at his request order that the execution of the sentence or order appealed against shall be suspended pending the hearing of his appeal.”

25. The grant of bail pending appeal is purely discretionary. The discretion of the court in this regard is exercised only in exceptional circumstances, bearing in mind that there is a conviction in place and the applicant has lost the constitutional presumption of innocence. In **Chimambhai v Republic 1971 EA 343**, the court held that:

“The case of an appellant under sentence of imprisonment seeking bond lacks one of the strongest elements normally available to an accused person seeking bail before trial, namely, the presumption of innocence, but nevertheless the law of today frankly recognizes, to an extent at one time unknown, the possibility of the conviction being erroneous or the punishment excessive, a recognition which is implicit in the legislation creating the right of appeal in criminal cases...”

26. This position was reiterated in the case of **Joshua Kiarie Njuguna v Republic [2021] eKLR**, in which the court quoted the case of **Masrani vs. R [1960] EA 321** to the effect that:

“Different principles must apply after conviction. The accused person has then become a convicted person and the sentence starts to run from the date of his conviction.”

27. In **Francis Kamote Mutua v Republic (1988) eKLR**, the Court of Appeal stated that:

“It must be remembered that a person has been convicted by a properly constituted Court, and is undergoing punishment, because of that conviction, which stands until set aside on appeal. It is not wise to intervene either from the point of view of the welfare of the Appellant or the State, unless there is a real reason why the Court should hold that he should not be deprived of his liberty. The best test of that consideration is whether the Appellant can show an overwhelming chance of establishing his right to be set at liberty. If he does not do so, the law should take its ordinary course.”

28. Similarly, in its decision in **Charles Owanga Aluoch v Director of Public Prosecutions [2015] eKLR**, the court held that:

“The right to bail is provided under Article 49(1) of the Constitution but is at the discretion of the court, and is not absolute. Bail is a constitutional right where one is awaiting trial. After conviction that right is at the court's discretion and upon considering the circumstances of the application. The courts have over the years formulated several principles and guidelines upon which

bail pending appeal is anchored. In the case of Jivraji Shah vs. R [1966] KLR 605, the principle considerations for granting bail pending appeal were stated as follows:

1. Existence of exceptional or unusual circumstances upon which the court can fairly conclude that it is in the interest of justice to grant bail.

2. It appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of a substantial point of law to be argued and that the sentence or substantial part of it will have been served by the time the appeal is heard, then, a condition of granting bail will exist.

Main criteria is that there is no difference between overwhelming chances of success and set of circumstances which disclose substantial merit in the appeal – being allowed, the particular circumstances and weight and relevance of the points to be argued.”

29. Finally, in his decision in **Joshua Kiarie Njuguna v Republic (supra)** Odunga J summarised the principles to be considered in granting bail pending appeal as follows:

“It is therefore clear that a different test from that applied in bail pending trial is applied in bail pending appeal. When considering an application for bail pending appeal, the Court has discretion in the matter which must be exercised judicially taking into consideration various factors as follows:

a) Whether the appeal has overwhelming chances of success. See *Ademba vs. Republic [1983] KLR 442, Somo vs. R [1972] EA 476, Mutua vs. R [1988] KLR 497;*

b) There are exceptional or unusual circumstances to warrant the Court’s exercise of its discretion. See *Raghibir Singh Lamba vs. R [1958] EA 37; Jivraj Shah vs. R [1986] eKLR; Somo vs. R (supra); Mutua vs. R (supra);*

c) There is a high probability of the sentence being served before the appeal is heard. See *Chimabhai vs. R [1971] EA 343.”*

30. With the principles that emerge from the cases summarized above in mind, I turn to consider whether the applicant in this matter merits the grant of bail pending appeal.

31. In her petition of appeal dated 16th February 2021, the applicant lists 10 grounds of appeal. The main grounds of appeal are that the trial court failed to appreciate that the doctrine of common intention as envisaged in section 21 of the Penal Code was not established. It is argued on her behalf that the trial court, in its judgment, did not make any reference at all to common intention or its corollary in its analysis of the evidence adduced vis-à-vis the particulars of count I of the charges against her. It had also failed to address the submissions made on this point on behalf of the applicant.

32. The applicant further challenges her conviction and sentence on the basis that the trial court failed to appreciate that the evidence adduced by the prosecution was at variance with the entirety of the particulars of the charges against her; that the court misapplied section 331 of the Penal Code; that it considered prosecution evidence against the 2nd accused as having been adduced against the applicant; and that it failed to consider the applicant’s defence.

33. In my view, the grounds of appeal summarised above, when considered against the judgment of the trial court, do not demonstrate an appeal with overwhelming chances of success. The grounds raised do not show, *prima facie*, that the appeal is likely to be successful on account of a substantial point of law to be argued. While the applicant in her first ground hinges her appeal and the present applications on the doctrine of common intention, I note that the applicant was charged with the offence of false accounting by a public officer, and that false returns and forgeries were attributed to her personally.

34. Without going into the merits of the appeal, I note that the evidence of the document examiner and the Investigating Officer (PW40 and PW41) was to the effect that the accused authored, signed and doctored myriad forged documents in an attempt to falsely account for misappropriated funds meant for an infrastructure needs assessment exercise. Other grounds of appeal are generalised grievances against the decision of the trial court, while the rest pertain to the sentence imposed on the applicant.

35. The applicant was charged with the offence of false accounting by an officer contrary to section 331 of the Penal Code. The penalty under the section is a fine not exceeding Kenya Shillings one million or to imprisonment for a term not exceeding ten years or to both. The applicant was sentenced to a term of imprisonment for 1 year on count 1 and 2½ years imprisonment on count 2, the sentences to run concurrently. It is not correct, as the applicant contends in her application, that the sentence was for 42 months’ imprisonment running consecutively. At this stage, I am not persuaded that the sentence was unlawful or excessive to warrant the grant of bail pending appeal.

36. I note further that the applicant argues that she was found not to be a first offender, and therefore not entitled to a fine, because she had been convicted of another offence arising from the same transaction as the case the subject of the present appeal. The case that the prosecution placed before the trial court in which the applicant had been convicted was Anti-Corruption Case No. 24 of 2011. The conviction was upheld on appeal in **Dorothy Ndia & another v Republic [2017] eKLR**. Whether the trial court was correct in considering that the applicant was not a first offender on account of this conviction does not, in my view, amount to a substantial point of law to be argued at the appeal that would warrant the grant of bail pending appeal. Indeed, taken in their totality, none of the grounds raised by the applicant demonstrate an appeal with an overwhelming probability of success that would warrant the grant of bail pending appeal.

37. The second issue raised by the applicant relates to her health. She avers in the affidavit filed in support of her first application that she

has serious medical conditions, while her advocate avers in support of the second application that she has contracted Covid 19 in prison and is in isolation. Mr. Omuga avers that he obtained this information from an unnamed prison warder. No evidence has been placed before the court relating to the applicant's medical condition other than the averments by her advocate and the medical report from a private practitioner dated 29th January 2021. No confirmation of the applicant's medical condition from the prison authorities or public medical facility has been placed before the court. I am not satisfied that there are exceptional circumstances on account of the applicant's health that justify the grant of bail pending appeal.

38. In any event, it has been consistently held in our courts that ill health is not a ground for grant of bail pending appeal, and that there are medical facilities in prison that can handle the medical needs of prisoners-see **Dominic Daniel Karanja v Republic** (supra).

39. The applicant has also argued that the appeal would be rendered nugatory as she would have served a substantial portion of her sentence by the time her appeal is heard and determined. This argument, however, is not borne out by the applicant's own experience and the practice before this court. The applicant's appeal in **Dorothy Ndia & another v Republic [2017] eKLR** was delivered on 23rd March 2017, within 6 months of her application in **Concelia Aoko Ondiek & another v Republic [2016] eKLR** dated 7th October 2016 in which she also sought bail pending appeal. The practice of this court is to expedite the hearing of all appeals pending before it.

40. The upshot of my findings above is that the applications dated 16th February and 23rd March 2021 are unmerited and are hereby dismissed.

Dated Signed and Delivered electronically this 14th day of April 2021

MUMBI NGUGI

JUDGE