



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. E070 OF 2021

SGT. ANDREW MUOKI MUTUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Appellant is a member of the Kenya Defence Forces, Unit DHQ CAU. Pursuant to the provisions of Section 133 (1) (b) of the Kenya Defence Forces Act, he was charged the offence of 'Committing a civil offence' in Isiolo Court Martial Case Number 3 of 2020. The specific offence was that of 'Obtaining money by false pretences contrary to Section 313 of the Penal Code.' The particulars of offence for all the 3 counts he was charged with all pointed to facts of obtaining money with the intention to defraud by falsely pretending that he was in a position to secure recruitment into the Kenya Defence Forces. He pleaded not guilty to all counts.

2. Following hearing of the case, the Appellant was convicted and sentenced to 2 years, 6 months and 2 years respectively for each of the counts. Being dissatisfied with the outcome of the Judgment, the Appellant intends to Appeal and has filed a Petition of Appeal dated 8th April 2021 against the said Judgment. He has also filed an application under certificated of urgency seeking the following orders: -

i) Spent

ii) THAT a Production Order be issued to the Officer in Charge Meru GK Prison to produce the Appellant/Applicant during the hearing of this Application and/or the Appeal.

iii) THAT the Appellant/Applicant be released on bail pending the hearing and determination of this Application.

iv) THAT the Appellant/Applicant be released on bail pending the hearing and determination of this Appeal.

v) THAT the execution of the sentences in the impugned Judgment be suspended pending the hearing and determination of this Application.

vi) THAT the execution of the sentences in the impugned Judgment be suspended pending the hearing and determination of this Appeal.

3. The Respondent has not filed any response to the Application.

Applicant's Submissions

4. The Applicant filed submissions dated 3rd May 2021. He urges that he has an arguable appeal with high chances of success. He submits that his appeal would be rendered nugatory if his application is not allowed as he shall have served a substantial part of the sentence by the time of determination of the appeal.

5. He submits that there is an exceptional and/or unusual circumstance in that as noted in his mitigation, he suffered a head injury while in service (which service he undertook diligently serving the country for the last 13 years) which injury caused him vertigo, a medical condition that has led to him suffering convulsions and fainting and that he also suffers from chronic ulcers and he thus requires medical attention.

6. He submits further that he is the sole breadwinner of his young family of five; his young wife Redemptor and 4 school going children aged 20, 11, 9 and 2 years old and that his first born is a university student and all of them solely depend on him for their well being and schooling.

7. He further submits that his appeal raises pertinent questions of fact and law as exhibited in the Petition of Appeal including that the Learned trial Magistrate erred in fact and law by: -

- a) Convicting the Appellant despite the Prosecution's failure to prove its case beyond reasonable doubt.
- b) Convicting the Appellant against the weight of unresolved contradictory testimonies of the Prosecution witnesses.
- c) Failing to follow the correct procedure for the taking of fresh plea when the charges were amended on the 2nd February 2020.
- d) Convicting the Appellant on the basis of inadmissible evidence.
- e) Failing to make an adverse inference against the Prosecution's failure to avail key witnesses when such failure was neither explained nor justified in the circumstances.
- f) Failing to consider the Appellant's defence and the fact that the same gave a plausible explanation against the charges.
- g) Sentencing the Appellant to a term of imprisonment that was manifestly too harsh in the circumstances.

8. He submits that when the charge sheet was amended, the Court did not follow the right procedure in plea taking; That the Court relied on inadmissible electronic evidence from PW5, PW6 and PW7 with respect to their affiliation to and expert evidence from Safaricom, Equity Bank and Co-operative Bank. He submits that the procedure adopted in admitting the computer print-outs by PW6 as evidence was contrary to the provisions of Section 106B of the Evidence Act. Relying on the case of *Peter Waiithiga Kabiru & 2 Others v Republic and County Assembly of Kisumu & 2 Others v Kisumu County Assembly Service Board & 6 Others*, he submits evidence that fails to comply with the requirement in Section 106 B of the Evidence Act is inadmissible. He submits that going by these authorities, the entire evidence making reference to Exhibits 5, 6, 10 and 14 are an illegality which must have the effect of rendering the entire proceedings a nullity and/or at least being excluded from the evidence meaning that there was no proof of the alleged transfer of money by any of the parties. He further submits that the Prosecution failed to avail key witness namely Joseph Wachira Migwi despite it being alleged that he was the first point of contact between the accused, PW1 and PW2; and Shukri Mohamed Kulow who allegedly sent the money to Nelson Mandela Kabwere (PW3) and who was to benefit therefrom.; and Stephen Kitonga who was the alleged link between PW3 and the said Shukri Mohamed Kulow. He submits that failure to call a key witness in this case must leave this Court with no choice but to make an adverse inference against the Prosecution in favour of the accused person. He relied on the case of *Bukenya & Others vs Uganda*. He also submits that his sentences were manifestly too harsh in the circumstances (conviction plus dismissal from service) noting that he had served the forces for 14 years and he had never had a disciplinary issue from his records.

The Principles

9. The principles to be considered in an application for bail pending appeal pursuant to the provisions of Section 356 and 357 of the Criminal Procedure Code were set out in *Jivraj Shah v. R* (1986) KLR 605 which considered earlier decisions of the Court and expounded on the factor of overwhelming chances of success and held as follows: -

“There is not a great deal of local authority on this matter and for our part such as we have seen and heard tends to support the view that the principal consideration is if there exist exceptional or unusual circumstances upon which this court can fairly conclude that it is in the interest of justice to grant bail. If it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of some substantial point of law to be urged, and that the sentence or a substantial part of it, will have been served by the time the appeal is heard, conditions for granting bail will exist. The decision in Somo v Republic (1972) EA 476 which was referred to by this court with approval in Criminal Application 5 No. NAI 14 of 1986, Daniel Dominic Karanja v Republic where the main criteria was stated to be the existence of overwhelming chances of success does not differ from a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed. The proper approach is the consideration of the particular circumstances and the weight and relevance of the points to be argued. It is almost self defeating to attempt to define phrases or to establish formulae.”

Whether the applicant's appeal has exceptional circumstances

10. The totality of the Appellant's contention that his appeal has high chances on both the conviction and also the sentence. With respect to the conviction, the key issues concern the purported failure to take fresh plea following amendment of the charge sheet, purported reliance on inadmissible evidence and failure to call key witnesses. This Court will on appeal look at all these matters and determine whether the alleged acts and/or omissions on the part of the trial Court resulted in a miscarriage of justice. This Court is mindful of the provisions of Section 382 of the Criminal Procedure Code which provides as follows: -

382. Finding or sentence when reversible by reason of error or omission in charge or other proceedings

Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

11. The above sets out the criteria of determining whether a finding or sentence imposed when there was an error, or an irregularity in the charge sheet or proceedings is worth disturbance on appeal. The test is on whether the said error and/or irregularity and/or omission occasioned the Appellant a failure of justice.

12. This Court finds that the questions raised by the Appellant in his Petition of Appeal are substantial questions of law which has the potential of overturning the outcome of the trial Court. Should this Court find for instance that the evidence which was adduced was inadmissible, and if it is the case that such evidence is what was used to secure the conviction, then the Court will be obliged to overturn the finding of the trial Court. The Court will also be under a duty to examine the nature of the purported amendments to the charge sheet and determine whether failure to exhaustively conduct the plea taking process again caused any miscarriage of justice to the Appellant.

13. This Court must however add that with respect to the failure to avail key witnesses, the Prosecution's case is different from the Defence Case and it is not for the Defence to determine what witnesses the Prosecution should call. Any loopholes that arise from the Prosecution's case would of course be to the advantage of the Defence. Were it that the Appellant argued that the failure to call these witnesses resulted in an omission to prove a necessary ingredient of the offence of obtaining money by false pretense, then the Court would find this to be a more plausible argument. This Court is minded that even in the absence of these supposed key witness, it could be that the elements of the offence were proven to the trial Court's satisfaction based on the evidence of the other key witnesses.

14. As regards the health of the Appellant, it is alleged that he suffers from vertigo, a medical condition that has led to him suffering convulsions and fainting and that he also suffers from chronic ulcers and he thus requires medical attention.

15. He submits further that he is the sole breadwinner of his young family of five; his young wife Redemptor and 4 school going children aged 20, 11, 9 and 2 years old and that his first born is a university student and all of them solely depend on him for their well being and schooling. This Court is not convinced that the fact that he is a sole breadwinner is a special circumstance to make this Court to grant bail. His conviction was merely a natural consequence of the proceedings in the trial Court and the same is reasonably expected to befall any accused person.

16. However for the reasons that the Appellant has an arguable appeal raising substantial points of law and going by the length of the sentence vis a vis the time it may take to dispose the Appeal, this Court finds that the application for bail is warranted.

Conclusion

17. The court finds that the Appeal raises certain substantial points of law to be urged on appeal, as to the admissibility of evidence, the procedure of plea taking following amendment of charges thereby warranting a grant of bail.

18. The Court also considers that against the sentence of 2 years, 6 months and 2 years, totaling 4 ½ years with remission, being an actual custody of three years **"the sentence or a substantial part of it, will have been served by the time the appeal is heard"** by this court.

19. With respect to the prayers for production order, the Applicant failed to submit on this issue. In any event, it follows that during hearing of any Appeal, the respective Appellant is ordinarily brought to Court to attend the same. This Court does not find any reason to grant the prayer.

Orders

20. Accordingly, for the reasons set out above, the Court makes the following orders:

i) The Appellant's application for bail pending appeal dated 9th April 2021 is hereby allowed in terms of prayer number iv) of the application.

ii) The Appellant is admitted to bail pending appeal upon terms that he executes a bond of Ksh.500,000/= with one (1) Surety for a similar amount.

Order accordingly.

DATED AND DELIVERED ON THIS 3RD DAY OF JUNE, 2021.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Obetto & Associates Advocates, Advocates for the Appellant.

Ms. Nandwa, Prosecution Counsel for the Respondent.