



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

MISCELLANEOUS APPLICATION NO.E11 OF 2021

CORNEL OTIENO ONYANGO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Application coming for consideration in this ruling is the one dated 16/3/2021 seeking bail pending appeal.
2. The Applicant was convicted on 15/2/2021 and fined Kshs.500,000 in default to serve two (2) years imprisonment to serve two for conspiracy to defraud contrary to section 317 of the Penal Code CAP 63 Laws of Kenya.
3. The Applicant was also fined a further Kshs. 500,000 in default to serve one (1) year imprisonment for cheating contrary to section 315 of the Penal Code CAP 63 Laws of Kenya.
4. The Application is supported by the grounds on the face of it and supported by the Affidavit of **GEORGE TAWO** dated 16/03/2021 in which it is deposed that the intended Appeal has high probability of success.
5. Further that the Applicant is apprehensive that is he is not granted bail his appeal may be rendered nugatory given that he would have served most of his sentence by the time the appeal is heard and determined.
6. It is also deposed in the supporting affidavit that the Applicant is the sole bread winner of his family and further that he suffers from diabetes and further that on 10/03/2021, he was diagnosed with a serious medical condition regaining urgent special procedure and he may be greatly jeopardized if he continues to remain in prison.
7. The Respondent opposed the Application and filed written submissions stating that the Applicant has not demonstrated that the appeal has high probability of success.
8. Further, the Respondent submitted that the sentence imposed on the Applicant is lenient as the sentence prescribed for both offences is three (3) years imprisonment each and further that the sentences are legal and as per the discretion of the court.
9. On the issue that the Applicant suffers a serious medical condition, the Respondent submitted that the Prisons in Kenya have provisions and facilities that can assist convicts whenever they suffer any health problems including chronic diseases while in prison.
10. The Respondent submitted that the Appellant violated bond terms during the trial in he failed to appear in court on 3/12/2018 and a warrant of arrest was issued. The warrant of arrest was extended and the same was issued against his surety on 18/1/2019 and also extended until 8/7/2019 when the Applicant was arrested and his bond was cancelled.
11. The Applicant's counsel filed written submissions on behalf of the Applicant in which he stated that the issues for determination in this Application are as follows;

(i) Whether there are exceptional or unusual circumstances upon which the court of appeal can fairly conclude that it is in the interest of justice to grant bail.

(ii) Whether the appeal has high chances of success.

(iii) If the appeal will be rendered nugatory taking into account the time the court will take to hear the appeal.

(iv) Whether the Applicant has met the conditions for grant of bail pending appeal.

12. It was further submitted on behalf of the Applicant that the amended memorandum of appeal filed herein demonstrates that the appeal has high chances of success as there are errors of law and fact apparent on the face of the record.

13. I have considered the submissions filed by both parties in this Application are as follows;

(i) Whether the appeal has high probability of success.

(ii) Whether the Applicant is a flight risk.

14. On the issue as to whether the appeal has high probability of success, I find that the Applicant has not demonstrated the same. The Applicant merely attached an amended Petition of appeal dated 8/3/2021 and submitted that the trial court relied on the testimony of PW1 who was not recalled after the charge sheet was amended.

15. In the case of **CHARLES OWANGA ALOUCH -VS- DIRECTOR OF PUBLIC PROSECUTIONS [2015] eKLR** it was 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."**

16. In applications for bail pending appeal the issues for determination are whether the appeal has overwhelming chances of success and whether there are exceptional circumstances warranting the release of the Appellant on bail pending appeal.

17. In **DOMINIC KARANJA -VS- REPUBLIC (1986) KLR 612**, the Court of Appeal stated that **"the most important issue was that if the appeal had such overwhelming chances of success, there is no justification for depriving the applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances. The previous good character of the applicant and the hardships if any facing his family were not exceptional or unusual factors. Ill health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners."**

18. On the issue as to whether the Applicant is a flight risk, I find that the Applicant did not refute the Respondent's submissions that he had previously violated bond terms, which resulted in his bond being cancelled. He was subsequently remanded in custody until the trial was concluded.

19. I find that the Applicant is a flight risk and he is not entitled to bail pending appeal.

20. The Application dated 16/3/2021 lacks in merit and the same is dismissed.

21. The case will be mentioned within fourteen (14) days for the record of appeal.

22. The Applicant to remain in custody.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 11TH DAY OF JUNE 2021.

A. N. ONGERI

JUDGE