

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

MISCELLANEOUS CRIMINAL APPLICATION NO. E051 OF 2021

(From Original Conviction and Sentence in Mumias PMCCRC No.

1206 of 2018, by Hon. TA Odera, Chief Magistrate, of 22nd March 2021)

SYLVERSTER WASHIALI NAMBWAYA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The applicant was convicted by Hon TA Odera, Chief Magistrate, on 22nd March 2021, on 7 counts of stealing by servant, forgery and uttering forged documents, contrary to sections 282, 350 and 353, respectively, of the Penal Code, Cap 63. Laws of Kenya, and was accordingly sentenced to fines or imprisonment for periods ranging between 6 and 12 months, running concurrently. He subsequently moved to the High Court in this cause for leave to appeal out of time and for bond pending appeal.

2. The plea for leave to file appeal out of time was not opposed by the respondent, and I granted it on 3rd May 2021. What remained for consideration was the plea to be admitted to bond or bail pending appeal. The applicant avers that his appeal raises substantial questions of law and fact, that the prison terms imposed were short and could be served out before his appeal is ahead and determined if he not released on bond, that he faithfully adhered to the bond terms during trial, would abide by bail terms if the application is granted, that he was not a flight risk and that his health was not so good.

3. The applicant was argued orally before me on 3rd May 2021.

4. Bail pending appeal is provided under section 357 of the Criminal Procedure Code, Cap 75, Laws of Kenya. It is undoubtedly a right that accrues to the appellant herein, and I need not reproduce the provision verbatim in this ruling.

5. It was stated, by the Court of Appeal, in *Mutua vs. R* (1988) KLR 497(platt, Apaloo JJA & Mesime Ag JA), that:

“It must be remembered that an applicant for bail has been convicted by a properly constituted court and is undergoing punishment because of that conviction which stands until it is set aside on appeal. It is not wise to set the applicant at liberty either from the point of view of his welfare or of the state unless there is real reason why the court should do so.”

6. A court faced with an application for bail pending appeal has to exercise discretion judicially, upon taking into account various factors, which include whether the appeal has overwhelming chances of success (see *Ademba vs. Republic* (1983) KLR 442 (*Potter, Kneller and Hancox JJA*), *Somo vs. R* (1972) EA 476 (Trevelyan J)and *Mutua vs. R* (supra), whether there exist exceptional or unusual circumstances to warrant the exercise of discretion of discretion in favour of the applicant (see *Raghibir Singh Lamba vs. R* (1958) EA 337(*Sprly AG J*), and whether there is a high probability of the sentence being served before the appeal is heard (see *Chimabhai vs. R* (1971) EA 343)(*Harris J*).

7. One of the principles set out above that the appellant anchors his application on is that the term of imprisonment imposed was fairly short, and he feared that he might serve it out before the appeal is heard and determined. He also pleads that he has fairly substantial appeal, and that his health was giving him challenges.

8. An applicant who is entitled to appeal is entitled to his day in court. I note that the custodial sentence imposed is fairly short, and it could be served out before the appeal is heard, and determined. I will exercise discretion in favour of the applicant, and allow the application. He is admitted to his own bond of Kshs. 2, 500, 000.00 with a surety of similar amount, or cash bail of Kshs. 1, 500, 000.00.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 18th DAY OF June 2021

W MUSYOKA

JUDGE