REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION- MILIMANI

COURT MARTIAL Appeal No. E001 Of 2021

(MISC.CRIMINAL APPLICATION NO. E122 OF 2021)

MAJOR ERASTUS HEZBON OTIENO (S/NO.19989).....APPLICANT/APPELLANT

VERSES

REPUBLIC.....RESPONDENT

RULING

1. The application herein having been canvassed on the 28th August, 2021, the Ruling was slated for delivery on the 27th day of September, 2021, since the court was proceeding on vacation from the 31st August, 2021 to 16th September, 2021 and there were other matters scheduled for judgment and rulings pending. On the 31st August, 2021 an application dated 27th August, 2021 was received by the court; where the court was asked to review the Ruling date and bring it forward in the interest of justice. The Application upon being placed before the Duty Judge was scheduled to be heard on 16th September, 2021. It was heard and accordingly allowed, hence the Ruling date being brought forward.

2. Major Erastus Hesbon Otieno, S/NO. 19989, the Appellant/Applicant, was arraigned before the Court Martial and charged with four counts;

3. Count 1- Committing a civil offence contrary to **section 133 (1)** of the **Kenya Defence Forces Act (KDFA**) (Conspiracy to defraud contrary to **Section 317 of the Penal Code**); where it was alleged that he conspired with others to defraud Jemos Quick Investments of a quantity of 500 Antilock Jam Pins worth Ksh.14,850,000/- and in the alternative, he was alleged to have conducted himself to the prejudice of good order and service discipline contrary to **section 121** of the **KDFA.**

4. Count 2- He was alleged to have been found in possession of a false contract for supply of Antilock Jam Pins hence the charge of conduct to the prejudice of good order and service discipline contrary to **Section 121** of the **KDFA.**

5. Count 3 - Committing a civil wrong contrary to **Section 133 (1) (b**) of the **KDFA** (Personation contrary to **section 382 (1)** as read together with **section 36** of the **Penal Code**) having allegedly presented himself as Major Were, and, in the alternative, having conducted himself to the prejudice of good order and service discipline contrary to **Section 121** of the **KDFA** following the alleged false representation to Mrs Gladys Maisiba and Miss Caroline Muthoni.

6. Count 4 - Conduct to the prejudice of good order and service discipline contrary to **Section 121** of the **KDFA 2012** by allegedly facilitating of Mrs. Gladys Maisiba and Miss Caroline Muthoni into Langata Barracks and hosting them at the officers' mess where the false contract was signed.

7. He was convicted on **Count 2**, and sentenced to serve one (1) year imprisonment; the alternative charge to **Count- 3** and **Count-4** and sentenced to two (2) and six (6) months imprisonment, respectively, sentences that were ordered to run concurrently.

8. Aggrieved by the decision of the court, he has lodged the appeal herein and seeks to be released on bail pending the appeal on grounds that having been sentenced to one-year imprisonment, if successful, the appeal will be rendered nugatory and having not met his family from the time he was detained will jeopardize his family.

9. The State/Respondent filed grounds of opposition where it was stated that the Applicant has not demonstrated that the appeal is arguable and with an overwhelming chance of success; exceptional circumstances to warrant grant of the relief sought; there is no right of appeal as

the presumption of innocence was lost by virtue of conviction; and as the record of appeal is ready a hearing date could be fixed on a priority basis.

10. It is stated that the appeal has a probability of success; it will be rendered nugatory if successful as he will have served most of the sentence; and having been denied bail by the Court Martial, he has been in custody since February, 2019.

11. It is urged by Mr. Were, learned counsel for the Applicant that the appeal is arguable considering that the person alleged to have been given the contract had no nexus with the company; the period of sentence does not require only custodial sentence, it could be remedied by other sentences. In this regard he relied on the case of ***Samuel Waruinge Wanjiku Vs Republic (2014) elkr*** *and* ***Peter Hinga Ngotho Vs Republic (2015)eklr.***

12. Mr. Kiragu, learned counsel for the State argued that the Court Martial process was meticulous, it analyzed issues before it and reached a justifiable conclusion hence there are no overwhelming chances of the appeal succeeding; no unusual circumstances have been demonstrated and the sentence meted out was very lenient. That the Appellant was not in custody for the better part of the proceedings.

13. I have duly considered the application, the affidavit in support thereof, grounds of opposition and rival submissions of both parties.

14. Although the Constitution provides for the right to be released on bail unless there are compelling reasons requiring incarceration of an accused person, where an individual has been taken through full trial, found guilty, convicted and sentenced accordingly, principles applicable are completely different. This court is seized of jurisdiction to release an Appellant on bail following an application in that respect pending disposal of the appeal, power that is discretional, therefore, the criteria set must be satisfied.

15. In the case of ***Jivraj Vs Republic (1986) KLR 605***, the Court of Appeal stated that:

> **"(1) The principal consideration in an application for bond pending appeal is the existence of exceptional or unusual circumstances upon which the Court of Appeal can fairly conclude that it is in the interest of justice to grant bail.**
>
> **(2) If it appears prima face from the totality of the circumstances that the appeal is likely to be successful on account of some 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, conditions for granting bail exists.**
>
> **(3) 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."**

16. In the instant application, the Applicant would therefore be required to demonstrate the presence of an overwhelming chance of the appeal succeeding; exceptional or unusual circumstances and the probability of the sentence being served before the appeal is heard and determined that warrant issuance of the order sought.

17. This court has been called upon to look at the Appellant's record in considering the application as he was not a flight risk and also the nature of the offence in relation to the sentence meted out. In the case of ***Mutua Vs Republic (1988) KRL 497***

The Court of Appeal stated 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."**

18. In the case of ***Dominic Karanja Vs Republic (1986) KRL 612*** the court held partly 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. A solemn assertion by an Applicant that he will not abscond if released, even if it is supported by sureties, is not sufficient ground for releasing a convicted person on bail pending appeal".**

19. In **Chimambhai Vs Republic (1971) EA 343** it was stated 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."**

20. The question to be considered would therefore be whether the appeal has overwhelming chances of succeeding. The argument raised by

the Applicant is that the period of sentence imposed may not necessarily call for a custodial sentence as it can be remedied by other sentences. This is a fact, but, the nature of the offence with regard to the interest of justice must be considered. Cumulatively, the Applicant is to serve one-year imprisonment. The record of appeal was ready by the time the application was filed which was followed by yet another application. It was simply a question of admitting the appeal and assigning it a hearing date, had this avenue been persued it would be question of considering the appeal. The issue of delay in disposing of the appeal should therefore not arise. On the issue of there being chances of the appeal succeeding, looking at the petition of the appeal, and the offences the applicant was convicted of, it hangs in the balance. Therefore, chances of the appeal succeeding can not be authoritatively stated to be overwhelming.

21. From the foregoing I find the application lacking merit.

Accordingly, the application is dismissed. However, the appeal should be first-tracked. The appeal shall be subjected to the administrative function of admission and a date given for hearing on a priority basis.

22. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY, THIS 20TH DAY OF SEPTEMBER, 2021

L. N. MUTENDE

JUDGE