



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARISSA**

**CRIMINAL APPEAL NO. 1 OF 2020**

**ABDIFATAH MOHAMED IBRAHIM.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The applicant was charged with obtaining by false pretence contrary to Section 313 of the Penal Code.
2. Particulars of the offence was that on diverse dates between February 2018 and February 2019 at Mandera East Sub-County within Mandera County, with intent to defraud, he obtained from Sheikh Mohamed Bale a sum of Kshs.1,271,778 by falsely pretending that he will help the said Sheikh Mohamed Bale's daughter who is disabled.
3. He pleaded not guilty and after full trial he was convicted and sentenced to serve 3 years imprisonment and also to refund Kshs.1, 271,778 to the complainant.
4. He was aggrieved by the aforesaid decision thus instituted appeal herein. He has now filed a Notice of Motion dated 4/2/2020 seeking to be released on bond pending appeal.
5. He relies on the grounds on the Notice of Motion;
  - (i) **The appellant has an appeal with high chances of success.**
  - (ii) **The learned Trial Magistrate erred in law and in fact in proceeding to sentence and convict the appellant based on evidence that had glaring contradiction, omissions and gaps.**
  - (iii) **The learned Trial Magistrate erred in both law and fact in disregarding the defence offered by the appellant hence shifting the burden of proof to the appellant.**
  - (iv) **The appellant is not a flight risk and undertakes to obey the terms of the bond should this court so grant.**
  - (v) **The cornerstone of the justice system is that no one will be punished without the benefit of due process including the right to exhaust the right of appeal. Incarceration before trial or pending hearing of an appeal cuts against this principle.**
  - (vi) **The appellant has a fixed abode and cooperated with the investigation and prosecutions throughout the trial.**
  - (vii) **The case is substantively debt recovery hence civil in nature.**
  - (viii) **It is in the interest of justice that the application is allowed.**
6. He swore an affidavit to support Notice of Motion on 4/2/2020 which reiterates the grounds listed above.
7. The prosecution only responded by stating that the threshold factors for grant of bail pending appeal have not been established.
8. **Section 357 of the Criminal Procedure Code** provides for admission to bail or suspension of sentence pending appeal. It states at sub section (1);

***“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.”***

9. The appellant has filed an appeal. I reiterate the words of the Court in **Gerald Macharia Githuka vs Republic Criminal Appeal No. 119 of 2004**, that;

***“The cornerstone of the justice system is that no one will be punished without the benefit of due process including the right to exhaust the right to appeal. Incarceration before trial or pending hearing of an appeal cuts against this principle...”***

10. This is the essence of the right to bail pending appeal where the applicant has fulfilled the requisite conditions, despite losing the presumption of innocence.

11. **Chimambhai vs Republic (No 2) [1971] E.A.343;**

***“The case of an appellant under sentence of imprisonment seeking bail 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. ....”*** (Emphasis added).

12. These words are in resonance with the Constitutional provision that an accused person has the right, if convicted, to appeal to, or apply for review by, a higher court as prescribed by law at article 50(2) (q).

13. The prosecution in opposing the application relied on the ground that the threshold for grant of bail pending appeal has not been established.

14. The granting of bail pending appeal is discretionary, depending on the circumstances of each case. That is why in other cases for instance Samuel **Macharia Njagi vs Republic [2013] eKLR**) the same High Court allowed a similar application following **Arvind Patel vs Uganda S.C Cr. Appeal No. 1 of 2003**.

15. I also draw guidance from this case where the Supreme Court of Uganda, Justice Oder, set out the circumstances under which bail pending appeal could be granted:

***1.The character of the offender***

***2. Whether the applicant is or not a first offender;***

***3.Whether the offence of which the applicant is convicted involved personal violence;***

***4.The appeal must not be frivolous and has reasonable chance of success;***

***5.The possibility of substantial delay in the determination of appeal and;***

***6.Whether the applicant complied with bail conditions granted before the applicant's conviction during the pendency of the appeal.***

16. The same court also stated that an applicant did not have to demonstrate all these considerations in order to be granted bail. A combination of two or more of the conditions would be sufficient.

17. The applicant has complied with the provisions of section 357(1) of the Criminal Procedure Code and has filed an appeal. If unable to pay the fine he may have served his full sentence of one-year imprisonment or a substantial part of the same by the time the appeal is determined.

18. I allow the application and order that;

***i) Applicant shall be released on bond pending appeal on condition that he refunds Kshs.1,271,778 to the complainant within 30 days.***

***ii) Upon payment of the above the applicant shall sign a personal bond of Kshs.50,000/-.***

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 16<sup>TH</sup> DAY OF APRIL, 2020.

.....

C. KARIUKI

**JUDGE**