



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 204 OF 2019**

**(CORAM: F. GIKONYO J.)**

**LAWRENCE GIKUNDA MWANDIKI.....APPELLANT**

**-versus-**

**REPUBLIC.....RESPONDENT**

**(Appeal against the conviction and sentence by Hon. E.M Ayuka (SRM) in NKUBU PMCCRC No. 648 of 2018)**

**JUDGMENT**

1. The Appellant was charged with the following five counts; Stealing contrary to section 268 (1) as read with Section 275 of the Penal Code; Obtaining registration by false pretences contrary to section 320 of the Penal Code; two counts of Forgery contrary to section 345 as read with section 349 of the Penal Code; and Uttering a false document contrary to section 355 of the penal code. The appellant was convicted on all five counts and handed a deterrence sentence of 3 years on each count save for count 2 where he was sentenced to serve one-year imprisonment with sentences to run concurrently without the option of a fine.

2. Being aggrieved by the aforesaid decision the applicant filed his petition of appeal on 11<sup>th</sup> November 2019 raising six grounds of appeal stated below: -

**(i) That the trial Magistrate erred in both law and fact by failing to provide the appellant herein adequate time and facility to prepare a defence as provided under article 50 of the constitution.**

**(ii) That the trial Magistrate erred in law and fact by denying he appellant adequate time and opportunity to seek alternative legal representation when the advocate he had retained failed to appear in court on the date of the hearing hence his inability to adequately cross-examine al the witnesses who adduced evidence on the said date.**

**(iii) That the trial magistrate erred in both law and fact by convicting the appellant when the case against him had not been proven beyond reasonable doubt.**

**(iv) The the trial magistrate erred in both law and fact by failing to find that he prosecution evidence was inconsistent and full of doubts, which ought to have been resolved in favour of the appellant.**

**(v) That the trial magistrate erred in both law and fact by failing to consider the evidence adduced by the appellant herein.**

**(vi) That the trial magistrate erred in both law and fact by failing to consider the appellants defence of alibi tendered.**

3. Simultaneously with the Petition, the applicant filed an application seeking to be released on bond or bail pending the hearing and determination of the appeal. The application was supported by the sworn affidavit of **Myron Mukuna Eshuchi**, the advocate in conduct of this matter. He averred that the appeal herein has high probability of success. That the appellant is apprehensive that if not granted bail his appeal may be rendered nugatory should he succeed given that he may have served most of his sentence by the time the appeal is heard and determined. That the appellant suffered from acidity and high blood pressure, medical condition that requires him to see a specialist twice a month in addition to special diet and the same facilities are not available at the prison hence his health will continue to deteriorate if he continues to be incarcerated.

4. On 20/11/2019 this Court directed the parties to canvass the application by way of written submissions. The applicant contended that during the trial he was denied the right to engage a new advocate and was equally denied the right to call witnesses in support his case. That this therefore curtailed his right to fair hearing therefore raising probable grounds of appeal which has high likelihood of success. In this regard he relied on the cited case of **Jivraj Shah v Republic 1986 KLR 605, Dennis Yobesh Ombogo & Anor V Replibc [2014] eKLR.**

The Respondent submitted that the applicant was afforded every opportunity in the course of the trial to adequately prepare and to be represented. That no evidence has been placed on record to show that he is suffering from high acidity and high blood pressure. The Respondent sought to be guided by the following authorities i.e. **Daniel Dominic Karanja (1986) ekr, R.K.T vs Republic (2017) ekr.**

### **Analysis and Determination**

5. Has the applicant herein satisfied the threshold for bail pending appeal? 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:**

6. In the case of **Jivraj Shah -vs- Republic [1986] KLR 605**, the Court of Appeal held:-

**“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 the court can fairly conclude that it is in the interests 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 an account of some substantial point of law to be urged, and the sentence or substantial part of it, will have been served by the time the appeal is heard, conditions for granting bail will exist.”**

7. Judicial precedent on this subject suggest that bail pending appeal will be granted; where the appeal has overwhelming chances of success; and or where there are exceptional circumstances; and or where there is possibility of serving the sentence before the appeal is heard. One or a combination of these conditions will justify release of the appellant on bail pending appeal.

8. In support of his claim that his appeal has overwhelming chances of success, the applicant placed preponderant weight on the ground that he was not allowed adequate time to hire an advocate for purposes of conducting his defence. On this claim, I will say just enough. The record show that the applicant herein was represented initially by Mr Mugambi, advocate who cross-examined Pw1-Pw3. He later on represented himself and cross-examined Pw4 to Pw7. He testified and called one more witness in support of his defence. He later on filed submissions in support of his defence. He would later be represented by Mr. Mukuna during his defence. At no time did the appellant inform the trial court of his need to be represented by counsel and or call further witnesses.

9. I note that the applicant also relied on his medical condition in seeking release on bail. But, he has not provided medical records to support his averments on his medical ailments. There is nothing which show that Prison establishment cannot be able to take care of his conditions. This ground requires cogent and specific proof to be provided by the applicant on his ailment and that it is of a nature that the prison establishment cannot provide treatment or support health care.

10. I note also that arguments on legality of conviction were made; but these are best canvassed during the hearing of the appeal. I will, therefore, not discuss them in great detail for purposes of the application. Notably, the record of the trial Court show that the trial Court convicted the Applicant on the basis of evidence adduced by the prosecution. Given what I have stated, the less I say about this issue the better.

11. In the upshot, all pointers are in favour of refusing the application. No proper case was made out for this court to exercise discretion in favour of the Applicant. Accordingly, I dismiss the Applicant’s Notice of Motion dated 11th November 2019.

12. However, as at the time of writing this ruling, the DR had prepared the record of appeal. I, therefore, order the DR to transmit without delay, the record of appeal through appropriate means given the COVID 19 situation to the counsel for the appellant and the state counsel. The DR will also, in light of the COVID 19 situation, assign the appeal a date for directions on the hearing of the appeal. It is so ordered.

**Dated and delivered at Milimani Nairobi on this 21<sup>ST</sup> day of APRIL 2020**

**F. GIKONYO**

**JUDGE**

**Representation:**

**1. Eshuchi & Associates Advocates for the Appellant/Applicant**

**2. Director of Public Prosecution-Meru, for the Respondent**

**[dppmerucounty@yahoo.com](mailto:dppmerucounty@yahoo.com)**