



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NUMBER 256 OF 2018**

**BENARD OMONDI NGODE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***CONSOLIDATED WITH***

**CRIMINAL APPEAL NO. 255 OF 2018**

**CHARLES OTIENO MEMBO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

**Background.**

1. Both Applicants were jointly charged in Milimani Cr. Case No. 839 of 2018 alongside another. Benard Omondi Ngode (hereinafter the 1<sup>st</sup> Applicant) was the 3<sup>rd</sup> Accused whereas Charles Otieno Membo (2<sup>nd</sup> Applicant) was the 1<sup>st</sup> Accused. They each filed separate applications seeking admission to bail pending the hearing and determination of the respective appeals. The applications have been consolidated for purposes of this ruling. Both were filed on 21<sup>st</sup> December, 2018. They were certified urgent for hearing during the court's vacation on 28<sup>th</sup> December, 2017 by Hon. Onyiego, J. Mr. Busiega represented the 1<sup>st</sup> Applicant and held brief for Ms. Moenga for the 2<sup>nd</sup> Applicant. The applications are supported by affidavits of the respective Applicants sworn on the 24<sup>th</sup> December, 2018.

2. The main ground upon which the applications are premised is that the respective appeals have a high chance of success. It is averred that the evidence adduced before the trial court was not sufficient to support a conviction. It is also argued that the learned trial magistrate, Hon. E. Riany in convicting the Applicants shifted the burden of proof from the prosecution to the accused persons.

3. Both applications were opposed by the Respondent through Grounds of Opposition filed on 2<sup>nd</sup> January, 2019 by Carol C. Sigei, Learned State Counsel. The grounds of opposition are similar in all respect. They are that the appeal has no overwhelming chances of success, there are no exceptional or unusual circumstances that would warrant the court to grant bail pending appeal, that the appeal will not be rendered nugatory if the applications are not allowed and that the application is an abuse of the court process merely intended to waste the court's precious time.

4. The appeal was canvassed before me on 2<sup>nd</sup> January, 2019 with Mr. Busiega for both Applicants and Ms. Sigei for the Respondent. In arguing that the appeals have a high chance of success, counsel submitted that the court should have a clear look at the grounds of appeal filed in respect of each of the Applicants. Arguing for the 1<sup>st</sup> Applicant, counsel submitted that the evidence before the court was not at all corroborated and that therefore it was in error to base the conviction of the 1<sup>st</sup> Applicant on the weight of evidence of only one witness, PW18 who was the investigating officer.

5. Counsel argued that the 1<sup>st</sup> Applicant was convicted in respect of counts I to XVI. He submitted that in respect of counts 1 which was a

conspiracy to defraud contrary to Section 317 of the Penal Code, no iota of evidence demonstrated that the Applicant acted in cohort with other accused persons to defraud various hospital facilities of monies payable by the Parliamentary Service Commission.

6. As regards counts II to XI which related to making documents without authority contrary to Section 357 of the Penal Code, he equally submitted that the prosecution did not link the Applicant to the documents mentioned thereunder being Parliamentary staff medical cards. Additionally, he argued that none of the documents were attributed to the Applicant or was demonstrated that he made any of them. He made a similarly argument in respect to counts XII to XVI. He emphasized the fact that no witness was called to confirm that he obtained the drugs mentioned in the charges from the respective hospitals. He relied on the cases of **Tom Omale Magutu vs Republic (2017) eKLR and Peter Hinga Ngatho vs Republic (1915) eKLR** to buttress the above submissions.

7. He underscored the spirit in the first cited case that no person should be condemned without exhausting all the due processes of the court and in respect of the second case, that the court must have regard to the conduct of an Applicant whilst determining an application for bail pending an appeal. In respect of the latter, he argued that the 1<sup>st</sup> Applicant is a full time employee of the Nairobi Women's Hospital and that his continued incarceration denied his family a livelihood as he is the sole breadwinner to the family.

8. It was Mr. Busiega's argument that the only remote evidence attributed to the 1<sup>st</sup> Applicant was a log-in password belonging to a UN staff. He submitted that the 1<sup>st</sup> Applicant made a good justification as to why he was in possession of the said password. And in any case, no staff from the UN was called as a prosecution witness to confirm that he was in possession of the password of the Signa Insurance illegally. Accordingly, even if the 1<sup>st</sup> Applicant had opted to keep quiet in his evidence, he ought not to have been convicted.

9. Counsel further submitted that the 1<sup>st</sup> Applicant was denied a right to cross examine the investigating officer. He noted that whereas the right to cross examine a witness is not absolute the court ought to exercise its discretion judiciously. In this respect, he argued that the trial court ought to have considered the seriousness of the offences facing the Applicant and that a denial to thoroughly cross examination the witness was tantamount to a denial of liberty as it would likely lead to the conviction of an accused person. More so because, the conviction of the 1<sup>st</sup> Applicant was solely based on the evidence of the investigating officer and that therefore, a denial of the right to cross examine him took away the trial of fair trial of the Applicant.

10. Counsel did also argue that the Applicants were denied a chance to file submissions after the close of the prosecution case. This, he argued, was a denial of a right to a fair trial particularly because the 2<sup>nd</sup> Applicant was unrepresented. He therefore should have been accorded a chance to file submission to emphasize the weight of any evidence adduced.

11. Mr. Busiega also urged the court to take into account that the 2<sup>nd</sup> Applicant is a family man and before the sentence was passed, he had been in remand for six months which is a special circumstance warranting his admission to bail.

12. Learned State Counsel, Ms. Sigei in opposing the application submitted that the appeals had no chances of success. While summarizing the evidence of the prosecution, she argued that the evidence of PW1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 14 and 15 who were Parliamentary Service Commission employees linked the 1<sup>st</sup> Applicant to all the offences. In particular, she argued that the 2<sup>nd</sup> Applicant was found in possession of the fake medical cards which by the evidence of the witnesses were proved were not legally issued by the Parliamentary Service Commission. As regards the 1<sup>st</sup> Applicant, she argued that upon interrogating the witnesses, PW18 gathered evidence that it was the 1<sup>st</sup> Applicant who had assisted the 2<sup>nd</sup> accused and the 2<sup>nd</sup> Applicant to acquire the cards and defraud the respective hospitals. It was her case therefore that the evidence adduced before the court squarely nailed both the Applicants to the offences.

13. Ms. Sigei denied that both Applicants were denied fair trial arguing that the trial was conducted in a fair manner.

14. On whether exceptional and unusual circumstances exists to warrant the grant of bail, learned counsel submitted that no evidence had been adduced to show that the Applicants' families cannot take care of themselves because the head of the families are in prison. It was also her argument that the appeal would not be rendered nugatory if the application is not allowed. She argued that this is hinged on the ground that the appeal is fresh and the sentence imposed is of four years imprisonment and so the appeals will have been heard and determined before the sentences are spent.

15. In response, Mr. Busiega urged the court to disregard the submission by Ms. Sigei that there does not exist exceptional or unusual circumstances to warrant grant on bail on ground that the Respondent did not file a replying affidavit. He urged the court to uphold the Applicants' submission that they are the sole bread winners of the families and their continued incarceration hurts their dependents.

16. Emphasizing that the appeals had high chances of success, Mr. Busiega submitted that none of the medical cards was found in possession of the Applicants. Furthermore, no witness from Mater Hospital denied that 1<sup>st</sup> Applicant was legally in possession of Hospital documents by virtue of his employment in that hospital then. He also emphasized that the document examination report was not produced by its maker, PW 17 who adduced it in evidence. And further that all the witnesses testified that they did not know the Applicants. That therefore, it begged how the investigating officer settled on them as the culprits to carry the burden.

17. I have carefully considered the application, the supporting affidavits, the Grounds of Opposition and the respective rival submissions. The by this principles to be considered court in deciding whether or not to release the Applicants on bail pending appeal were set out by the Court of Appeal in **Jivraj Shah vs Republic [1986] KLR 605 at page 606 thus:**

**a. The principle consideration in an application for bail pending appeal is the existence of exceptional or unusual circumstances upon which the Court of Appeal can fairly conclude that it is in the interests of justice to grant bail.**

**b. If it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of some**

**substantial point of law to be urged and that the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail will exist.**

**c. 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."**

18. In the present application, the dominant factor to be considered is whether the Applicants' respective appeals have high chances of success. I have carefully read through the evidence of the trial court as well as the judgment of the learned trial magistrate. With respect to the 1<sup>st</sup> Applicant, the trial court convicted him on account that he was arrested after the police established that the information that was being used by the fraudsters was obtained from Mater Hospital, Development House Branch where he was working. The information was disclosed by PW18 the investigating officer. The most intriguing fact is that the investigating officer did not disclose the source of his information. More so, none of the prosecution witnesses supported the argument by the investigating officer. According to PW18, he and his colleagues visited the house of the 1<sup>st</sup> Applicant in Umoja II estate on 24<sup>th</sup> April, 2018 and after a search, they recovered an envelope with two printouts containing names of UN staff including Kelvin Mutua Mutuku. Additionally, an ID Card with Kelvin's name but bearing a picture of the 2<sup>nd</sup> accused was recovered. The same was produced as exhibit 14. According to PW13, unfortunately, this identity Card was recovered during the arrest of the 2<sup>nd</sup> Applicant. It is the basis of this evidence that the trial court linked the 1<sup>st</sup> Applicant to the offence of conspiracy to defraud. But clearly, no witness adduced evidence sufficiently linking the 1<sup>st</sup> Applicant to the conspiracy.

19. The trial court on the other hand also convicted the 1<sup>st</sup> Applicant on account of recovery of a list of names and log in information recovered from him. No doubt, the 1<sup>st</sup> Applicant conceded to this fact but gave a candid explanation of how he came by the documents by virtue of his employment at the Mater Hospital then. The names in the documents were of UN staff. However, no UN staff was called as a prosecution witness to confirm that the 1<sup>st</sup> Applicant was unlawfully in possession of the documents. Although the name of Kelvin Mutua was among the list recovered, my view is that it was just coincidental as it was alongside other staff members of the UN. For this reason, it is the view of the court that based on the fact that no prosecution witness supported the evidence of PW18, the 1<sup>st</sup> Applicant stands a high chance of success in his appeal.

20. As regards the 2<sup>nd</sup> Applicant, he was convicted in counts I to XVI. The core evidence linking him to the offences was by PW13, an officer with DCI Kayole who arrested him on 5<sup>th</sup> April 2018 in his home to Komarock. A search in his house led to the recovery of an Identity Card belonging to Kelvin Mutua Mutuku, a staff medical card of one Job Amolo and a Driving Licence. Expert evidence from Parliamentary Service Commission employees and document examiners report did show that the medical card and identity card were fake. Furthermore, he was also linked by the 2<sup>nd</sup> Accused as the originator of other medical cards produced in court. That information was supported by the prosecution evidence adduced in court. No doubt then it is the view of this court that his appeal stands little chance of success.

21. On other issues raised, that is; that the Applicants' right to a fair trial was violated are issues as at now this court thinks should be determined at the hearing of the main appeal. Suffice it to say though, is that submissions do not constitute evidence. Their main role in proceedings is to emphasize and highlight key evidence and issues on record. Therefore, whether or not submissions are filed, the court relies on the evidence adduced and the relevant law to found a case against an accused person.

22. Apart from the fact that the 2<sup>nd</sup> Applicant's appeal is unlikely to succeed, it was also argued that he was a family man and had been in remand for six months prior to his conviction. Counsel arguing the application urged the court to consider that the Applicant was the sole breadwinner of the family and that in his absence the family was suffering. However, as was held in **Dominic Karanja vs Republic, [1986] KLR 612;**

**"the previous good character of the Applicant and the hardships, if any, facing his family were not exceptional or unusual factors...".**

23. It is trite then to say that the mere fact that the 2<sup>nd</sup> Applicant is the sole bread winner of the family does not constitute an unusual or exceptional circumstance to warrant the grant of bail pending appeal. The court also takes note of the fact that he was sentenced to serve four years imprisonment in all counts which sentences run concurrently. The conviction having been passed on 6<sup>th</sup> December, 2018 means that there is sufficient time to hear and determine his appeal before the sentence is spent.

24. Finally, I wish to underscore the fact that both Applicants were charged in respect of counts I to XVI. The court also convicted them accordingly. However, in sentencing the learned trial magistrate sentenced the 1<sup>st</sup> Applicant additionally in Counts XVII to XXI which was a grave error. I leave this error for correction by the court that will hear the appeal.

25. The upshot of my findings is that the application in respect of the 1<sup>st</sup> Applicant succeeds. I admit him to bail pending appeal. He shall deposit a cash bail of Kshs. 300,000/= or a surety bond of Kshs. 800,000/=. The surety shall be assessed by the Deputy Registrar of this court.

26. The application in respect of the 2<sup>nd</sup> Applicant fails and the same is dismissed with no orders on the costs.

**DATED and DELIVERED this 9<sup>th</sup> day of January, 2019**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. Mr. Busiega for the 1<sup>st</sup> Applicants.
2. Mr. Miiri for the Respondent.