



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO.16 OF 2018

(From original conviction and sentence in Criminal Case No. 180 of 2017 of the Senior Principal Magistrate's Court at Wang'uru)

ROSEMARY MICERE MITHAMO.....APPELLANT

V E R S U S

REPUBLIC.....PROSECUTOR

RULING

1. The appellant was convicted with the various offences of obtaining money by false pretences, making a false document, uttering a false document and personation. She was sentenced to serve various sentences running concurrently to a maximum 14 years imprisonment. She proceeded to file Petition of Appeal on 12/03/2018 and an application for bail pending appeal on 29/08/2018.

The application is brought under **Section 357(1) Criminal Procedure Code** which provides:-

“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.”

2. When considering an application for bail pending appeal, the court has discretion in the matter which must be exercised judicially taking into consideration various factors as follows:

1. Whether the appeal has overwhelming chances of success.

2. There are exceptional or unusual circumstances to warrant the court's exercise of its discretion.

3. There is a high probability of the sentence being served before the appeal is heard.

3. The leading authority on this subject is **Somo –VS- Republic**. In refusing to grant bail the High Court, held that the most important ground in deciding whether or not to grant bail is whether the appeal has an overwhelming chance of being successful and that there were no exceptional or unusual circumstances to justify the grant of the bail.

4. In an application of this nature, an applicant is required to satisfy the existent of one or a combination of the conditions mentioned in the above cited authority. I will proceed to consider this conditions.

1. Overwhelming chance of being successful

In order to ascertain whether the appellant's appeal has chances of success, one needs to consider the evidence adduced before the trial court and the judgment delivered by the learned trial magistrate but without going into any detail in order not to prejudice the court which will eventually hear the appeal.

5. The appellant has faulted the decision of trial magistrate on the following grounds;

i) For handling the agreement dated 03/09/2014 as an exhibit and yet it was only marked MFI II and not produced by the advocate who drew it.

ii) Failing to consider evidenced adduced in cross-examination

iii) Believing evidence of PW 5 and 6 without tabulating the evidence.

iv) Gave biased judgment.

v) Decided the case on balance of probabilities instead of prosecution proving their case without reasonable doubt.

vi) Meting a severe sentence.

6. As per the proceedings, the sale agreement was produced by PW 6 as P. Exh 1 and failure to have it produced by the advocate who drew it was not fatal. In addition, the appellant was being represented by an advocate and they never raised any objection to the said production.

7. Having considered the evidence adduced and the judgment delivered, I am of the view that appellant's appeal cannot be said to have high chances of success.

2. Exceptional or unusual circumstances

She stated that she had been released on bond/bail during trial and she adhered to the terms set by the court. This are not un usual and exceptional circumstances. Such circumstances would be where she states that she is sick and is likely to suffer or such circumstances.

3. High probability of the sentence being served

The appellant was sentenced to 14 years imprisonment, she will not have served a substantial part of her sentence until her appeal is heard and determined since the record of appeal is ready. The appeal is likely to be heard and determined before the end of the year.

8. In the premises therefore the appellant has not put forward a case to warrant her release on bail pending appeal. The application is without merits.

9. I therefore dismiss the application.

Dated at Kerugoya this 14th day of March 2019.

L. W. GITARI

JUDGE