



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 33 OF 2018**

**JOSEPHAT GAKUYA MURIUKI .....APPELLANT**

**V E R S U S**

**REPUBLIC..... PROSECUTION**

**RULING**

1. The appellant Josphat Muriuki Gakuya was charged before the Principal Magistrate's Court at Wangu'ru with five counts namely –
  - Making a false document without authority contrary to **Section 357(A) of the Penal Code** (Two Counts thereof).
  - Forgery contrary to **Section 349 of the Penal Code** (two Counts thereof).
  - Stealing contrary to **Section 268(1) as read with Section 275 of the Penal Code.**
2. The appellant was convicted on the two counts of making a false document and sentenced to serve four years imprisonment on each count.
3. For the offences of forgery contrary to **Section 349 of the Penal Code** he was sentenced to serve three years imprisonment on each count. The sentences were pronounced on 20/4/18 and ordered to run concurrently.
4. The appellant was aggrieved by both the conviction and sentence and lodged this appeal. He has now filed this application under **Section 357 of the Criminal Procedure Code** seeking an order that he be granted bail pending the hearing and determination of the appeal.
5. The application is based on the grounds that the appeal has high probability of success. That the appeal stands to be rendered nugatory if the applicant is not granted bail or bond pending appeal. That the applicant is not a flight risk, is the sole breadwinner of his family of a wife and four children and is a person of high moral standing, a law abiding citizen with no criminal record. He prays that bail be granted to avert any situation that may cause a miscarriage of justice. That the respondent shall not suffer any prejudice.
6. The application is supported by the affidavit of Ndegwa Njiru, Advocate sworn on 15/5/18 where the above grounds are reiterated and expounded.
7. The application proceeded by way of oral submissions. For the applicant, in support of the ground that the appeal has high chances of success it was submitted that some evidence was not considered, documents which were not part of the evidence were considered when there was no legal basis for their production and the appellant was convicted on uncorroborated evidence. It was further submitted that the defence of the applicant was not considered, documents which were not part of the evidence were considered when there was no legal basis for their production and the appellant was convicted on uncorroborated evidence. It was further submitted that the defence of the applicant was not considered which was a violation of the right to fair trial.
8. For the State it was submitted that the Appeal has no overwhelming chances of success. That the defence of the appellant was considered and so the ground must fail. He further submits that the document examiner confirmed that the signatures on the documents were made by the applicant. He submits that there was overwhelming evidence and the appeal has no chances of success.
9. I have considered the application. The granting of bail pending appeal is an exercise of discretion which is guided by some set principles. Unlike bail pending trial, it is not a constitutional right. Bail pending trial is based on the principle that an accused person is presumed innocent until proved guilty. For bail pending appeal the applicant is presumed to have been properly convicted until the contrary is proved. The applicant bears the burden to prove that the conviction was not proper. The court when determining the application has to balance the public interest that crimes where they are proved must be punished and the rights of an applicant to liberty. The court then considers whether the appeal has overwhelming chances of success in which case the applicant should be released to avoid a miscarriage of justice and to avoid situations where the sentence imposed is served before the appeal is heard and determined.

10. The ground of the application that the appeal has overwhelming chances of success forms one of the main principles for the grant of bail pending appeal. The leading authority on the subject is the case of **Somo –v- R (1972) E. A. 476** where it was stated that the most important ground in deciding whether or not to grant bail pending appeal is that the appeal has overwhelming chances of being successful and in that case there is no justification for depriving the applicant his freedom.

11. The other principles are whether there are unusual or exceptional circumstances and whether the sentence or substantial part of the sentence will have been served. These have been laid out in various authorities. In **Jivraj Shah –v- Republic (1986) KLR 605 Court of Appeal** it was stated:-

*“The principal consideration in an application for bail pending appeal is the existence of unusual circumstances upon which the court of Appeal can fairly, conclude that it is in the interest 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 account of 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.”*

12. The applicant was convicted by a court with competent jurisdiction. The onus is on the applicant to prove that the appeal is not frivolous but has high chances of success. The counsel for the applicant has submitted that the appeal has high chances of success citing the grounds which I have stated above.

13. I have perused the grounds of appeal and the proceedings before the trial magistrate. Without pre-empting the appeal, having considered the judgment of the trial magistrate and the evidence which was tendered, I am of the view that the appeal has overwhelming chances of success.

**Section 357(1) of the Criminal Procedure Code** provides:-

*“After the entering of an appeal by a person entitled to appeal, the High Court or the Sub-ordinate 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.”*

14. I find that this application has merits. I allow it. I order that the applicant shall be released on a bond of Kshs 100,000/- plus one like surety, pending the hearing and determination of the appeal.

15. The surety shall be approved by the Deputy Registrar.

16. The applicant shall attend court as directed until the appeal is heard and determined.

**Dated at Kerugoya this 16<sup>th</sup> day of May 2019.**

**L. W. GITARI**

**JUDGE**