



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NO. 43 OF 2019**

**JOEL MWANGI THAYU.....APPELLANT/APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. By a Notice of Motion application dated 12<sup>th</sup> March 2019 the Applicant urges for bail pending the hearing and determination of the appeal herein. This application was founded on an appeal from the judgment and conviction in the Chief Magistrate's Court at Makadara Criminal Case number 1293 of 2012 delivered by Honorable S. Jalango, SRM.

2. The Applicant was charged with **obtaining money by false pretence contrary to Section 313 of the Penal Code**. He was convicted and sentenced to pay Kenya Shillings two hundred thousand (Kshs. 200, 000/-) and to compensate the complainant a sum of Kenya Shillings five hundred and five thousand (Kshs. 505 000/-). In default, he was sentenced to serve two years imprisonment.

3. The application is premised on five grounds, namely;

**a. That the Appeal has overwhelming chances of success;**

**b. That the Applicant will have served a substantial time in prison by the time the appeal is determined should the court not grant the orders;**

**c. That the Applicant is not a flight risk;**

**d. That the Appellant is sickly and ailing from diabetes and hypertension; and**

**e. That the Respondent will not suffer prejudice should the application be allowed.**

4. The brief facts of the case are that the Appellant sold a piece of land to the complainant. The purchase price was set at Kenya Shillings Five hundred thousand (Kshs. 500 000/-). An additional Kenya Shillings five thousand (Kshs 5000/-) was paid as advocate fees. The complainant Stephen Mburu Gichumbi and his brother Nelson Waweru corroborated this account. The Appellant handed over to the complainant a letter of allotment. However, as the complainant attempted to construct on the lot of land he was forcefully ejected. It was then alleged that the Applicant deceitfully sold the property. It was claimed that he did this on behalf of his son, thereby insinuating to have capacity to sell.

5. In prosecuting this application, the Applicant through his advocate Mr. Magara advanced arguments to support the assertion that the appeal had high chances of success. Counsel submitted that the charge was at variance with the evidence in that the person who was named as the complainant is not the one who testified in that capacity. He added that the sentence was harsh. It was the Applicant's submission that the court erred in making a determination that the fine and compensation should be paid before securing his freedom. The Respondent through Miss Sigei argued that sentencing is discretionary to the court. She submitted that the sentence was intended to protect the interests of the victim.

6. It was submitted that the Appellant has been sickly and therefore should not be denied bail. Further that he was diagnosed with diabetes and hypertension. In responding, Miss Sigei submitted that the prison authorities were well equipped to handle the ailments. It was therefore her submission that this did not constitute an exceptional circumstance to warrant that the Applicant be released on bail.

7. Lastly, the Appellant argued that he was not a flight risk. It was his intimation that, firstly, he had attended trial faithfully. Secondly, that

that the surety who secured his release was willing to continue in the same capacity. It was Respondent's submission that the previous character of an Applicant did not constitute a ground for grant of bail pending appeal.

8. An application for bail pending appeal is anchored on whether the appeal has high chances of success or that there exists exceptional or unusual circumstances to warrant the grant of bail pending appeal. An application may also be granted where it is demonstrated that an Applicant is likely to serve the sentence or a substantial part of the sentence before the appeal is heard and determined. (See Jivraj shah v Republic [1986] eKLR and Dominic Karanja v. Republic [1986] KLR 612).

9. In an application of this nature, the Applicant only needs to establish that, on the face of it, that the appeal has high chances of success. Two points were argued in this case. The first was that there was variance of the names of the complainant as named in the charge sheet from the person who testified. I have re looked at the evidence. This assertion is not factual at all. The complainant in the charge sheet is one Stephen Mbui Gichumbi who testified as PW1. He explained how he accompanied his brother when he visited the Applicant who pretended he was in a position to sell land. PW1 ended up parting with Ksh. 500,000/ as the purchase price and Ksh.5000/ as legal fees. No land was transferred to him. Thus, the Applicant's submission is unmeritorious.

10. The second limb of argument was that the sentence was harsh because the Applicant was fined and additionally ordered to pay compensation. I entirely concur with him. Although the law provides for compensation, the trial court in the instant case ordered for compensation of the entire value of the subject matter. This is an issue that can well be canvassed in a civil suit. Besides, ordering compensation of the full subject matter clearly prejudices the Applicant who has not exhausted the judicial appellate process. If he were to succeed in any appeal and the compensation was paid, there is a likelihood that he may be unable to recover his money back. The issue of double jeopardy also plays in. My view is that compensation works well in minor cases such as assault. In a scenario like the instant one, voluntary compensation is the best recourse. All the same, the other limb of the sentence was fair as the Applicant has the option of paying a reasonable fine.

11. However, my reevaluation of the evidence drives me to conclude that the evidence on record, prima facie supported the conviction. It is an application that lacks merit in the circumstances in so far as the appeal is likely to succeed.

12. As regards the Applicant's sickness, it is an issue that can be catered for in the prison. The court is well aware that in serious cases, referrals are made to bigger hospitals. Therefore, the Applicant's sickness does not constitute an exceptional circumstance to warrant the grant of bail pending appeal. The same case applies to the assertion that the Applicant was not a flight risk. He is now a convicted person and unless that conviction is set aside by a competent court, he must serve the sentence.

13. In sum, I find that the application lacks merit. I dismiss it save that I set aside the order for compensation pending the hearing and determination of the appeal. I order that the Appellant serves the record of appeal as soon as is practically possible and the appeal be listed for hearing on priority basis. I give this order having regard to the length of the sentence.

**DATED AND DELIVERED 23<sup>RD</sup> THIS DAY OF JULY 2019**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

*1. Miss Mukami for the appellant/applicant.*

*2. Mr. Momanyi for the respondent.*