



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 31 of 2019

REMIGUS NGAANYI WATIERI.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal against the conviction and sentence of the Chief Magistrate's Court at Kisumu

(Hon. J. K. Ng'arng'ar CM) dated the 25th June 2017 in Kisumu Anti-Corruption C. No. 04 of 2015)

RULING

The Applicant, **REMIGUS NGAANYI WATIERI**, was convicted for the offence of **Fraudulent Disposal of Public Property** Contrary to **Section 45 (1)** and **Section 48 (1)** of the **Anti-Corruption and Economic Crimes Act**.

1. He was then sentenced to a Fine of Kshs 500,000/= or in default 2 Years Imprisonment.
2. In addition to the Fine, the learned trial magistrate imposed a Mandatory Fine of Kshs 12 Million, or in default 4 Years Imprisonment.
3. Finally, the trial court ordered that the land in question, being **L.R. NO. KISUMU MUNICIPALITY/BLOCK 8/148**, should revert to the County Government of Kisumu.
4. The Applicant has lodged an appeal to challenge both the conviction and the sentence.
5. The application now before me is for Bond or Bail pending the hearing and determination of the appeal.
6. According to the Applicant, his appeal is not just arguable but is also so robust that it has overwhelming chances of success.
7. He drew the court's attention to the fact that during the trial, he was out on Bail, and that he had fully complied with the Bail Terms which the trial court had imposed.
8. The Applicant told this court that he was ready and willing to comply with all such stringent terms which the court may order when granting him Bond or Bail pending appeal.
9. As regards his health, the Applicant said that he was hypertensive, and that his incarceration had complicated his ill-health.
10. He also informed the court that he was a man who had a fixed abode, where he lives with his wife and his 6 children.
11. When canvassing the application, Mr. Nyamweya advocate submitted that there are exceptional circumstances in this case, which therefore warrant the grant of Bail.
12. He added that the appeal raises very serious issues of both fact and law, which had high chances of success.
13. As an example of why the appeal had high chances of success, the Applicant said that the moment the prosecution had failed to prove the offence of **Conspiracy to Commit an offence**, the court ought not to have convicted him for the offence of **Fraudulent Disposal of property**.
14. The Applicant was, at all material times, a District Lands Registrar based at Kisumu District Lands Office.

15. As he was not the owner of the property which was allegedly disposed of fraudulently, the Applicant reasoned that it was not possible for him to have disposed of the said property.
16. This court was reminded that the other persons who had been charged together with the Applicant were acquitted. In the circumstances, the Applicant believed that he too ought to have been acquitted.
17. On the issue of the sentence, the Applicant submitted that the “*Mandatory Sentence*” of a fine of Kshs 12 Million was unconstitutional.
18. Mr. Nyamweya expressed the view that any Act of Parliament which imposed a mandatory sentence was unconstitutional.
19. Accordingly, the Applicant believes that he will persuade the appellate court that the imposition of an alleged mandatory sentence was not consistent with the current thinking in the Judiciary.
20. In the circumstances, the Applicant feels that his continued incarceration was unlawful.
21. In answer to the application, Mr. Muia, learned State Counsel submitted that the Applicant had failed to demonstrate that his appeal has high chances of success.
22. He reminded the court that after conviction, an Applicant may only be granted Bond or Bail if he demonstrates that his appeal has overwhelming chances of success, and also if there are unusual circumstances.
23. In this case, the Respondent submitted that the Applicant had failed to meet the requirements which could have led to the grant of Bond or Bail.
24. In his Reply to the Respondent’s submissions, the Applicant said that he is a public servant, who would lose his job if he remained in custody pending his appeal.
25. He said that he was not a flight risk, and that his appeal had overwhelming chances of success.
26. At this stage, the court is not called upon to determine the appeal. Indeed, it is important that the court refrains from making any definitive findings on the issues to be canvassed at the hearing of the appeal, because any such determinations could occasion an embarrassment to the Judge who would thereafter hear the substantive appeal.
27. When an accused person asks that he be granted Bond or Bail, the court would ordinarily grant the same unless the prosecution demonstrates, to the court’s satisfaction, that there were Compelling Reasons to warrant a denial of Bond and Bail.
28. However, after a person has been convicted, the onus is upon him to satisfy the court that he ought to be granted Bond or Bail pending appeal.
29. When a person has been imprisoned after being convicted, ordinarily he would not retain his job. Therefore, if the Applicant were to lose his job because he was serving a jail term, that would not, of itself, constitute exceptional circumstances.
30. Similarly, it is not an exceptional factor when the family of the sole bread-earner has to endure financial and other challenges, when the said bread-earner is imprisoned.
31. The justice systems all over the world have put in place structures for appeal. Such structures are deemed necessary because there is always a possibility that some decisions of trial courts may be set aside after being re-evaluated by an appellate court.
32. In the event that an appellate court formed the considered opinion that the appeal had overwhelming chances of success, and that the appeal could not be determined quickly, it would be unjust to keep the Appellant in custody pending the determination of the said appeal.
33. The injustice would arise from the fact that when it was clear that either the conviction would be quashed or the sentence would be set aside or that both conviction and sentence would be set aside; there would be no good reason for keeping the Appellant behind bars.
34. But therein lies the difficulty faced by the court when called upon to determine whether or not to grant Bond or Bail pending appeal. I so find because if the court were to make a finding to the effect that the appeal had overwhelming chances of success, that would be akin to telling the Judge who would later hear the said appeal, that he/she should not dismiss the appeal.
35. It is not acceptable that one Judge should fetter the discretion of another Judge, by making substantive findings at an interlocutory stage, before the substantive appeal was heard.
36. The offence for which the Applicant was convicted is that of **Fraudulent Disposal of Public Property**.
37. The conviction was not founded upon the premise that the Applicant was the Vendor.
38. Indeed, the charge-sheet clearly and unequivocally indicates that the Applicant was an employee of the Ministry of Lands.

39. In his capacity as the District Lands Registrar, he is said to have disposed of the public parcel of land, by issuing a Certificate of Lease, without the requisite Full Council Meeting Resolution and without the Approval from the Minister for Local Government.

40. As the Applicant indicated that he would be attacking the conviction on the grounds that he cannot have disposed of the property in issue when he was not the Vendor, I find myself unable to share in his optimism about his chances of success.

41. But I hasten to add that the issue is arguable.

42. However, as regards the trial court's pronouncement about the Mandatory nature of the second fine, which is based upon the value of the subject matter, I find that it is now well-settled that the discretion of a trial court ought not to be curtailed by a statute in such a manner as to compel the court to feel that it had no right to give appropriate consideration to mitigating factors which could lead to a sentence commensurate to the actions of the offender.

43. Did the learned trial magistrate herein feel constrained in the manner suggested by the Applicant?

44. That question will be answered after the appeal is canvassed.

45. In the event that the Applicant serves a considerable part of the sentence prior to the hearing of his appeal, and if the appeal were to be allowed, it may be an injustice to the Applicant if he had already lost his job; and if his health might have gone south.

46. Accordingly, I do allow the application for Bond pending appeal. I order that the Applicant will execute a Personal Bond of Kshs 4,000,000/=, plus **TWO SURETIES** of similar sum.

DATED, SIGNED and DELIVERED at KISUMU

This 11th day of **September** 2019

FRED A. OCHIENG

JUDGE