



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 198 OF 2019

JANE QWEEN OMWEGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. In the Notice of Motion dated 7th October, 2019, the Applicant prays that she be granted bail pending the hearing and determination of the main appeal. She was charged in the Chief Magistrate's Court at Kibera in Cr. Case No. 149 of 2013 with the offence of obtaining money by false pretense contrary to Section 313 of the Penal Code. The particulars of the offence were that on the 19th day of June, 2012 at Kangemi within Westlands District in Nairobi County, with intent to defraud obtained from Ezekiel Momanyi Osongo Kshs. 420,000/= by falsely pretending that she would sell to him motor vehicle Reg. No. KBK 196 Q Toyota Hiace white in colour, a fact she knew to be false.
2. The application is brought under Section 357 of the Criminal Procedure Code. In summary, it is premised on the grounds supporting the application that the Applicant suffers from hypertension and requires to follow up on her doctor's appointments, that she is a Lecturer at Jomo Kenyatta University of Agriculture and Technology (JKUAT) and is on the verge of losing her employment from a conviction arising from a civil transaction, that she is the sole bread winner of her two sons and four orphans who need her care and attention, that her children and the orphans she takes care of are likely to be discontinued from school due to lack of school fees, that the appeal has high chances of success and that she stands to be highly prejudiced if the application is not allowed.
3. The application is further supported by an affidavit of Amanyia Odera, Counsel for the Applicant which is undated but filed in the court on the 7th October, 2019. The affidavit basically expounds the grounds on which the application is premised. It further states that the Applicant is a person of good conduct who never absconded trial and is ready to abide by any conditions of bond/bail that the court shall set.
4. The application was canvassed before me on 22nd October, 2019. Learned counsel, Mr. Amanyia appeared for the Applicant whilst Miss Chege appeared for the Respondent. The latter neither filed a Replying Affidavit nor Grounds of Opposition but argued the application on points of law only.
5. Mr. Amanyia basically emphasized the averments borne on the grounds and the affidavit in support of the application. He further pleaded with the court to grant bail/bond to the Applicant because she was on verge of losing her job at JKUAT where she works as a lecturer. As regards the success of the appeal, counsel argued that the complainant in the trial converted a civil matter to a criminal one; more so, by vexing his powers as a police officer. He stated that the transaction of the sale of the motor vehicle by the Applicant to the complainant being commercial in nature ought to have been dealt with as a civil suit. Further, counsel submitted that since the complainant had indicated to the Applicant that he intended to pay the balance of the purchase price, it was an error on the part of the learned magistrate to hold that there was an intention to defraud.
6. Mr. Amanyia further submitted that the arrest of the Applicant was malicious. This was in view that the complainant caused the arrest of the Applicant after he tricked her that they meet so that he could pay the balance of the purchase price.
7. Counsel persuaded the court to grant bail to the Applicant because throughout the trial she was out on bond and she never absconded. He added that if bail was not granted, she was likely to serve a substantial part of the sentence before the appeal was heard and determined.
8. Learned State Counsel M/s. Chege opposed the application. Her argument was that the appeal had no chances of success. She submitted that necessary elements of the offences charged were proved. She explained that the Applicant misrepresented to the complainant that she was in a position to sell a motor vehicle that she never owned. That there was no malice in the manner of her arrest because she had to be lured into a trap to effect the arrest. She submitted that the fact that the Applicant is a person of good conduct does not warrant her to be granted bail pending appeal. She urged the court to dismiss the application as it lacked merit.

9. In rejoinder, Mr. Amanya urged the court to look at the Applicant's medical appointment card and her letter of appointment to employment to buttress earlier submissions. He added that proof as to who owned the vehicle in issue was not established as no document expert testified in this regard to show that the log book was a forgery. He insisted that the dispute was commercial in nature. Finally, he submitted that the continued incarceration of the Applicant was likely to cost her job. He urged the court to consider that the Applicant had student thesis to mark which students were unlikely to graduate if the Applicant was not released to go and do her job.

Determination

10. This being an application for bail pending appeal, the court is enjoined to consider the following factors. Firstly, whether the appeal has high chances of success. Secondly, whether there exists unusual or exceptional circumstances to warrant the grant of bail pending appeal, and thirdly whether the Applicant is likely to serve the sentence or a substantial part of her sentence before the appeal is heard and determined. The Court of Appeal in the Case of **Jivraj Shah V R (1986) e KLR** held that:

“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 a substantial part of it, will have been served by the time the appeal is heard, conditions for granting bail will exist.”

11. The principles to be considered in an application for bail pending appeal were also enunciated by the Court of Appeal in the case of **Ademba V Republic [1983] KLR, 442**. The Court delivered itself thus:

“1. Bail pending appeal may only be granted if there are exceptional or unusual circumstances;

2. The likelihood of success in the appeal is a factor to be taken into consideration in granting bail pending appeal. Even though the appellants showed serious family and personal difficulties in view of the unlikelihood of success in this appeal, the application could not succeed.”

12. As regards to whether the instant appeal is likely to succeed, it was argued that the charges arose out of a commercial transaction. Without going into details of the evidence, I underscore the fact that nothing stops the police from investigating a criminal action even where it is demonstrated it was committed in the course of a civil transaction. The only rider to this is that police must desist into delving in resolving civil disputes through intimidation in instituting criminal proceedings. Where this scenario obtains, nothing would stop a court from protecting the rights of the parties involved.

13. As regards the assertion that her arrest was malicious because the complainant lured her into a trap before her arrest the same has nothing to do with whether or not she defrauded the complainant. Police with the assistance of the complainant had to devise a manner of arresting her. It is not asserted that the arrest was illegal. This is an argument that does not add value to the application.

14. Further, as regards the submission that the complainant look advantage of the State machinery to cause her arrest is also an unmeritorious argument. Police officers too are citizens of this country who have a right to complain if they are wronged. In any case, the complaint was established to be genuine leading to charges being filed against the Applicant.

15. The court was urged to grant bail because the prosecution failed to establish the elements constituting the offence of obtaining by false pretence. My analysis of the evidence drives me to conclude that, *prima facie*, the prosecution discharged this burden. I will however leave it to the court that shall hear the appeal to further re-evaluate the evidence and make a concise decision on this issue.

16. On the whole, it is my view that the appeal has little chances of success.

17. As regards to whether there exists any unusual and exceptional circumstances, it was argued that the Applicant suffers from high blood pressure, that she has two children and four orphans to take care of that she is a lecturer who is likely to lose her job due to continued incarceration and that she also has thesis for students to mark. As was held in the case of **Ademba v Republic (Supra)**, that ***“even though the Applicant showed serious family and personal difficulties in view of the unlikelihood of success in this appeal, the application could not succeed.”***

18. This is a case in which the Applicant's illness of blood pressure can be taken care of at the prison. Furthermore, having been convicted, even though she has family responsibilities it must be borne in mind that she was convicted by a properly constituted court and is undergoing punishment because of that conviction which stands until it is set aside. I see no compelling real reason to warrant the grant bail pending the hearing of the appeal.

19. Finally, there is no overwhelming probability that the sentence would be served or a substantial part thereof before the appeal is heard and determined. The court is currently hearing the 2018 and 2019 appeals. The Applicant has had the proceedings typed. She only needs to serve the record, have the appeal admitted and a hearing date taken. This ground of argument is unmeritorious.

20. The totality of my finding is that the application lacks merit and the same is accordingly dismissed.

Dated and Delivered at Nairobi This 20th day of November, 2019.

G.W.NGENYE-MACHARIA

JUDGE.

In the presence of:

1. *Mr. Wambui for the Applicant/Appellant.*
2. *Miss Chege for the Respondent.*