



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL APPEAL NO. 32 OF 2018**

*(From Original Conviction and Sentence in Criminal Case No. 475 of 2011*

*of the CM's Court at Mombasa: Hon. Richard Odenyo SPM)*

- 1. JAMES OBWANA OGUTA**  
**2. RICHARD JOTHAM KARUGU NJUE.....APPELLANTS/APPLICANTS**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

**Application**

1. The Notice of Motion before the court is dated 8<sup>th</sup> May, 2018 filed by the Applicants under Articles 49 and 165 of the constitution, Section 356 of the Criminal Procedure Code and inherent powers and jurisdiction of the court. The application prays for the following orders.

- (a) That this application be certified as urgent and be heard ex parte in the first instance.
- (b) That this Honourable court be pleased to admit the Appellant/Applicant therein on bail pending appeal and/or on such terms this Honourable court deems appropriate to protect the fundamental freedoms and liberty of the Appellant/Applicant.
- (c) That this Honourable court be pleased to issue such other orders it deems just and convenient to meet the ends of justice.
- (d) That the costs of this application be provided for.

2. The application is premised on grounds set out there and is supported by affidavit of the 1<sup>st</sup> Applicant James Obwana Oguta sworn on 4<sup>th</sup> May, 2018.

3. The Applicants' case is that this application is the only venue available to seek bail pending appeal and seek their protection, fundamental rights and freedoms as enshrined in the constitution of the Republic of Kenya and the Criminal Procedure Code Cap 75 Laws of Kenya. The Applicants expect success in the appeal proffered before this court, and they shall abide by such orders issued by this court and shall at all

material times as is necessary attend court for the hearing and dispensation of the appeal herein. The Applicants state that this court is tasked with the mandate to ensure the upholding of the rule of law and protection of the rights of the citizens of this nation inclusive of the rights of the Appellants herein. It is the Applicants' case that the Respondent will not suffer any prejudice should the orders sought herein be granted as prayed. Yet the Applicants shall suffer irreparable loss and damage should the orders sought herein not be granted. The Applicants aver that they are law abiding citizen currently put in hard place due to an irregular sentence and conviction issued by the subordinate court in Chief Magistrate's Court at Mombasa. They are sole bread winners of now destitute families who are desolate due to current incarceration, and it is on the larger interest of justice that this court do grant the orders sought herein.

### **The Response**

4. There is no evidence on record of a formal response from the State. However, Ms. Mutua for State submitted in opposition to the application.

### **Submissions**

5. Mr. Oduor for the Applicants submitted that the Appellants be admitted to bail pending appeal on terms appropriate to this court. The trial court sentenced the Appellants to four (4) years in prison and have appealed based on that Judgment, and that their appeal has high chances of success. Acknowledging that they have no automatic right to bail at this stage, Mr. Oduor submitted that since 2011 the Appellants have abided by orders of this court and they are not flight risk. The Appellants are ailing. They are also bread winners of their families. The Appellants were charged with three offense being stealing of goods in transit contrary to Section 279(c) of the Penal Code. The Second charge was stealing contrary to Section 315 of Penal code and obtaining registration by false pretense contrary to Section 320 of the Penal Code. Counsel submitted that the Appellants were previously released on bail during the hearing of the lower court matter. The appellants should be released on bail based on the terms in the lower court.

6. Mr. Ajigo associated himself with the submissions of Mr. Oduor. The 1<sup>st</sup> Appellant had been released on bond of Kshs. 200,000 while the 2<sup>nd</sup> Appellant was released on cash bail of 100,000.

7. Ms. Mutua for State opposed the application for bail pending appeal on the grounds that the Appellants have not demonstrated how their appeal have a great chance of success. Counsel submitted that the issues of compelling reasons do not apply at this stage. The Appellants were convicted by a competent court so Article 49 of the constitution does not come into play. Ms. Mutua submitted further that the issue of the Appellants not being flight risk is not relevant at this stage since they are serving a rightful Judgment. On the issue allegation that the Appellants are ailing Ms. Mutua submitted that this issue is irrelevant since there are medical facilities in the prison.

Ms. Mutua urged the court to dismiss the application and instead the main appeal should be fixed for hearing to fast track the appeal.

### **Determination**

8. James Obwana Oguta (1<sup>st</sup> accused), John Mugisha (2<sup>nd</sup> accused) and Richard Jotham Karugu Njue (3<sup>rd</sup> accused) were charged in the first count with the offence of stealing of goods in transit contrary to Section 279 (c) of the Penal Code. Particulars of the charge are that between the 22<sup>nd</sup> day of November, 2010 and 16<sup>th</sup> day of December, 2010 at unknown place and time within the Republic of Kenya jointly with others not before court they stole one unit of motor vehicle make Mercedes Benz C – Class Chassis No. WDB202020-ZF 643317 valued at Kshs. 759,271.00 the property of M/S Maruni Products Company Limited while the said motor vehicle was on transit from Mombasa Port to Kampala, Uganda via Malaba Border.

9. After the case was heard the accused persons, who are the Applicants herein, were found guilty, convicted and sentenced to serve four (4) years in prison. The Applicants not being satisfied with the

outcome of their case have filed an appeal against the conviction and sentencing. In the meantime the Applicants seek to be released on bail pending appeal hence this application.

10. At this stage when the trial process is over, and as submitted by Ms. Mutua for the state, the Appellants are serving a lawful sentence and they have no automatic right to bail. For the Applicants to be released on bail they have to demonstrate a compelling reason. Now, a person who is in jail cannot demonstrate a more compelling reason for his freedom. Perhaps what such an Applicant needs to emphasize is that they have a compelling appeal likely to succeed and that the trial court's decision is manifestly unjust. Even these must await the hearing of the appeal where the merit of the appeal will be heard. In my view a compelling reason will also include the fact that the Applicant was on bail throughout the trial period and fully cooperated with the lawful authorities during the trial.

11. The Applicants have informed this court they are not flight risk. That is acceptable because there is nowhere for them to run to. They have families and ran their businesses before they were incarcerated. While a right to bail is not automatic under the constitution, the constitution allows a court which considers this kind of application to grant bail pending appeal whenever appropriate. I have noted that the criminal proceedings herein started in February, 2011, and ended in May, 2018. The Appellants have not hindered the progress of justice in this matter. This court believes that the Appellants are not a flight risk and that they can be considered for bail pending appeal.

9. In that regard this court allows the application and makes the following orders:

(a) The Appellants are herewith released on bail pending appeal on the condition that:

(i) The Appellants execute a personal bond of Kshs. 500,000 with one surety

or

(ii) The Appellants execute a cash bail of Kshs. 400,000 each.

Costs shall be in the cause.

Orders accordingly.

**Dated, Signed and Delivered in Mombasa this 5<sup>th</sup> day of July, 2018.**

**E. K. O. OGOLA**

**JUDGE**

In the presence of:

Mr. Oduor for Appellants

Ms. Ogega holding brief Ms. Mutua for Respondent

Mr. Kaunda Court Assistant