



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 11 OF 2018

DAVID MUTSOTSO WENDO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The appellant herein, **David Mutsotso Wendo**, was on charged with the offence of obtaining money by false pretences Contrary to Section 313 of the **Penal Code** the facts being that he had jointly with others, with intent to defraud obtained Kshs 1,560,000/- from **Daniel Mutiso Makau** by falsely pretending that he was to sell to the said complainant land, a fact he knew to be false.
2. After hearing the evidence in the case, the Learned Trial Magistrate found him guilty, convicted him accordingly and sentenced him to a total of 13 years.
3. The appellant now seeks by his application defiled herein on 6th March, 2018 that he be granted bail/bond pending the hearing and determination of his appeal.
4. According to the appellant, he was convicted and sentenced without an option of a fine and unless he is released on bond and his appeal is heard, he will be occasioned irreparable damage as his appeal, which has overwhelming probability of success, would be rendered an academic exercise. He averred that he w prepared to abide by any terms that may be imposed by this Court.
5. In a further affidavit sworn by the appellant's counsel, it was disclosed that the appellant suffers from HIV and TB and has recurrent pneumonia and opportunistic infections as a result of low immunity hence his health has deteriorated.
6. In support of his application the appellant relied on Article 49(1)(h) of the Constitution as well as section 357(1) of the **Penal Code**. He also relied on **Somo vs. R [1972] EA** cited with approval in **Anthony Gathogo Kiama & 2 Others vs. R [2009] KLR** and **Charles Owanga Aluoch vs. Director of Public Prosecutions [2015] eKLR**.
7. According to the submissions, the appellant contends that he was not afforded a fair hearing as mandated in Article 50(2)(j) of the Constitution as he was forced to proceed with the case without being supplied with the prosecution's witnesses' statements. It was further contended that the sentence was harsh in that he was sentenced to serve consecutive rather than concurrent sentences contrary to Article 50(2)(p) of the Constitution which calls for the benefit for the least severe punishment.
8. It was further submitted that the appellant suffers from chronic illness hence the need to have him serve his sentence outside the penal institutions.
9. It was therefore submitted that the appellant had established a case for release on bond pending his appeal.
10. The application was opposed. According to the Respondent, from the record, the applicant has a habit of absconding Court having done so on two occasions during trial leading to issuance of warrants of arrest against him. It was therefore deposed that the conduct of the appellant absconding Court after being released on bond and going into hiding for months before being arrested and being availed under warrant o arrest pointed to the applicant being not suitable to be admitted to bail pending appeal since there are high chances of him absconding.
11. According to the Respondent, the thirteen years imprisonment sentence is a sufficient motivation for the appellant to take flight once released on bond. It was therefore the respondent's case that the appellant ought to set down his appeal for hearing at the earliest opportunity and if successful will suffer no prejudice as he would not have served a substantial part of the sentence.
12. I have considered the application, the affidavits in support thereof, the submissions made and the authorities relied upon.

13. Article 49(1)(h) of the Constitution provides that:-

An accused person has the right ...

(h) to be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released.

14. It is however true that a different test applies where the matter before the Court is an application for release on bail pending the hearing of the appeal. Section 357(1) of the *Criminal Procedure Code* provides as follows:

After the entering of an appeal by a person entitled to appeal, the High Court, or the subordinate 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.

15. I therefore agree with the position in Charles Owanga Aluoch vs. Director of Public Prosecutions (supra) where it was held that:

“The right to bail is provided under Article 49(1) of the Constitution but is at the discretion of the court, and is not absolute. Bail is a constitutional right where one is awaiting trial. After conviction that right is at the court’s discretion and upon considering the circumstances of the application. The courts have over the years formulated several principles and guidelines upon which bail pending appeal is anchored. In the case of *Jiv Raji Shah vs. R [1966] KLR 605*, the principle considerations for granting bail pending appeal were stated as follows:

(1) Existence of exceptional or unusual circumstances upon which the court can fairly conclude that it is in the interest of justice to grant bail.

(2) It appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of a substantial point of law to be argued and that the sentence or substantial part of it will have been served by the time the appeal is heard, then, a condition of granting bail will exist.

Main criteria is that there is no difference between overwhelming chances of success and set of circumstances which disclose substantial merit in the appeal – being allowed, the particular circumstances and weight and relevance of the points to be argued.”

16. This position was restated in Mutua vs. R [1988] KLR 497, the Court of Appeal stated:

“It must be remembered that an applicant for bail has been convicted by a properly constituted court and is undergoing punishment because of that conviction which stands until it is set aside on appeal.”

17. It is therefore clear that a different test from that applied in bail pending trial is applied in bail pending appeal. When considering an application for bail pending appeal, the Court has discretion in the matter which must be exercised judicially taking into consideration various factors as follows:

a) Whether the appeal has overwhelming chances of success. See Ademba vs. Republic [1983] KLR 442, Somo vs. R [1972] EA 476, Mutua vs. R [1988] KLR 497;

b) There are exceptional or unusual circumstances to warrant the Court’s exercise of its discretion. See Raghibir Singh Lamba vs. R [1958] EA 37; Jivraj Shah vs. R [1986] eKLR; Somo vs. R (supra); Mutua vs. R (supra);

c) There is a high probability of the sentence being served before the appeal is heard. See Chimabhai vs. R [1971] EA 343.

18. I have considered the record of the proceedings before the Trial Court. Whereas this Court cannot at this stage state that the appellant’s appeal will not succeed, I cannot say based on the record that the appeal has overwhelming chances of success. As to the existence of exceptional circumstances, if I understand the appellant correctly, those circumstances relate to his state of health. However as was held in Mutua vs. R [1988] KLR 497, the Court of Appeal stated:

“It is not wise to set the applicant at liberty either from the point of view of his welfare or of the State unless there is a real reason why the Court should do so.”

19. Regarding the possibility of the sentence or a substantial part thereof being served before the appeal is heard and determined, the appellant is serving 13 years. In my view there is a very remote possibility of the appellant serving out his sentence before the hearing and determination of the appeal.

20. From the record of the lower court, on 9th September, 2015, the appellant was not present in court and a warrant of arrest was issued against him. It was not until 17th February, 2016 that he was brought to court under warrant of arrest after which his surety withdrew. On 15th March, 2016 upon his application, the appellant was once again admitted to bail pending the hearing of his case. Once again on 14th September, 2016 he was absent and a warrant of arrest was issued against him. On 16th December, 2016 he was once again brought to Court

under warrant of arrest and his surety applied to be discharged. After that the appellant remained in custody until the matter was heard and determined.

21. It is therefore clear that the appellant's conduct during the trial does not entitle him to favourable exercise of this Court's discretion. In his evidence he admitted that he absconded twice. The first time he was found in Mlolongo while the second time he was found in Kakamega.

22. In the premises the application seeking that the appellant be released on bail pending the hearing of his appeal is unmerited and is hereby dismissed. Let the appellant expedite the hearing and determination of his appeal.

23. Orders accordingly.

Ruling read, signed and delivered in open court at Machakos 17th day of September, 2018.

G V ODUNGA

JUDGE

In the presence of:

Mr Swaka for Mr Mulwe for the Appellant

Ms Mogoi for the Respondent

CA Geoffrey