



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 98 OF 2018

ISAIAH MMUROKI IMUNYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

Double jeopardy and Bail pending appeal

[1] The two significant orders sought in the Notice of Motion dated 6th August 2018 are:-

a. THAT the appellant/applicant be admitted to bail and bond pending the hearing and determination of this appeal.

b. THAT the appellant be discharged in Meru Criminal Case No. 1410 of 2018 as the said case is over the same offence in Meru Criminal Case No. 1327 of 2018 wherein the appellant is serving a sentence.

[2] The Motion is expressed to be brought under Section 375(1) of the Criminal Procedure Code (CAP) 75 Laws of Kenya, Articles 50 and 51 of the Constitution of Kenya, 2010 and any other enabling provision of the law. The grounds upon which the Motion is grounded are set out in the application and the affidavit sworn by Isaiah Muroki Imunya on 6th August 2018. The main argument is that he was charged with the offence of obtaining money by false pretence in Meru Criminal Case No. 1327 of 2018 in respect of a land sale agreement. The complainant in the case is said to be very senior person at Meru County Assembly and that he deceived him to plead guilty so that he would be pardoned. When the charges were read to him he pleaded guilty. He later realized the folly and made an application to change the plea which the trial magistrate declined. The complainant then charged him again over the same issue in Meru Chief Magistrate Criminal Case No. 1410 of 2018. He says that if he is not released on bail he might serve the sentence before the appeal is heard, thus, rendering the appeal nugatory. The appeal has overwhelming chances of success.

[3] Counsel for the appellant submitted before the court that this is a case of double jeopardy as the accused has already been charged and convicted on similar facts and transaction. He urged that both charge sheets relate to same transaction. The application ought to be allowed as the petition of appeal reveals that it has overwhelming chances of success.

[3] On the other hand, counsel for the respondent submitted that the petitioner is misleading the court as the charges are different and relate to different transactions. They may have been on the same day but the facts are not similar as one relates to Kshs. 10M and the other Kshs. 3M. Consequently, the appeal has no chances of success as the appellant pleaded guilty.

ANALYSIS AND DETERMONATION

Issues

[4] The two issues that falls for determination by the court are

a. Whether the appellant should be discharge in Meru Criminal case No. 1410 of 2018, for he was charged and convicted on same offence in Criminal Case No. 1327 of 2018; and

b. Whether the appellant should be granted grant bail/bond pending the hearing and determination of this appeal

Case of double jeopardy?

[5] The first issue portends double jeopardy. Double jeopardy refers to:

“The fact of being prosecuted or sentenced twice for substantially the same offence”. See Black’s Law Dictionary, Tenth Edition

[7] And double jeopardy is prohibited by article 50(2) (o) of the Constitution when it states that:-

50(2) Every accused person has the right to a fair trial, which includes the right—

(o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;

[8] The appellant seeks that the charge in Meru Criminal Case No. 1410 of 2018 is same as the offence in Criminal Case No. 1327 of 2018 of which he was convicted and is now serving a sentence. I have perused Case No. 1327 of 2018. The offence is obtaining money by false pretence contrary to section 312 as read with section 313 of the penal code. The particulars are that, between 2nd August 2013 and 15th July 2015, he obtained a sum of Kshs. 3,437,340 from Joseph Kaberia by false pretence. I have also perused case number 1410 of 2018. The offence is conspiracy to defraud contrary to section 317 of the penal code. The particulars are that, on 2nd August 2013, he conspired to defraud Joseph Kaberia a sum of Kshs. 10,000,000. The charges in both cases are different and so are the amounts involved. I note however that the transaction was the same. Ordinarily, prudent prosecution of criminal cases desires that such should be placed in a single charge sheet as substantive or alternative counts. But, I may not wish to determine the appropriateness or adequacy or otherwise of the charges in the case pending in the lower court. If I accept the invitation by the appellant, I will need to evaluate the evidence in support the charge which is within the province of the trial court. In any case, the defence being raised herein is available to the appellant and may be raised it in the case before the trial court. I am content to cite cases which justify this approach. For instance, the Court of Appeal in the case of **Meixner & another v Attorney General [2005] eKLR** stated that:

“It is the trial court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge.... It would indeed, be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court.”

As a result, I will be weary to usurp the jurisdiction of the trial of discharging the appellant in Meru Criminal Case No. 1410 of 2018. I decline the invitation.

Of bail pending appeal

[6] Bail pending appeal denotes the applicant has already been declared guilty and convicted for an offence. Such applicant should therefore satisfy the threshold of law set out in the case of **Dominic Karanja v. Republic [1986] KLR 612** that:

- a. The... appeal had such overwhelming chances of success, there is no justification for depriving the Applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances. (Emphasis added)**
- b. The previous good character of the applicant and the hardships, if any, facing his family were not exceptional or unusual factors. Ill health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners.**
- c. A solemn assertion by an Applicant that he will not abscond if released, even if it is supported by sureties, is not sufficient ground for releasing a convicted person on bail pending appeal.**
- d. Upon considering the relevant material in this case, there was no overwhelming chance of the appeal being successful.**

[7] See also decision of Court of Appeal in the case of **Jivraj Shah -vs- Republic [1986] KLR 605**, inter alia:

“1. The principal consideration in an application for bail pending appeal is, the existence of exceptional or unusual circumstances upon which the court of Appeal can fairly conclude that it is in the interests of justice to grant bail.

2. If it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on an account of some substantial point of law to be urged and the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail will exist.”

[8] The sentence is six months. Applying the test of law, there is a possibility that the sentence or substantial part of it will have been served by the time the appeal is heard and determined. On that basis, I grant the appellant bail of Kshs. 200,000 or bond of Kshs. 500,000 with one surety of similar amount.

Dated, signed and delivered in open court at Meru this 4th day of October, 2018.

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F. GIKONYO

JUDGE

In the presence of:

Mr. Namiti for Respondent

Mr. Kithinji advocate for appellant

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F. GIKONYO

JUDGE