



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CRIMINAL CASE NO. 56 OF 2018

PAUL NDUVE.....APPELLANT/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The appellant herein, **Paul Nduve**, was charged with the offence of Corruptly Soliciting for and receiving a Benefit Contrary to Section 39(3)(a) as read with section 48(1) of the *Anti-Corruption and Economic Crimes Act*, No. 3 of 2003. The facts were that the appellant, a Principal, Wakaela Secondary School, corruptly solicited for a benefit of and received Kshs 10,000/= from **Susan Wanjiku Wanyoike**, as an inducement so as to facilitate the release of a cheque in respect of payment for the supply to the said school of two computers, a printer, computer accessories and stationary.
2. After hearing the evidence in the case, the Learned Trial Magistrate found the appellant guilty, convicted him accordingly and on 5th June, 2018 sentenced him to serve 3 years for each count the said sentences to run concurrently.
3. The appellant, through his Learned Counsel, **Ms Muthini**, now seeks by his application filed dated 16th July, 2018, that he be granted bail/bond pending the hearing and determination of this appeal.
4. According to the appellant, he was taking care of his children and family and paying their school fees but since his arrest and detention has been unable to pay the said fees thus they have been unable to go to school. He however disclosed that he was ready and willing to provide and/or deposit any reasonable security the Court may find proper and/or sufficient.
5. The applicant averred that he is of good antecedents and high moral standing and will abide fully by the conditions this Court may impose. It was his contention that he is a law-abiding citizen having not been charged and/or convicted of any crime until the age of 52 when the charges the subject of these proceedings were preferred against him.
6. The applicant disclosed that on 1st May, 1983, he was appointed by the Teachers Service Commission to work thereat as a Secondary School Teacher being TSC Registration Number 197608/190 which he diligently did till his incarceration and conviction on 5th June, 2018.
7. It was his view that since he resided within the county where he worked for gain as a teacher there is no compelling reason why he should not be admitted to bail and that it is in the interest of justice that he be granted the orders sought.
8. It was the applicant's belief that his appeal harbours very high possibility of success and that no prejudice will be suffered by anyone if his application is allowed.
9. The application was opposed by the Respondent through **Ms Mogoi**, the Learned Prosecution Counsel. According to the Respondent, the Applicant as not demonstrated at all that his appeal has high chances of success or any chances at all. It was deposed that at this stage, the applicant is a convict and not an accused person hence bond is not a matter of right but is purely based on the likelihood of the success of the appeal and other compelling reasons which reasons the applicant have not adduced.
10. To the learned Prosecution Counsel, the solemn assertion by the applicant that he will not abscond if released. Even if supported by sureties, is not a sufficient ground for releasing him on bail pending appeal, considering the seriousness of the offence herein It was contended that the application and the supporting affidavit filed herein are not substantiated as no evidence has been attached in support hence the same cannot be considered in deciding whether or not the applicant's application should be granted.
11. To the Respondent, the applicant ought to set down his appeal for hearing at the earliest and in the event that the same is successful, no

prejudice will be suffered in view of the lawful sentence imposed by the trial court which is lenient considering the effect that economic crimes have in the Country and the endless efforts being put in place to curb the same.

12. I have considered the application and the affidavits both in support thereof and in opposition thereto.

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. It was therefore held in Masrani vs. R [1060] EA 321 that:

“Different principles must apply after conviction. The accused person has then become a convicted person and the sentence starts to run from the date of his conviction.”

16. I therefore agree with the position in Charles Owanga Aluoch vs. Director of Public Prosecutions [2015] eKLR 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.”

17. 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.”

18. 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 Ragbir 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.

19. What constitute exceptional circumstances were dealt with in R vs. Kanji [1946] 22 KLR, where **De Lestang, Ag.J** (as he then was) held that:

“The appellant’s appeal is not likely to be heard before the end of March or beginning of April by which time I am informed

he shall have served one fourth to one-third of his sentence. The mere fact of delay in hearing an appeal is not of itself an exceptional circumstance, but it may become an exceptional circumstance when coupled with other factors. The good character of the appellant may, for example, together with the delay in hearing the appeal constitute an exceptional circumstance. The appellant in this case is a first offender and his appeal has been admit to hearing showing thereby that it is not frivolous. In addition to that there is the fact that his co-accused, who is in no respect in different position from him as regards bail, has been admitted to bail.”

20. According to Trevelyan, J in Somo vs. R [1972] EA 476:

“...the single fact of having been two identical applications with one being allowed and the other being refused was, of itself, an unusual and exceptional circumstance.”

21. Good character alone, however, it was held in the same case:

“can never be enough. There is nothing exceptional or unusual in having such a character.”

22. The rationale for considering the chances of success of the appeal was given in Somo vs. R (supra) at page 480 as follows:

“There is little if any point in granting the application if the appeal is not thought to have an overwhelming chance of being successful, at least to the extent that the sentence will be interfered with so that the applicant will be granted his liberty by the appeal court. I have used the word “overwhelming” deliberately for what I believe to be good reason. It seems to me that when these applications are considered it must never be forgotten that the presumption is that when the applicant was convicted, he was properly convicted. That is why, where he is undergoing a custodial sentence, he must demonstrate, if he wishes to anticipate the result of his appeal and secure his liberty forthwith, that there are exceptional or unusual circumstances in the case. That is why, when he relies on the ground that his appeal will prove successful, he must show that there is overwhelming probability that it will succeed.”

23. In this case I must however agree with Miss Mogoi, Learned Prosecution Counsel, that the applicant did not sufficiently disclose why he believes that his appeal has overwhelming probability of success. In fact apart from a mere mention, it was not demonstrated by him in what manner he believed his appeal would succeed. It is not enough in such matters to simply make an allegation that the appeal will succeed. As was stated in Somo vs. R (supra) the fact that the appeal is not frivolous is of no consequence on its own in support of the application though the fact that it is thought to be frivolous, on the other hand, is for consideration in favour of its rejection. In this case, I must say that the applicant’s application with due respect does not offer the court much help in terms of consideration of the chances of success of his appeal.

24. That notwithstanding Section 48(1)(a) of the *Anti-Corruption and Economic Crimes Act* provides that:

A person convicted of an offence under this Part shall be liable to a fine not exceeding one million shillings, or to imprisonment for a term not exceeding ten years, or to both.

25. However paragraph 11.5 of the *Judiciary Sentencing Policy* provides that where the option of a fine is provided, the court must first consider it before proceeding to impose a custodial sentence and that if, in the circumstances a fine is not a suitable sentence, then the court should expressly indicate so as it proceeds to impose the available option. See Anis Mihidin vs. Republic HCCRA No. 98 of 2001 (Unreported). In Fatuma Hassan Salo vs. Republic [2006] eKLR, it was stated that, “where an option of a fine is given, the court has to give reasons as to why a fine is inappropriate”. In this case despite the option of a fine the trial court opted for a custodial sentence merely commenting that the offences were serious and that it was sending a strong message to the accused. Of course the legislature must have been aware that corruption is a serious matter in this country. Despite that it still gave an option of a fine. Without dwelling in the matter in details, as was implied in Somo vs. R (supra) at page 480 regard may be had to the possibility of the appeal being successful, at least to the extent that the sentence will be interfered with so that the applicant will be granted his liberty by the appeal court. In my view the chances of the custodial sentence being interfered with cannot be ruled out in light of the said policy and decisions. In other words, whether or not this was a matter in which the court was justified imposing a custodial sentence without the option of a fine is, in my view an exceptional or unusual circumstance warranting the Court’s exercise of its discretion.

26. In the premises, the applicant’s application succeeds. The appellant is hereby admitted to bail pending the hearing of this appeal and shall be released on a bond of Kshs. 250,000.00 with a surety of the like sum. Further, he shall appear in court every month for the mention of his case.

27. Orders accordingly.

Ruling read, signed and delivered in open court at Machakos 12th day of November, 2018.

G V ODUNGA

JUDGE

In the presence of:

Miss Kane for the Applicant

Ms. Mogoi for the Respondent

C/A Geoffrey