

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

COURT MARTIAL APPEAL NO. 2 OF 2017

RODGERS MUSYOKI MILAI.....APPELLANT

VERSUS

REPUBLICRESPONDENT

RULING

The Appellant has come to this court by way of Notice of Motion dated 17th February, 2017 brought under **Section 357 of the Criminal Procedure Code, Article 51 of the Constitution** and all other provisions of the law. The main prayer is that the Appellant be admitted to reasonable bail pending the hearing and determination of the appeal. He was charged before the Court Martial at Kahawa Garrison under Court Martial Case No. 2 of 2015 with five counts. In Counts I, II, IV and V, he was charged with committing a civil offence contrary to **Section 133 (1)(b) of the Kenya Defence Forces Act** which is to say obtaining money by false pretenses contrary to Section 313 of the Penal Code. In Count III he was charged with conduct to the prejudice of good order and service discipline contrary to Section 121 of the Kenya Defence Forces Act, 2012.

The Appellant was found guilty for the offence of conduct to the prejudice of good order and service discipline contrary to Section 121 of the Kenya Defence Force Act, 2012. He was sentenced to three months imprisonment on 6th February, 2017. His main ground in this application is that the appeal has overwhelming chances of success. In oral submissions, learned counsel Mr. Were for the Appellant submitted that, firstly, the sentence being of only 3 months, the Appellant was likely to serve the same before the appeal was heard and determined. This would render the appeal nugatory. Secondly, he submitted that the offences were alleged to have been committed at Garissa whereas there was evidence that at all material times, he was in Nairobi. Furthermore, he was on terminal leave which meant that he could not have acted as representing the Kenya Defence Forces when he committed the offences. In that regard, he ought to have been charged under Section 124 of the KDF Act. Thirdly, that the appeal was likely to succeed in respect of the sentence. He submitted that the Appellant having been in remand since January, 2015, and having already served one month of the jail term, the Court Martial ought to have considered that he had already served sufficient sentence.

Learned State Counsel, M/s Nyauncho for the Respondent conceded to the application on ground that the appeal was likely to succeed on sentence. She submitted that when passing the sentence, the Court Martial did not take into account the period the Appellant had been in remand. And taking into account the short sentence imposed, it was only in the interest of justice that the application be allowed.

The principles to be considered in an application for bail pending appeal were settled in the case of **Jivraj Shah vs Republic [1986] eKLR** in which the Court of Appeal held that:

“1. The principle 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 account of some substantial point of law to be urged and that the sentence or

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

3. The main criteria is that there is no difference between overwhelming chances of success and a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed and the proper approach is the consideration of the particular circumstances and weight and relevance of the points to be argued.”

From the record, it is clear that the appeal will most likely succeed with respect to the sentence. It is obvious that the Appellant before the sentence was passed had been in custody for more than one year. Out of the 3 months jail term imposed, he has already served one month of it. In passing the sentence, the Court Martial did not take into consideration the period he had been in remand which is a requirement in law. Consequently, it is in the interest of justice and also not to further subject the Appellant to further prejudice that he should be granted bail.

In the result, the application herein is allowed. The Appellant shall pay a cash bail of Kshs. 20,000/= pending the hearing and determination of the appeal. Meanwhile, the Deputy Registrar must forward the appeal file to a judge for purposes of admission within seven days of this ruling. The appeal should thereafter be fixed for hearing within 21 days. It is so ordered.

DATED AND DELIVERED THIS 13th DAY OF MARCH, 2017.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. No appearance for the Appellant.
2. M/s Sigei for the Respondent.