



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL No. 75 OF 2016

SAMUEL KANG'ARU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

Samuel Kang'aru, the Appellant herein has come to this court by way of Chamber Summons dated 12<sup>th</sup> August, 2016 seeking, *inter alia*, to be granted bail pending appeal. The Application is premised on several grounds namely; that his appeal has an overwhelming probability of success, that he would abide by the terms of any bond granted, that failure to grant bail would render the appeal nugatory, that he poses no threat to society, that he was admitted to bail in the lower court whose terms he met, that he had a fixed abode and did not pose a flight risk and finally that he was sickly and the conditions in the prison would worsen his condition.

The Appellant swore a Supporting Affidavit. In it he deposed that the appeal had a high chance of success in that his conviction in the lower court was for the loss of Kshs. 963,500/ whereas the evidence adduced showed that only Kshs. 647,600/ was unaccounted for. He testified that a forensic report chronicling the loss of the money was prepared by an unqualified person and it was inherently contradictory to the prosecution's evidence. Further, that the burden of proof was shifted upon him against the tenets of natural justice and as such the prosecution never proved their case. He also deposed that when the matter came up before a new trial magistrate Section 200 of the Criminal Procedure Code were not adhered to which infringed on his right to a fair trial. He also deposed that Section 24(g) of the Criminal Procedure Code provided for a penalty of a fine which the court should have preferred in this case.

The parties also took the opportunity to orally present their cases to the court. Mr. Kamwaro for the Appellant elaborated on the issues deposed in the affidavit. He cited the case of **Dennis Yobesh Ombogo & anor v. Republic[2014] eKLR** to buttress his submissions. The Respondent was represented by learned State Counsel Ms. Nyauncho who opposed the application. She submitted that the appeal did not exhibit overwhelming chances of success. She submitted that the prosecution had proven its case to the required standard. She was of the view that appeal was unlikely to be rendered nugatory as the Appellant was only sentenced on 11<sup>th</sup> May, 2016 yet the sentence was a two year jail term.

DETERMINATION

This court has considered the Appellant's application and the submissions tendered in support of the same and in the same breath taken into consideration the Respondent's submissions opposing it. The principles to be considered in granting bail pending appeal were laid down by Trevelyan J. in **Somo v. Republic[1972] EA 476**, 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 and 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 an overwhelming probability that it will succeed. That the appeal has not summarily been rejected, taken in isolation, is of no account in the view of what I have said. ... Nor is the fact that the appeal is not frivolous of any consequence on its own in support of the application...*

*What of other grounds? I do not doubt that such matters as the applicant's good character, delay in the hearing of his appeal and hardship are for weighing in the balance in favour of the grant of the application. But they can only avail the applicant if, on the facts presented, unusual or exceptional circumstances are shown to exist."*

I have had an opportunity of going through the record of appeal and the grounds of appeal. In my view an overview of the evidence on record leads me to conclude that the appeal is likely to succeed. The case concerned theft of money. In particular, the prosecution ought to have demonstrated that the amount stated in the charge sheet is the amount that was proved as stolen. Prima facie, there is evidence that this burden may not have been discharged. It is therefore a case in which the application should be allowed on account that the appeal is likely to succeed.

In the result, the application is allowed. I admit the Applicant to bail pending appeal. He shall deposit a bond of Ksh. 200,000/ with one surety of similar amount or pay a cash bail of Ksh. 100,000/. Counsel for the Applicant should ensure that the appeal is admitted within 15 days. The Deputy Registrar shall in turn call for the lower court file which is ready as proceedings have already been typed and must fix the appeal for hearing within 30 days. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> MARCH, 2017.**

**G. W. NGENYE-MACHARIA**

**JUDGE**

**In presence of:**

1. Kimathi h/b for Kamwaro for the Appellant.
2. M/s Atina for the Respondent.