

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.307 OF 2015

BERNARD MUIGAI MUTAMBU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Bernard Muigai Mutambu was convicted of two counts of **committing a civilian offence** contrary to **Section 133(1)(b)** of the **Kenya Defence Forces Act** by the Court Martial sitting at Moi Airbase. The particulars of the offence were that the Applicant was **found in possession of**, and **dealing in wildlife trophy** contrary to **Sections 95 and 84(1)** of the **Wildlife Conservation and Management Act**, specifically two elephant tusks weighing 10 kilogrammes. The Applicant was sentenced to serve seven (7) years imprisonment. The Applicant was aggrieved by his conviction and sentence and has filed an appeal to this court. Contemporaneous with filing the appeal, the Applicant filed an application seeking to be released on bail pending appeal. The Applicant contends that his appeal has overwhelming chances of success. He was of the view that he would likely be prejudiced if he is not released on bail pending appeal because the appeal may take time to be heard and determined. The application is supported by the affidavit of Francis Omenya, the Advocate for the Applicant.

During the hearing of the application, Mr. Omenya submitted that the Applicant's appeal had overwhelming chances of success because the Court Martial did not have jurisdiction to hear the case as the offence was a civilian one which could only be heard by a civilian court as provided under **Article 50(2)(d)** of the **Constitution**. He further submitted that the Court Martial did not properly evaluate the evidence adduced in the trial. In his view, the evidence adduced did not meet the legal threshold provided by the law. He submitted that the Applicant would abide by any terms that the court may impose to enable him to be released on bail pending the hearing of the appeal. Ms. Wario for the State opposed the application. She submitted that the Court Martial had jurisdiction to try the Applicant pursuant to **Section 4** of the **Kenya Defence Forces Act**. The Court Martial had jurisdiction to mete out the sentence that was imposed on the Applicant. She submitted that the Applicant had failed to establish that his appeal had overwhelming chances of success or that there were exceptional or unusual circumstances that would persuade this court grant the Applicant bail pending the hearing of the appeal. She urged the court to dismiss the application.

This court has carefully considered the rival submission made by the parties to this application. The principles to be considered by this court in deciding whether or not to release the Applicant on bail pending appeal were set out by the Court of Appeal in **Jivraj Shah –vs- Republic [1986] KLR 605** at page 606:

*“There is not a great deal of local authority on this matter and for our part such as we have seen and heard tends to support the view that the principal consideration is if there exist exceptional or unusual circumstances upon which this court can fairly conclude that it is in the interest of justice to grant bail. 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 in law to be urged, and that the sentence or a substantial part of it, will have been served by the time the appeal is heard, conditions for granting bail will exist. The decision in **Somo –vs- Republic [1972] E A 476** which was referred to by this court with approval in **Criminal***

Application No.NAI 14 of 1986, Daniel Dominic Karanja –vs- Republic where the main criteria was stated to be the existence of overwhelming chances of success does not differ from a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed. The proper approach is the consideration of the particular circumstances and the weight and relevance of the points to be argued. It is almost self-defeating to attempt to define phrases or to establish formulae. There is a helpful passage in Archbold, Criminal Pleading Evidence and Practice, 41st Edition page 783, paragraph 7 – 86.”

In the present application, it was clear to this court that the issue that the Applicant intends to argue on his appeal cannot be dismissed as being frivolous at this stage of the proceedings. In all cases, jurisdiction is of utmost importance. Where an issue of jurisdiction is raised, the court must deal with that question first before addressing any other issue. In the present application, we are of the view that the ground of appeal raised by the Applicant on the jurisdiction of the Court Martial to try him on a civilian offence raises a triable constitutional question which will be addressed by this court on appeal. *Prima facie*, this court cannot say that the appeal lodged by the Applicant does not have an overwhelming chance of success. Suffice for this court to say is that, on the question of jurisdiction, the Applicant’s appeal has a chance of success. This court therefore agrees with the Applicant that he will be prejudiced by his continued incarceration if the possibility that his appeal would succeed is likely.

In the premises therefore, the Applicant’s application to be released on bail pending appeal has merit and is hereby allowed. The Applicant is released on bail pending appeal on condition that he deposits a cash bail of Kshs.100,000/- or posts a bond of Kshs.500,000/- with one surety of a similar amount. The Applicant shall be required to appear before the Deputy Registrar of this court once every month for the mention of his case until the hearing and determination of the appeal. The appeal should be listed for hearing within the next ninety (90) days. It is so ordered.

DATED AT NAIROBI THIS 14TH DAY OF OCTOBER 2015

L. KIMARU

JUDGE

G.W. NGENYE – MACHARIA

JUDGE