



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Platt, Apaloo JJA & Masime Ag JA)

CRIMINAL APPLICATION NO. NAI 2 OF 1988

BETWEEN

FRANCIS KAMOTE MUTUA..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

(Application for bail pending appeal from a Judgment of the High Court at Nairobi, Bhandari J)

April 27, 1988, **Platt, Apaloo JJA & Masime Ag JA** delivered the following Judgment.

This is an application for bail pending the hearing of the appeal preferred by Francis Kamote Mutua against the judgment of Bhandari, J.

The learned judge ultimately upheld the Appellant's conviction on the second and sixth counts. On the second count he was convicted of stealing shs. 12,000 as a servant c/s 281 of the Penal Code; and on the sixth count he was convicted of obtaining money by false pretences c/s 313 of the Penal Code. He was sentenced on each count to serve 3 years' imprisonment which was to run concurrently. These orders were given on 9th July 1987 and it is urged that the Appellant might be released from prison before his appeal is heard.

The main problem is whether the appeal has overwhelming chances of success for if it does not, then this Court should not grant bail pending the appeal by virtue of Rule 5 (2) (a) of the Court of Appeal Rules.

The Appellant at all material times was employed as an Accountant by the Day Star University college in Nairobi. On the second count it was alleged that the amounts on six cheques were altered so that the increases on these cheques totalled shs. 120,000. No payment vouchers were produced so that the amounts on the cheques could be compared with vouchers, but by other evidence, namely the cheque register, the original amounts could be established and so the difference.

Without going in to all the details concerning this Count, the defence was a denial by the Appellant of being responsible for these cheques being altered. The grounds of appeal are important but do not point to any factor which shows at this stage that there is an overwhelming chance of success. The memorandum of appeal complains that the burden of proof was shifted to the Appellant and that the conviction was

based on mere assumptions and not proven facts. These grounds of appeal concerned the evaluation of evidence and inferences drawn therefrom, which may properly form the basis of argument on appeal; but in this Court on second appeal, where matters of law must be urged, it is not clear that the appeal will certainly succeed or that there are overwhelming chances of the appeal succeeding.

On the sixth count the Appellant was alleged to have been directed to pay a debt for books by a cheque of US \$5,000 which had been drawn by the college on Barclays Bank of California San Francisco, U.S.A. The procedure was that the cheque would be drawn in favour of the Manager, Barclays Bank, Kenyatta Avenue where the College has its Account. The latter Bank was then to remit foreign exchange to the U.S.A on behalf of the College. In fact that the cheque was not negotiated in this way at all, because it had an endorsement on the back of the personal number of the Appellant. This attracted another practice of the bank to credit the amount on such cheques to the account stated at the back of the cheque. The proceeds of the cheque were therefore credited to the Appellant's account.

The Appellant claimed that he had been given the cheque by the Principal of the College to receive the proceeds as a loan. This defence was considered and rejected for various reasons. In the memorandum of appeal it is urged that the letter of the Principal (upon which the Appellant relied as showing that the Appellant was to have the proceeds of the cheque), had not been properly considered by the learned Judge. It was again a case of assumption and not proof. Having perused the record we think that this argument is not overwhelming.

Mr. Kokonya Mukolongolo referred us to *Lambert Houareau v R* [1957] EA 414 and *Chimambhai v Republic* [1971] EA 343. But we will curtail the argument by referring directly to *Somo v Republic* [1972] EA 476 relied on by Mr. Chunga, the Director of Public Prosecutions. That case exhaustively considered the approach to this problem, and followed an earlier case *Lamba v R* [1958] EA 337, so that the test is whether there are exceptional or unusual circumstances, the most important ground being whether the appeal has overwhelming chances of being successful. If the latter case is made out, there will be no justification for depriving the Appellant of his freedom.

On the question of time, the possibility of the appeal being delayed is not a certainty, and in any event is not an unusual or exceptional circumstance on the facts in this case. On his claim that the appeal will succeed, there is no overwhelming probability that at least the sentence will be reduced, since this Court cannot deal with such a matter and on the other grounds, it is not apparent as a matter of law that the Appellant will succeed. As this matter very often leads to debate, we desire to say that the reasoning given in *Somo's* case is correct.

It must be remembered that a person has been convicted by a properly constituted Court, and is undergoing punishment, because of that conviction, which stands until set aside on appeal. It is not wise to intervene either from the point of view of the welfare of the Appellant or the State, unless there is a real reason why the Court should hold that he should not be deprived of his liberty. The best test of that consideration is whether the Appellant can show an overwhelming chance of establishing his right to be set at liberty. If he does not do so, the law should take its ordinary course.

Accordingly the application is dismissed.

Dated and Delivered at Nairobi this day 27th of April, 1988.

H.G PLATT

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JUDGE OF APPEAL

F.K APALOO

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JUDGE OF APPEAL

J.R.O MASIME

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AG. JUDGE OF APPEAL