



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KARANJA, WARSAME, GATEMBU, J.J.A.)**

**ANTI-CORRUPTION APPLICATION NAI NO. E010 OF 2020**

**BETWEEN**

**ALEXANDER MUSANGA MUSEE .....APPLICANT**

**AND**

**REPUBLIC..... RESPONDENT**

*(An application for bail pending the hearing of the appeal against the judgment of the High Court of Kenya at Nairobi (Onyiego, J) delivered on 23rd September, 2020 in Anti-Corruption Appeal No. 9 OF 2018)*

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**RULING OF THE COURT**

1. The applicant herein was convicted before the Chief Magistrate's Court Anti-Corruption Division in ACC. No. 20 of 2010 of the offence of knowingly giving a misleading document to principal contrary to section 41(2) as read with section 48 of the Anti-Corruption and Economic Crimes Act No. 3 of 2003 and sentenced to 3 years imprisonment. Aggrieved, the applicant moved to the High Court on appeal seeking orders to quash the conviction, set aside the sentence and consequently acquit the applicant. The High Court (Onyiego, J) in a judgement delivered on 23rd September 2020 in High Court Anti-Corruption Appeal No. 9 of 2018 upheld conviction and confirmed sentence against the applicant.
2. The applicant being dissatisfied with the outcome of his appeal moves this Court by a Notice of Motion dated 23rd November 2020 brought under section 3, 3A, 3B of the Appellate Jurisdiction Act, **Rule 5 (2) (b), 1 (2), 42 and 47** of the Court of Appeal Rules, **Article 1 (3) (6), 10, 19, 21, 22, 24, 25, 50, 159, 164** of the Constitution of Kenya, Preamble **Article 4, 5, 8, 10, 11** of the UDHR; **Article 14** of UNCCPPR, the Preamble, **Article 5, 7** of the African Charter on Human People's Rights as read along with **Article 2 (5) (6)** of the Constitution of Kenya. Pending the hearing and determination of his intended appeal, the applicant is seeking orders for bail and the suspension of the sentence and authorization for the release of the Applicant on exceptional circumstances of sickness, old age and Covid 19 challenges.
3. The application was canvassed by way of both oral and written submissions. At the plenary hearing, Mr. Ondieki learned counsel appeared for the applicant while Mr. Njeru was present for the respondent. Mr. Ondieki submitted on the applicant's main grounds for the orders sought; on arguability and the nugatory aspect of the intended appeal.
4. In support of the application, it was submitted that the applicant is aged 67 years old and that the prevailing Covid 19 pandemic is likely to affect his condition. The applicant produced medical reports to urge that pending the hearing and final determination of the intended appeal, she be granted bail. The Court was also referred to principles for granting bail as enunciated in **Michael Juma Oyamo v. Republic (2019) eKLR**.
5. The respondent in response, opposed the application and prayed that the same is dismissed on grounds that the age of 67 years is not very advanced and is not exceptional in the circumstances to warrant the orders sought herein as the conditions highlighted in the medical reports can be managed in the prisons.
6. Having considered the material placed before us, it is clear that the sole issue arising for our determination is whether the application demonstrates exceptional circumstances which would justify our releasing the applicant on bail pending the hearing of his appeal.
7. The Court has discretion to release a convicted person on bail pending the determination of the appeal under the foregoing provisions. However, in exercising such discretion, the Court has to bear in mind, unlike the instance in **Michael Juma Oyamo v Republic** (supra) where the applicants were accused persons seeking bail pending trial, a person who has been convicted by a competent court has lost the

presumption of innocence conferred on him by the Constitution and that during the hearing of the pending appeal, the burden would be upon the convicted person to show that the conviction was wrong. Therefore, as it has been stated time and time again, bail pending appeal will only be granted in rare and exceptional circumstances - see for example Michael Otieno Ademba v Republic (1982-88) 1 KAR 263 and Abdi v Republic [1991] KLR 171. (See Issack Tulicha Guyo v Republic [2011] eKLR).

8. This position was emphasized in Francis Kamote Mutua v Republic [1988] eKLR where the Court stated thus;

*“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.”* Emphasis added.

9. In considering prayers made for bail pending appeal and suspension of sentences under Rule 5 (2) (a) of the Rules, the Court in Jivraj Shah v Republic [1986] eKLR held thus;

*“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 of 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 v 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 v 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.”*

10. We are not persuaded that there are exceptional circumstances, material at this stage to show the conviction is unwarranted and the sentence unlawful, and in the absence of such clear material before us, we are unable to exercise our discretion in favour of the applicant. Accordingly, the application is dismissed with parties bearing their own costs. We nonetheless direct that the appeal be given a hearing dated on priority basis.

*Dated and delivered at Nairobi this 7th day of May, 2021.*

**W. KARANJA**

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**JUDGE OF APPEAL**

**M. WARSAME**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU FCIArb**

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**JUDGE OF APPEAL**

I certify that this is a true

copy of the original.

Signed

**DEPUTY REGISTRAR**