



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CORAM: OMOLO, ONYANGO OTIENO & NYAMU JJ.A.**

**CRIMINAL APPLICATION NO. 16 OF 2010 (UR12/2010)**

**BETWEEN**

**ISSACK TULICHA GUYO.....APPLICANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(An application for bail pending appeal from the judgment and order of the**

**High Court of Kenya at Meru (Emukule, J) dated 22<sup>nd</sup> October, 2010**

**in**

**H.C.CR.C. NO. 248 OF 2008**

**\*\*\*\*\***

**RULING OF THE COURT**

*Issack Tulicha Guyo*, the applicant before us, was tried and convicted by a Senior Resident Magistrate at Moyale on two counts of stealing by servant contrary to **Section 281 of the Penal Code**. He was sentenced to five years imprisonment on count one and two years imprisonment on count two. The magistrate ordered the two sentences to run consecutively which means that the applicant is serving a total of seven years’ imprisonment. He appealed to the High Court and when his appeal in that court was pending determination, he was released on bail. On 10<sup>th</sup> March, 2010, Emukule, J dismissed his appeal and confirmed the sentences imposed by the magistrate. The learned Judge also cancelled his bail and ordered him to restart serving the sentences.

The applicant filed a notice of intention to appeal to this Court on 26<sup>th</sup> October, 2010. He next lodged in the Court the present motion which his counsel told us is brought under **Rule 5 (2) (a) of the Court’s Rules** and under **Section 357 (1) of the Criminal Procedure Code**. In his submissions before us, Mr Mutunga, learned counsel for the applicant, told us the motion is also brought pursuant to **Article 49 of the new Constitution**. In the motion three prayers are sought but in this ruling we are only concerned with Prayer No 3 which is:

*“THAT the applicant herein be admitted to bail pending the hearing and determination of his intended appeal.”*

**Section 357 (1) of the Criminal Procedure Code** cited by the applicant in his motion applies only to appeals to the High Court from decisions of the subordinate courts. That section does not confer on the Court of Appeal power to release convicted persons on bail pending their appeal to the Court of Appeal. Appeals to this Court from the appellate decisions of the High Court are brought under **Section 361 of the Criminal Procedure Code**. No provision under that section authorizes the Court of Appeal to release a convicted person on bail pending appeal.

**Article 49 of the new Constitution** deals with rights of arrested persons waiting to be tried; we see nothing in that Article which would entitle a person who has been tried and convicted by a subordinate court and whose conviction has been confirmed by the High Court to be released on bail by the Court of Appeal pending the hearing and determination of his appeal to the Court of Appeal.

That leaves the applicant only with **Rule 5 (2) (a) of the Court of Appeal Rules**. That Rule provides:

*“5 (2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may -*

*(a) in any criminal proceedings, where notice of appeal has been given in accordance with rule 59, order that the appellant be released on bail or that the execution of any warrant of distress be suspended pending the determination of the appeal.”*

Under that provision, the Court has a discretion to release a convicted person on bail pending the determination of the appeal. How is the Court to exercise the discretion? The Court has to bear in mind that 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. It is not, therefore, surprising that it has been stated time and time again that bail pending appeal will only be granted in rare and exceptional circumstances - see for example **MICHAEL OTIENO ADEMBA VS REPUBLIC (1982-88) 1 KAR 263** and **ABDI VS REPUBLIC [1991] KLR 171**.

Apart from telling the Court that the appeal pending in this Court might take sometime to be heard, Mr Mutunga did not really point out to us any exceptional circumstances surrounding the applicant’s case. We note that he is serving a long sentence of some seven years. The proceedings from the magistrate’s court and from the High Court all appear to be ready because they are included in the record of the motion before us. We think there are no exceptional circumstances which would justify our releasing the applicant on bail pending the hearing of his appeal.

That being the view we take of the matter, the applicant’s notice of motion fails and we order that it be and is hereby dismissed. Dated and delivered at Nairobi this 28<sup>th</sup> day of January 2011.

**R. S. C. OMOLO**

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**JUDGE OF APPEAL**

**J. W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

**J. G. NYAMU**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**