



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO. 6 (E010) OF 2021

DICKSON MOKUA MANDERE.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. On the 15th March 2021 Dickson Mokuia Mandere (**'the applicant'**) filed a Notice of Motion dated the 8th March 2021 seeking the following orders;

i. That the court be pleased to admit the applicant to bond pending the hearing and determination of his Appeal and to suspend his sentence of 2 years imprisonment upon such terms and conditions that it may consider and deem just and fit in the circumstances

ii. That the cash bail of Kshs. 30,000/- paid and held by the Judiciary in Ogembo Senior Resident Magistrate's Case No. 2283 of 2018 (Republic –vs- Dickson Mokuia Mandere) be utilised as bond pending the hearing and determination of the applicant's appeal.

2. The application is supported by the applicant's affidavit filed simultaneously with the application. He avers as follows that; he was charged at Ogembo SRM's Case No. 2283 of 2018 for the offence of Obtaining by false pretences contrary to section 313 of the Penal Code (Cap 63) of the Laws of Kenya. After a full hearing the trial court found him guilty and convicted. His advocate has preferred an appeal on both the conviction and sentence. His appeal has high chances of success in the sense that the sentence he is serving goes against the law and also the known principles and sentencing guidelines as set by the judiciary in that it is harsh, excessive and without basis at law. He promises to abide by all conditions that the court will impose on him regarding his conduct while out on bond. That he has been told that criminal appeals take a bit of time to be heard and since the period of his incarceration is two years without the option of a fine he should be granted bond pending the hearing of his appeal. That he is asthmatic and he has to seek medical attention on a regular basis to keep his health in check and he is also the sole breadwinner of his family.

3. The application was opposed. The respondent filed grounds of opposition as follows; that the application lacks merit. That the sentence of two years was lenient considering that the maximum sentence for the offence is 3 years without the option of a fine. That there exists no exceptional or unusual circumstances upon which the court can fairly conclude that it is in the interest of justice to grant bail. That bail pending appeal is discretionary as the applicant's innocence was compromised upon conviction. That appeals are normally fast tracked in the court and in fact the application in itself though a constitutional right is an impediment to the expeditious disposal of the same and that the issues raised in the application should be canvassed at the appeal on a priority basis given the sentence of 2 years imprisonment.

4. The application was canvassed by way of oral submissions. I have considered the said submissions.

5. The Court of Appeal held in the case of **Jivraj Shah -vs- Republic [1986] KLR 605**, inter alia that:

“1. The principal consideration in an application for bail pending appeal is, the existence of exceptional or unusual circumstances upon which the court of Appeal can fairly conclude that it is in the interests of justice to grant bail.

2. If it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on an account of some substantial point of law to be urged and the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail will exist.

3. The main criteria is that there is no difference between overwhelming chances of success and a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed and the proper approach is the consideration of the particular circumstances and the weight and relevance of the points to be argued.”

6. In the case of **Dominic Karanja v. Republic [1986] KLR 612** the Court of Appeal held that:

a. The most important issue was that if the appeal had such overwhelming chances of success, there is no justification for depriving the Applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances.

b. The previous good character of the applicant and the hardships, if any, facing his family were not exceptional or unusual factors. Ill health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners.

c. A solemn assertion by an Applicant that he will not abscond if released, even if it is supported by sureties, is not sufficient ground for releasing a convicted person on bail pending appeal.

d. Upon considering the relevant material in this case, there was no overwhelming chance of the appeal being successful.

7. I have considered the application, the oral arguments of the parties and a petition of appeal. The onus is on the applicant to demonstrate that there is good reason to grant him bail pending appeal. The applicant states that his appeal has high chances of success on law and sentence. He claims he was sentenced to 2 years imprisonment for the offence of obtaining money by false pretences and that there is a likelihood that his appeal will be heard before the 2 years. I do not agree with this submission as appeals are heard timeously in this court. Ill health and good character does not constitute exceptional circumstances nor a pledge that he will not abscond if released on bond.

8. I however note that the said offence the applicant was found guilty of and convicted is a misdemeanour and carries a sentence of 3 years. 9. I have considered the grounds of appeal and I am persuaded the said grounds disclose reasonable grounds of appeal and taking all factors into account, I find that the applicant has demonstrated that he is entitled to grant of bail pending appeal.

8. The applicant is now a convict serving sentence, I hereby release him on his bond of Kshs. 100,000/- with one surety of like amount to be approved by the Deputy Registrar.

DATED, SIGNED AND DELIVERED AT KISII THIS 17TH DAY OF DECEMBER, 2021

R.E. OUGO

JUDGE

In the presence of;

Appellant Present

Mr. Kaino for the Respondent Absent

Isindu Court Assistant



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