



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. E081 OF 2021

IBRAHIM SAMON ALL.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

Application

1. The application dated 3rd September 2021 was brought under Section 357 of the Criminal Procedure Code and all other enabling provisions of law.
2. The Applicant seeks for orders that the Honourable Court be pleased to admit the Applicant to bail pending hearing and determination of the instant appeal. That in the alternative the Honourable Court be pleased to order stay and/or suspension of execution of sentence in Criminal Case No. 853 of 2019 pending hearing and determination of the instant appeal. That the bond terms be similar to the bond terms ordered at the trial court.
3. The application was premised on the grounds that the Applicant was charged in Criminal Case No. 853 of 2019 before the Chief Magistrate Mombasa Law Courts. That the Applicant was charged with two counts of dealing in wildlife trophy of an endangered species without a permit contrary to Section 92(2) of the Wildlife Conservation and Management Act 2013 and in possession of a specified wildlife trophy without a permit or lawful exemption contrary to Section 92(4) of the Act. That the Applicant was convicted by the Subordinate Court and has filed the instant appeal. That the Applicant has got good grounds of appeal with overwhelming chances of success.
4. The application is supported by an affidavit sworn on 3rd September 2021 by Ruqayya A. Essajee, the advocate acting for the Applicant with such other grounds.

Response

5. The Respondent filed a Replying Affidavit sworn on 26th October 2021 by Edgar Mulamula the prosecution counsel in contact of the matter in response to the Notice of Motion Application dated 3rd September 2021 and the Petition of Appeal dated 2nd September 2021.
6. The Respondent states that the application totally lacks merit and does not meet the legal requisite threshold of the orders that it seeks. That the intended appeal has no chance of success whatsoever as the evidence tendered by the prosecution is overwhelming, well corroborated and sufficient to warrant the conviction arrived at by the Honourable Court. That due to the nature of the offence, the Appellant is convicted of and the sentence imposed, the Appellant's chances of absconding are extremely high. That bail pending appeal is discretionary as the Applicant's innocence was compromised upon conviction. That the Applicant has not demonstrated any peculiar and exceptional circumstances to warrant grant of the orders sought, and that the sentence imposed by the court is lenient considering the nature of the offence which the Applicant was charged and convicted. The Respondent therefore prayed that the application be dismissed. **Applicant's Submissions**
7. The Applicant submits that Section 357 of the Criminal Procedure Code under which the application is brought states that:-

‘After the entering of an appeal by the person entitled to appeal, the High Court, or the subordinate court which convicted or sentenced that person, may order that he be released on bail with or without sureties, or if that person is not released on bail, shall at his request order that the execution of the sentence or order appealed against shall be suspended pending the hearing of the

appeal.’

8. The Applicant submits that the principles for granting bail/bond pending an appeal were reiterated in the case of *Jivraj Shah v Republic* [1986] KLR 605 as follows:-

1. The principal contribution in an application for bond pending appeal is the existence of exceptional or unusual circumstances upon which the Court of Appeal can fairly conclude that it is in the interest 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 account of some substantial point of law to be argued and that the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail exists.

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 weight and relevance of the points to be argued.

9. The Applicant submits that bail/bond pending appeal has been recognised by numerous case law and its principles established. In the case of *Chimambhai v Republic* [1971] EA 343, the court held that:-

“The case of an appellant under sentence of imprisonment seeking bond lacks the strongest elements normally available to an accused person seeking bail before trial, namely the presumption of innocence, but nevertheless the law of today recognises, to an extent at one time unknown, the possibility of conviction being erroneous or the punishment excessive, a recognition which is implicit in the legislation creating the right of appeal in criminal cases...”

10. The Applicant submits that he was convicted purely based on suspicion and circumstantial evidence as evidenced in the grounds of appeal and thereafter on the hearing of the appeal itself. The prosecution failed to prove in whatsoever manner that the Appellant was in possession of the items nor the intentions or the commission in dealing with the items. No evidence was brought forth by the prosecution to prove any liability on the part of the Appellant.

11. The Applicant submits that he was solely arrested based on intelligence reports that described him. The same was not adduced during hearing and its veracity tested during the trial, none of the prosecution witnesses could specifically state what the report stated and connected the 1st and 2nd accused persons to the offences. The Applicant submits that the Appellants were entitled to a true investigation involving the offence charged and the court is expected to determine the matter based on the evidence produced and the application of the law. That the trial court erred in making an assumption on the veracity of the intelligence reports as the same may have been fabricated by the police officers.

12. The Applicant submits that the Appellant during trial fulfilled and complied with all conditions of bail without fail placed by the trial court which were a bond of Kshs. 2,000,000 with a surety. The Appellant produced motor vehicle KBU 171H valued at Kshs. 1,750,000 and Kshs. 350,000 to cater for the balance of the value of the motor vehicle.

13. The Applicant submits that he is of good character, he is the bread winner of his family and cooperated with the court in having the matter determined in good time. That he shall not abscond court and shall ensure he cooperates with the terms the court shall place on him. The Applicant further submits that he has shown the court that the appeal is likely to be successful on account of substantial point of law and fact to be argued and would be unfair for the Appellant to be in prison for the duration of the hearing of the appeal due to a wrongful conviction. The Applicant submitted that in the interest of justice and fairness, he urged that the court exercises its discretion and grant the Appellant bail pending appeal as the same would not be prejudicial to either party.

Respondent’s Submissions

14. The Respondent submits that it is the Appellant’s submission that he was convicted on suspicion and circumstantial evidence. It is the Respondent’s submission that the evidence tendered in court was not based on any suspicion as there was intelligence information that the Appellant was ferrying wildlife trophies from Kitale to Nairobi. PW7 having corroborated the evidence of PW1, PW2, PW3, PW4, and PW5 as he identified the Appellant as one of the accused persons found with a sack of maize that had nine elephant tusks in it.

15. The Respondent submits that the intelligence report provided for the description of the Appellant. PW8 being a Kenya Wildlife Service Officer and the scene of crime officer stated he received intelligence information indicating the Appellant in the company of another person being in the process of ferrying wildlife trophies from Kitale to Nairobi. This can be substantiated by the fact that when a search was conducted on the accused person, two bus tickets were recovered which were in the name of the Appellant. The same were marked as exhibits and produced in court.

16. The Respondent submits by citing the case of *Kigecha Njuga v Republic* [1965] EA 773 where it was stated that:-

“Informers play a useful part no doubt in the detection and prevention of crime, and if they become known as informers to that class of society among whom they work, their usefulness will diminish and their very lives may be in danger. But if the prosecution desires the court to hear the details of the information an informer has given to the police clearly the informer must be called as a witness.”

17. The Respondent submits that the trial court having intelligently interrogated the evidence on record and arrived at a decision on the intelligence information not being fabricated, went ahead to point out the fact that the defence was given ample time to come up with a

reasonable defence on showing the extent of injustice they would suffer should the informer not be called but they never tendered any evidence to show the same.

18. The Respondent submits that bail pending appeal is discretionary as the Appellant's innocence was compromised upon conviction. In the bond and bail policy in such an application, the burden lies with the applicant to establish that the appeal has high chances of success or that he is likely to serve a substantial part of the sentence before the appeal is heard. The Appellant in his application has merely asserted that his appeal has high chances of success without specifically stating the grounds on which he relies on. The Respondent cites the case of *Somo v R* at page 480.

19. The Respondent submits that the application lacks merit and the sentence meted out to the Appellant is lenient as the nature of the offence attracts life imprisonment or a fine of twenty million Kenya shillings provided by Section 92 of the Wildlife Conservation and Management Act 2013. The Respondent therefore prayed that the application be dismissed.

Analysis and Determination

20. This court has considered the Notice of Motion Application dated 3rd September 2021, the Replying Affidavit sworn on 26th October 2021 and submissions by both parties.

21. Article 49(1)(h) of the Constitution provides that:-

An accused person has the right ...

(h) to be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released.

22. In the case of *Masrani v R* [1060] EA 321, it was held that:-

“Different principles must apply after conviction. The accused person has then become a convicted person and the sentence starts to run from the date of his conviction.”

23. This court agrees with the position in the case of *Charles Owanga Aluoch v Director of Public Prosecutions* [2015] eKLR where it was held that:-

“The right to bail is provided under Article 49(1) of the Constitution but is at the discretion of the court, and is not absolute. Bail is a constitutional right where one is awaiting trial. After conviction that right is at the court's discretion and upon considering the circumstances of the application. The courts have over the years formulated several principles and guidelines upon which bail pending appeal is anchored. In the case of *Jiv Raji Shah vs. R* [1966] KLR 605, the principle considerations for granting bail pending appeal were stated as follows:

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

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

(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 weight and relevance of the points to be argued.”

24. The Court of Appeal in the case of *Dominic Karanja v Republic* (1986) KLR 612 stated 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)”

25. This court has considered the decisions above on whose basis point that it is the discretion of the court to grant bail pending appeal,

which discretion should be exercised judiciously. In such an application, the applicant has the burden of establishing that the appeal has high chances of success or has a high likelihood of serving a substantial part of the sentence before hearing the appeal.

26. In the application herein, only judgment of the trial court was availed but not the proceedings. This court was not in a position to peruse the record to establish whether an arguable appeal with high chances of success have been disclosed by the grounds of appeal.

27. The Applicant was sentenced on 23rd August 2021 to 7 years imprisonment or ten (10) million Kenya shillings fine on count one and 3 years imprisonment or three (3) million Kenya shillings on count two. Therefore, there is no likelihood of him having served a substantial part of the sentence before the appeal is heard. The current policy of quick disposal of cases does not create the possibility of delay in hearing of the appeal.

28. Additionally, this court observes that the Applicant has not demonstrated the existence of exceptional or unusual circumstance to warrant grant of bail pending appeal. The fact that the Applicant did not breach bail conditions in the trial court, is of good character, he is the bread winner of his family, and cooperated with the court in having the matter determined in good time are not exceptional circumstances to warrant admission to bail pending appeal.

29. In conclusion, this court finds no merit in the application and is therefore dismissed. Hearing of the appeal be fixed on a priority basis. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS 13TH DAY OF JANUARY, 2022

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of:-

Ogwel- Court Assistant

Ms. Kambaga holding brief for Mr. Mulamula for Respondent

No appearance for Ms. Essajee for the Applicant

Notice of Ruling to be issued to Appellant's counsel

HON. LADY JUSTICE A. ONG'INJO

JUDGE