Kehanche v Republic (Criminal Appeal E016 of 2022)
[2022] KEHC 10663 (KLR) (31 May 2022) (Ruling)

Neutral citation: [2022] KEHC 10663 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E016 OF 2022

GV ODUNGA, J

MAY 31, 2022

BETWEEN

GEOFREY ONYAGA KEHANCHE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the Principal Magistrate A. Nyoike given on 10 th March 2022 at Machakos Criminal S.O Case No. E036/2020)

RULING

1. According to the judgement of the trial court, the appellant herein, Geofrey Ongaga Kehanche, was charged before the Machakos Chief Mag Magistrate's Court in Criminal (SO) Case No E036 of 2020 and convicted of the offence of Committing an Indecent Act with a child contrary to section 11(1) of the *Sexual Offences Act*. No. 3 of 2006. Upon conviction he was sentenced to serve 10 years imprisonment.

2. Aggrieved by the said decision he has lodged this appeal. Pending the hearing and determination of the appeal, he seeks that he be admitted to bail. According to him, his appeal has chances of success. He expounded this by stating that he was not convicted by the trial court before sentence. It was averred that in the judgment delivered on March 10, 2022the court found that the accused was guilty under section 215 of the *Criminal Procedure Code* and the court did not convict the appellant as required on 10th March 2022 mitigation was given and on March 17, 2022 the accused was sentenced. It was further contended that whereas the appellant was charged with offence of indecent act, an offence which is non-existent, he was found for the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No 3 of 2006 which is not the same offence for which he was charged.

3. It was further contended that during the hearing and even in the judgment the court didn't record the exact words the complainant used to describe what the appellant did to her which the court translated to fondle in English. Infact the testimony of the complainant was not recorded in a manner which brought the key elements and infact the court did not record what the child said happened to her. There is no facts or evidence to support the alleged fondling which the court used to find the accused guilty of the offence. Further the court did not find out the fact that the evidence of the complaint did not support the particulars of the offence that the appellant touched the breasts of the complainant. In evidence as recorded by court is that the complaint was fondled there is nowhere the complainant told the court that her breasts were touched.

4. It was therefore submitted that the said grounds disclose the existence of an appeal that has overwhelming chances of success and the grounds turns out that is very likely to succeed even before the same is argued in court based on the judgment of the court.

5. To the appellant, there is an exceptional circumstance in that during the trial in the lower court the appellant was all along his trial out on cash bail and fully observed terms thereof. The applicant further had graduated from Machakos University and has five siblings who are in school and was only bread winner of the family since his father is deceased and his mother is diabetic and on medication and therefore was the only person providing for the family and his mother. It was disclosed that the applicant had just married and has a child and ought to be given a chance to take care of his young family.

6. In opposing the application the respondent averred that the ingredients of the offence with which the appellant was charged were proved before the trial court. It was further noted that the sentence facing the appellant is a long one and that the appeal has no chances of success. To the respondent, the applicant has not demonstrated any peculiar and exceptional circumstances warranting the grant of the orders sought.

Determination

8. I have considered the application and the affidavit in support thereof, the grounds of opposition thereto and the submissions filed.

9. 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.

10. However, a different test applies where the matter before the Court is an application for release on bail pending the hearing of the appeal. Section 357(1) of the *Criminal Procedure Code* provides as follows:

> After the entering of an appeal by a 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 his appeal.

11. It was therefore held in *Masrani v R* [1060] EA 321 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."

12. I therefore agree with the position in *Charles Owanga Aluoch vs. 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. Existence of exceptional or unusual circumstances upon which the court can fairly conclude that it is in the interest of justice to grant bail.
>
> 2. It appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of a 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, then, a condition of granting bail will exist.
>
> Main criteria is that there is no difference between overwhelming chances of success and set of circumstances which disclose substantial merit in the appeal – being allowed, the particular circumstances and weight and relevance of the points to be argued."

13. This position was restated in *Mutua v R* [1988] KLR 497, in which the Court of Appeal stated:

> " It must be remembered that an applicant for bail has been convicted by a properly constituted court and is undergoing punishment because of that conviction which stands until it is set aside on appeal."

14. In *Jivraj Shah vs Republic* [1986] KLR 605; [1986] eKLR, the Court of Appeal held that:

> " 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."

15. It is therefore clear that a different test from that applied in bail pending trial is applied in bail pending appeal. When considering an application for bail pending appeal, the court has discretion in the matter which must be exercised judicially taking into consideration various factors as follows:

    a. Whether the appeal has overwhelming chances of success. See *Ademba vs Republic* [1983] KLR 442, *Somo vs R [*1972] EA 476, Mutua vs R [1988] KLR 497;

    b. There are exceptional or unusual circumstances to warrant the court's exercise of its discretion. See *Raghbir Singh Lamba vs R* [1958] EA 37; *Jivraj Shah vs R* [1986] eKLR; Somo vs R (supra); Mutua vs R (supra);

    c. There is a high probability of the sentence being served before the appeal is heard. See *Chimabhai vs R* [1971] EA 343.

16. What constitute exceptional circumstances were dealt with in *R vs Kanji* [1946] 22 KLR, where De Lestang, Ag J (as he then was) held that:

> " The appellant's appeal is not likely to be heard before the end of March or beginning of April by which time I am informed he shall have served one fourth to one-third of his sentence. The mere fact of delay in hearing an appeal is not of itself an exceptional circumstance, but it may become an exceptional circumstance when coupled with other factors. The good character of the appellant may, for example, together with the delay in hearing the appeal constitute an exceptional circumstance. The appellant in this case is a first offender and his appeal has been admitted to hearing showing thereby that it is not frivolous. In addition to that there is the fact that his co-accused, who is in no respect in different position from him as regards bail, has been admitted to bail."

17. According to Trevelyan, J in Somo vs R [1972] EA 476:

> " ...the single fact of having been two identical applications with one being allowed and the other being refused was, of itself, an unusual and exceptional circumstance."

18. The rationale for considering the chances of success of the appeal was given in Somo vs R (supra) at page 480 as follows:

> " There is little if any point in granting the application if the appeal is not thought to have an overwhelming chance of being successful, at least to the extent that the sentence will be interfered with so that the applicant will be granted his liberty by the appeal court. I have used the word "overwhelming" deliberately for what I believe to be good reason. It seems to me that when these applications are considered it must never be forgotten that the presumption is that when the applicant was convicted, he was properly convicted. That is why, where he is undergoing a custodial sentence, he must demonstrate, if he wishes to anticipate the result of his appeal and secure his liberty forthwith, that there are exceptional or unusual circumstances in the case. That is why, when he relies on the ground that his appeal will prove successful, he must show that there is overwhelming probability that it will succeed."

19. In this case, according to the applicant his appeal has overwhelming chances of success on the grounds that there was no sufficient evidence to warrant his conviction and that the learned trial magistrate did not expressly convict him before sentencing. It would seem that according to the appellant a mere finding of guilty is not the same thing as a conviction. It is also contended that the appellant was charged

with Indecent Act, a non-existent offence but sentenced on Indecent Act with A Child a different offence. In the absence of copies of proceedings and the charge sheet, it is not possible to make a definite finding either way, assuming that the Court could properly make a determination at this stage.

20. While these contentions may well be sustained by the court at the hearing of the appeal itself, I am not satisfied that they constitute overwhelming chances of success. Insufficiency of evidence, defect in charge sheet and irregularity in proceedings are allegations that courts do deal with routinely and nothing makes the said allegations exceptional or show that the appeal has overwhelming chances of success. Whereas the appellant may well succeed in urging the said grounds at the hearing of the appeal, I am not satisfied that the chances of the appeal succeeding can be said to be overwhelming. The grounds are the usual grounds and there is no ground that stands out as one that is very likely to succeed even before the same is argued based on the state of the record, which record has not even been placed before me.

21. In order to make a finding therein, the appellate court, particularly the first appellate court is duty bound to analyse the evidence adduced before the trial court before arriving at its decision.

22. To constitute overwhelming chances of success, the applicant must show thecourt, without the necessity of detailed analysis of the evidence, a glaring error committed by the trial court such as a patently illegal sentence. Where such a decision can only be arrived at by a minute and protracted examination of the lower court record, it cannot be said that such an appeal has overwhelming chances of success since to do so would amount to invitation to the court to usurp the position of the appellate court and to determine the appeal at the interlocutory stage.

23. There is a difference between an appeal that has prospects of success and one that that has overwhelming chances of success. While the latter may warrant the party being admitted to bail/bond during the pendency of the appeal, the former does not. In this case, it is my finding that the matter falls under the former and hence does not meet the threshold for admission to bail pending appeal.

24. In my view, the mere fact that the applicant believes that his appeal has chances of success does not necessarily amount to exceptional circumstances since appellants are only expected to lodge appeal where they believed that their appeals have chances of success. It requires more than such belief to satisfy the court that there are exceptional circumstances. As was stated in Somo vs. R (supra) the fact that the appeal is not frivolous is of no consequence on its own in support of the application though the fact that it is thought to be frivolous, on the other hand, is for consideration in favour of its rejection.

25. I have considered the grounds of appeal and I am not satisfied that the said grounds disclose the existence of an appeal has overwhelming chances of success.

26. It was further contended that there is an exceptional circumstance in that during the trial in the lower court the appellant was all along his trial out on cash bail and fully observed terms thereof. The fact that the appellant complied with the bond terms during trial, in my view does not constitute exceptional circumstances. While absconding bail may well be taken into account in denying admission to bond pending an appeal, it does not follow that adherence to the terms of the bond, without other relevant factors, amount to exceptional circumstances. As appreciated in by Trevelyan, J in Somo vs R [1972] EA 476 good character alone, can never be enough since there is nothing exceptional or unusual in having such a character.

27. The applicant further averred that he had graduated from Machakos University and has five siblings who are in school and was only bread winner of the family since his father is deceased and his mother is diabetic and on medication and therefore was the only person providing for the family and his mother.

It was disclosed that the applicant had just married and has a child and ought to be given a chance to take care of his young family.

28. The Court of Appeal in *Daniel Dominic Karanja vs Republic* [1986] eKLRhowever, dealt with similar allegation as follows:

> " The most important issue here is if the appeal has such overwhelming chances of success that there is no justification for depriving the applicant of his liberty. The minor relevant considerations would be whether there are exceptional or unusual circumstances. The previous good character of the applicant and the hardship, if any, facing the wife and children of the applicant are not exceptional or unusual factors: see Somo v Republic [1972] EA 476. A solemn assertion by an applicant that he will not abscond if he is released is not sufficient ground, even with support of sureties, for releasing a convicted person on bail pending appeal. The applicant was certified to be fit by a doctor on September 23, 1986 and so no issue of illhealth arises. We are not to be taken to mean that ill-health per se would constitute an exceptional or unusual circumstance in every case. There exist medical facilities for prisoners in the country."

29. In this case the appellant was sentenced to 10 years. It is very unlikely that the appeal would be disposed after 10 years. In fact, if the appellant's legal advisers move with speed, the appeal may well be disposed of in the next few months. As regards the appellants alleged family and marital responsibilities, those factors even if true, in my view, do not, on their own, constitute exceptional circumstances. It is my view that it would be better for the appellant to expeditiously pursue his appeal so that he can now his certain of where he stands. It is better that the appellant knows his fate so that both himself and his family do not have anxiety that the appellant may later on be incarcerated.

30. In light of the foregoing I find no merit in this application. Let the appellant expedite the process of the hearing of his appeal.

31. It is so ordered.

RULING READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 31ST DAY OF MAY, 2022.

G V ODUNGA

JUDGE

In the presence of:

Mr Musee for Mr Mutinda Kimeu for the Appellant

Mr Jamsumba for the Respondent

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