



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. E007 OF 2020 AND E008 OF 2020

KENNEDY MAIRURA NATHAN AND

SAMWEL MOGAKA NATHAN.....APPELLANTS/APPLICANTS

=VRS=

THE REPUBLIC.....RESPONDENT

{Being an appeal against the Conviction and Sentence of Hon. B. M. Kimtai (Mr.) – PM Keroka dated and delivered on the 30th October 2020 in the original Keroka Principal Magistrate’s Court Criminal Case No. 1132 of 2018}

RULING

Being aggrieved by their conviction and imprisonment to a total of eighteen years imprisonment for fraud related offences by the Principal Magistrate’s Court at Keroka the applicants preferred separate appeals in this court and simultaneously with the petitions of appeal filed Chamber Summons application seeking to be granted bail pending appeal. The applications which were heard together are premised on identical grounds which are: -

- “1. THAT the Applicant has been tried convicted and sentenced to a total of 18 Years Honourable Bethwel M. Kimutai, PM given at Keroka Principal Magistrate Court in Criminal Case No. 1132 of 2018.**
- 2. THAT the applicant being dissatisfied with the judgement and sentence has lodged an appeal vide HC Criminal Appeal No. E007/2020 and E008/2020.**
- 3. THAT given the time it will take to hear the appeal and the nature of the sentence, if successful the appeal will be rendered nugatory if the appellant is not granted bail pending appeal.**
- 4. THAT the Applicant’s appeal has an overwhelming chance of success.**
- 5. THAT the applicant has a medical condition that may jeopardize him if he continues to remain in prison.**
- 6. THAT it is best interest of justice that the Applicant’s Application to be released on bail pending appeal is heard and determined expeditiously.**
- 7. THAT the continued detention of the Appellant/Applicant immensely undermines, devalues and contravenes the Appellant/Applicant’s constitutional right to bail, to be presumed innocent until proven guilty and to a fair and expeditious trial.**
- 8. THAT the Applicant is ready and willing to comply and abide by terms that this Honourable Court may set.**
- 9. THAT the liberty of the Applicant continues to be curtailed and it is of utmost urgency that to hear this application and his application for bail pending appeal so as to obviate further deterioration of his health and breach of his rights.**
- 10. THAT if the orders sought herein are not granted the Applicant stands to continue basking in the rays of injustice as he is remanded in prison yet he has a conditional right to be presumed innocent until proven guilty.”**

The applications are supported by affidavits sworn on 12th November 2020 by Danston Omari, Advocate. In the affidavit Counsel reiterates the apprehension by the applicants that given the time it will take to hear the appeals they are likely to be rendered nugatory; that the appeals

have overwhelming chance of success; that the continued detention of the applicants immensely undermines, devalues and contravenes their constitutional right to bail, to be presumed innocent until proven guilty and to a fair and expeditious trial. Counsel further deposes that the applicants have medical conditions that may jeopardize them should they continue to remain in prison. Counsel contends therefore that it is in the best interest of justice that the applicants be released on bond pending appeal. He deposes that they are ready and willing to comply and abide by any terms as may be set by this court. He also brings to the attention of this court that the applicants have always attended court when required and shall continue to do so if bail is granted.

The applications were heard orally via video link. Mr. Omayio together with Mr. Danston Omari appeared for the applicants and Prosecution Counsel Mr. Majale for the State.

In their submissions Counsel for the applicants maintained that the applicants were wrongfully convicted. They contended that the charges as drafted were defective, that the families of the applicants are undergoing hardship and that the appeals shall be rendered nugatory should this court reject the applications. It was also their submission that the applicants right to be presumed innocent until proved guilty has also been violated and that the applicants are ill and this court ought therefore to grant the applications.

The applications were vehemently opposed. Relying on the case of **Jivraj Shah v Republic [1986] 605** Counsel for the prosecution submitted that no exceptional or unusual circumstances have been demonstrated to warrant this court to grant the applications.

The jurisdiction to grant bail pending appeal is grounded in **Section 357 (1)** of the **Criminal Procedure Code** which states: -

“(1) 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:

Provided that, where an application for bail is made to the subordinate court and is refused by that court, no further application for bail shall lie to the High Court, but a person so refused bail by a subordinate court may appeal against refusal to the High Court and, notwithstanding anything to the contrary in sections 352 and 359, the appeal shall not be summarily rejected and shall be heard, in accordance with such procedure as may be prescribed, before one judge of the High Court sitting in chambers.”

The power to grant or not to grant bail pending appeal is therefore a discretionary one. That discretion must however as always be exercised judicially and the principles for exercising such discretion were settled in the case of **Jivraj Shah v Republic [1986] KLR 605** where it was held: -

“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 account of some substantial point of law to be urged and that 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 weight and relevance of the points to be argued.....”

The above principles were expounded as follows in the case of **Dominic Karanja v Republic [1986] 612**: -

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

2. 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.

3. 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.....”

It is instructive that the case of a convicted applicant is different from that of an accused person because once convicted the presumption of innocence is lost. The argument by Counsel for the applicants that their continued incarceration violates their right to be presumed innocent until proven guilty therefore lacks merit and cannot be a ground for granting them bail. My finding gets support from the observation of Harris J in the case of **Chimambhai v Republic [1971] EA343** that: -

“The case of an appellant under sentence of imprisonment seeking bond lacks one of the strongest elements normally available to an accused person seeking bail before trial, namely, the presumption of innocence, but nevertheless the law of today frankly recognizes, to an extent at one time unknown, the possibility of the conviction being erroneous or the punishment excessive, a

recognition which is implicit in the legislation creating the right of appeal in criminal cases.....”

As can be seen from the above cases the main considerations for grant of bail pending appeal are whether the appeal has high chances of success and whether the sentence or substantial part of it is likely to have been served by the time the appeal is heard. In the case of **Dominic Karanja v Republic (supra)** the Court of Appeal found submissions that the applicant had faithfully attended court during the trial, the hardships if any facing his family and the applicants’ ill health where there exist medical facilities for prisoners all of which were cited by Counsel for the applicants herein not to be exceptional circumstances. Each case must however be determined on its own merits and the courts have on several occasions drawn guidance from the case of **Arvind Patel v Uganda SC Cr Appeal No. 1 of 2003** where Justice Odera of the Supreme Court of Uganda set out the circumstances under which bail pending appeal could be granted as: -

- 1. The character of the offender;**
- 2. Whether applicant is or not a first offender;**
- 3. Whether the offence of which the applicant is convicted involved personal violence;**
- 4. The appeal must not be frivolous and has reasonable chances of success;**
- 5. The possibility of substantial delay in the determination of the appeal and;**
- 6. Whether the applicant complied with bail conditions granted before the applicant’s conviction during the pendency of the trial.**

I have considered the applications before me with all the above principles in mind and my finding is that the same have no merit. While this court could have treated the illness of the applicants as exceptional circumstances given that we are in a pandemic and those with pre-existing conditions are more vulnerable, no evidence of such illness was placed before this court. The excuse that Counsel could not procure the documents evidencing the illness because the applicants are in Kisii is not in my view plausible as Kisii is not very far from Nairobi. Secondly, the applicants were sentenced to imprisonment for eighteen years and it is unlikely that the term or any substantial part thereof will be served before this appeal is heard as appeals are now heard expeditiously within a set time frame. There is therefore no possibility that the appeals shall be rendered nugatory. In the premises the applications are dismissed. It is so ordered.

Signed, dated and delivered electronically this 21st day of January 2021.

E. N. MAINA

JUDGE