



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

Coram: D. K. Kemei - J

**CRIMINAL APPEAL NO. E 005 OF 2020**

**FRANCIS MACHARIA NZEKI *alias* "MACHA" .....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The Applicant applied for bail pending determination of his appeal. The application was lodged by Notice of Motion dated 13.10.2020 that was brought under sections 356 and 357 of the Criminal Procedure Code.

2. The grounds of the application as contained in the Notice of Motion are:

***a) The Applicant had been charged, convicted and sentenced to serve 20 years' imprisonment for the offence of Grievous Harm contrary to section 234 of the Penal code in Mavoko Senior Principal Magistrates Court Criminal Case 468 of 2020.***

***b) That being aggrieved by the conviction and sentence of the learned trial magistrate, the applicant has since appealed against the said conviction and sentence by filing the present appeal.***

***c) The appeal has overwhelming chance of success.***

***d) The applicant is not at flight risk as he has a residence at known places.***

3. The application was filed in the court registry on 13.10.2020 and is supported by the affidavit of the Applicant. In the affidavit in support of the application, the Applicant reiterated the grounds in the notice of motion and added that he was coerced to offer a plea of guilty by the complainant and his family; that the charges were faked against him with a view to extorting money from him. He averred that he is likely to serve a substantial part of the sentence before his appeal is heard and determined. No copy of the petition of appeal is annexed to the supporting affidavit but however there is a copy of the same on the court record.

4. On record is an affidavit in reply by Martin Mwongera learned counsel for the Respondent working with the office of the DPP. He pointed out that the appellant was charged with the offence of attempted murder and an alternative count of grievous harm. It was averred that the applicant entered a plea of guilty and was sentenced. The deponent opposed the application as it was not demonstrated that the appeal had any chances of success. It was averred that there are no grounds to warrant release of the applicant on bail pending appeal.

5. The court directed that the application be canvassed vide written submissions. Learned counsel for the Respondent in their submissions while appreciating the case of **Jivraj Shah v R (1986) KLR** submitted that the application is misconceived, unmerited, premature and should not be granted. The court was urged to dismiss the application. Counsel Maanzo & Co. Advocates who represented the Applicant filed their submissions in support of the application.

6. The Applicant's learned counsel in their submissions framed three issues for determination; firstly, whether the appeal had overwhelming chances of success; Secondly, whether there were exceptional circumstances to warrant the release of the applicant on bail pending appeal and finally if the applicant was likely to abscond if released on bond pending appeal.

7. In respect of the 1<sup>st</sup> issue, reliance was placed on the provisions of section 357(1) of the Criminal Procedure Code and the case of **Jivraj Shah v R (1986) KLR 605** in submitting that the applicant met the threshold for grant of bail pending appeal. According to counsel, the appeal had overwhelming chances of success and cited the cases of **John Muendo Musau v R (2013) eKLR**, **Wandete David Munyoki v R (2015) eKLR** and submitted that the appeal could not be defeated because the applicant was convicted on an own plea of guilty. It was pointed out that in the trial court, the applicant did not plead guilty when first arraigned and his response was that the complainant wished to

withdraw the case. It was pointed out that the complainant coerced the applicant to offer a guilty plea and that the applicant did not wish to plead guilty. It was further pointed out that the applicant was not represented at trial by an advocate and that the court ought to have exercised caution to ensure that the applicant was not wrongfully convicted and sentenced in the circumstances. Counsel cited the case of **Abdalla Mohammed v R (2018) eKLR** in this regard.

8. In respect of the 3<sup>rd</sup> issue, it was submitted that the applicant served three months and ought to be released so that he may continue fending for his family. It was submitted that the applicant was not likely to abscond as he had no intention of relocating from his area of residence as indicated in the probation officer's report.

9. I have carefully considered the application for bail pending appeal together with the evidence and taken into account the submissions of counsel for the applicant. I do not need to belabour the conditions for grant of bail pending appeal which the court to set out in the case of **Jivraj Shah v Republic [1986] KLR 605**. For emphasis the following principles are pertinent:

*i. The existence of exceptional or unusual circumstances upon which the Court may rely upon*

*ii. 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.*

*iii. 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.*

10. A convicted person who knows that he or she has little chance of succeeding on appeal is unlikely to wait patiently to serve what might be a severe sentence of imprisonment. This is because the said person does not now enjoy the presumption of innocence to his guilt. If bail is to be granted to a person serving a severe sentence, very stringent conditions must be imposed. Bail pending appeal maybe granted when there are exceptional and unusual circumstances which depend on the facts of each case. Thirdly, bail may be granted if there is an overwhelming probability of the appeal succeeding. Last but not least bail would be granted if it is unlikely that the appeal would be heard until the end or after the expiration of the sentence appealed against.

11. In **Raghibir Singh Lamba v R [1958] 1 EA 337** (High Court of Tanganyika) Spry Ag J at page 338 it was held that the burden is on the prosecution pending trial why the accused should not be released on bail. The onus shifts to the accused to show why he or she should be released on bail pending appeal after his or her conviction and sentence.

12. In **Girdhar Dhanji Masrani v R [1960] 1 EA 320** Sheridan J, held that different principles should apply to applications for bail pending appeal after conviction compared to applications for bail pending trial. A person applying for bail pending appeal lacks one of the most important elements normally available to a person seeking bail before trial which is the presumption of innocence (See Harris J in **Chimambhai v Republic (No. 2) [1971] 1 EA 343 (High Court of Kenya at Mombasa)**).

13. In **Kaguma v Republic [2004] 1 EA 68** it was reiterated by the Court of Appeal of Kenya following earlier precedents that *"The most important issue here is if the appeal has such overwhelming chances of success that there is no justification of or depriving the Applicant his liberty"*.

14. In **Kenneth Mwaniki v R (2015) eKLR** the court included the fact of previous good character of the applicant as well as an assertion not to abscond.

15. Bail pending appeal is provided for under section 357 (1) of the Criminal Procedure Code. It states that:

*"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."*

16. The entitlement to bail is subject to compelling reasons as per Article 49(1) (h) of the Constitution. Nevertheless, the law is silent on what amounts to compelling reasons. In **Hassan Mahat Omar & Another v Republic, Nairobi High Court Criminal Revision No. 31 of 2013**, Lady Justice L.A Achode rendered herself thus:-

*"What amounts to compelling reasons as envisaged in Article 49(1) (h) of the Constitution is a matter of judicial discretion. Kenya does not have statutory guidelines to govern the granting of bail. However, a glimpse at pertinent laws of other common law countries such as the Bail Act of England and Section 60(4) of the Criminal Procedure Code of South Africa, gives us examples of issues to consider in determining whether or not compelling reasons exist in a given case."*

17. In the Ugandan Trial on Indictments Act, exceptional circumstances are defined by section 15 (3) and additional factors are considered by section 15 (4) which are reproduced for ease of reference:

*"(3) In this section, "exceptional circumstances" means any of the following-*

*(a) grave illness certified by a medical officer of the prison or other institution or place where the accused is detained as being incapable of adequate medical treatment while the accused is in custody;*

(b) a certificate of no objection signed by the Director of Public Prosecutions; or

(c) the infancy or advanced age of the accused.

(4) In considering whether or not the accused is likely to abscond, the court may take into account the following factors-

(a) whether the accused has a fixed abode within the jurisdiction of the court or is ordinarily resident outside Uganda;

(b) whether the accused has sound securities within the jurisdiction to undertake that the accused shall comply with the conditions of his or her bail;

(c) whether the accused has on a previous occasion when released on bail failed to comply with the conditions of his or her bail; and

(d) whether there are other charges pending against the accused."

18. In this application, the first and main issue is whether the Applicant's appeal will succeed or whether the appeal has a high chance of success and the second is compelling reason or exceptional circumstances warranting the release of the Appellant on bail pending appeal that have been discussed above. The petition of appeal has not been annexed to the application but however the same is on the court record and was filed on 13.10.2020.

19. The Applicant through his learned counsel, argued that the appeal has overwhelming chances of success. Learned counsel has filed a Petition for Appeal in which he raises ten (10) grounds of appeal. It is trite law that it is not for the court to delve into the merits of each ground but it should suffice that all the grounds are examined, and a conclusion is made that *prima facie* the prospects of success are high or dim.

20. I have carefully examined the grounds of appeal raised by the Applicant. The Applicant/Appellant raises issues such as the propriety of the plea of guilty and the severity of sentence. I could state that the appeal is arguable but am constrained to speak to the success of the appeal.

21. I note that the Respondent herein has also not offered sufficient reasons to show that the Appellant will abscond if granted bail. These circumstances will work well towards the applicant. Besides, it is noted from the record that the appellant and complainant had entered into negotiations on compensation whereby the appellant had made some part payment and which the trial court took into consideration. There is a high possibility that the applicant had been duped into pleading guilty so as to pave way for release upon payment of compensation to the complainant.

22. I am unable to consider the doctrine related to delays in hearing an appeal alluded to by the applicant, as there is no evidence that the appeal that was filed on 13.10.2020 will not be heard within a year. Its hearing could be expedited. In any case most appeals are disposed by way of written submissions and hence the appeal could easily be wrapped up within the shortest time possible. Finally, it is noted that the presentence report presented to the trial court regarding the appellant is favourable as it recommended that he be given a non- custodial sentence.

23. In light of the foregoing, I find merit in the appellant's application dated 13.10.2020. The same is allowed in the following terms:

**a) The appellant is released on bond pending appeal in the sum of Kshs 200,000/ plus one surety of like sum.**

**b) Upon release the appellant shall attend court as and when scheduled without fail until the final determination of the appeal or until further orders.**

**c) In default to observe the terms of bond, the same will be cancelled and he together with his surety called to account.**

**d) The appellant is directed to ensure that he sets the appeal down for hearing on priority basis.**

It is so ordered.

**Dated and delivered at Machakos this 20<sup>th</sup> day of January,2021.**

**D. K. Kemei**

**Judge**