REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. E12 OF 2020

ANDREW MBAABU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. Before this Court is an application for bail pending appeal brought under Section 357 of the Criminal Procedure Code. The principles to be considered on an application for bail pending appeal were set out in ***Jivraj Shah v. R*** (1986) KLR 605 which this Court has previously discussed in numerous other decisions. See the case of ***Joyce Kainda Muthuri v. Republic Criminal Appeal Application No. E028 of 2020.*** As a matter of principle, the Appellant has to demonstrate that there are exceptional and unusual circumstances in the Appeal, say in the nature of an overwhelming chance of success and the likelihood of the applicant serving his sentence in full or substantially before the appeal is heard and determined.

2. The Appellant was charged with three counts being 'Forcible Entry contrary to Section 90 of the Penal Code; Creating Disturbance in a manner likely to cause a breach of peace contrary to Section 95 (1) (b) of the Penal Code; and Malicious Damage to Property contrary to Section 339 (1) of the Penal Code. He was convicted on the 1st and 3rd counts and ordered to pay a fine of Ksh 100,000/= and Ksh 20,000/= respectively or in the alternative to serve 2 years and 6 months imprisonment respectively.

3. The Appellant's Advocates swore the supporting affidavit on his behalf. This Court has previously warned against the practice of Advocates swearing affidavits on behalf of their client moreso when factual averments are with respect to the offence in issue. This notwithstanding, the Appellant urges that he was born and brought up on L.R. No. TIGANIA/KIRIMA/53 where he has had a home for the last 53 years and that the same has been subject of civil litigation between the Appellant and the Complainant and it is therefore misleading to allege that the Appellant forced himself there on 15th June 2017. He urges that his appeal has high chances of success and if not granted bail, his appeal may be rendered nugatory should he succeed, given that he is likely to have served most and/or a substantial part of his sentence by the time the appeal is heard and determined. He argues that he is the sole bread winner and he has small children to look after. He argues that he has always attended Court when required and will do so if released on bail pending appeal.

4. The Prosecution filed Grounds of Opposition which from a perusal seem misplaced as they relate to an application for Criminal Revision pursuant to Section 362 of the Criminal Procedure Code whereas the instant application is one for bail pending appeal. This Court will therefore not consider those grounds.

5. Applying the test laid out in the Jivraj Shah v. R case, this Court first has to consider whether there is an exceptional circumstance in the nature of an overwhelming chance of success. In urging an overwhelming chance of success, the Appellant's main argument is that the Learned Magistrate erred in failing to find that on 15th June 2017, when the alleged forceful entry on the property allegedly happened, the Appellant had already been on the same land believing it was his for 57 years reason that the Complainant had filed a civil suit praying for the Appellant's eviction and thus erroneously convicting the Appellant on an unproved charge.

6. The Appellant essentially claims ownership and/or belief of ownership of the property in question thereby arguing that he could not have forcibly entered into that which belonged to him and/or that which he believed belonged to him. Having perused the record and judgment, this Court notes that the trial Court addressed this issue of ownership and evidence was adduced to confirm that the Complainant was the owner of the property. Materially, it is one thing to own the property and it is another to believe that one owns the property. The latter would not under any circumstances be construed as giving one rights over the property as mere belief is just but that.

7. On whether the Accused is likely to have served a substantial part of the sentence by the time the appeal is heard, this Court finds that the sentence being one of 2 years and 6 months cumulatively, the Appellant may end up serving part of the same. As to whether this would be substantial, this Court finds that the Accused may indeed end up serving a substantial part of the same.

8. Further, this Court observes that for Count I, Forcible Entry contrary to Section 90 of the Penal Code, the Accused person was sentenced to pay a fine of Ksh 100,000/= in default of which he shall serve two (2) years imprisonment. It would appear to this Court that this sentence is illegal, going by the provisions of Section 28 (2) of the Criminal Procedure Code which provides as follows:-

> **In the absence of express provisions in any written law relating thereto, the term of imprisonment or detention under the Detention Camps Act (Cap. 91) ordered by a court in respect of the non-payment of any sum adjudged to be paid for costs under section 32 or compensation under section 31 or in respect of the non-payment of a fine or of any sum adjudged to be paid under the provisions of any written law shall be such term as in the opinion of the court will satisfy the justice of the case, but shall not exceed in any such case the maximum fixed by the following scale—**
>
> | **Amount** | **Maximum period** |
> |---|---|
> | **Not exceeding Sh. 500 .....** | **14 days** |
> | **Exceeding Sh. 500 but not exceeding Sh. 2,500** | **1 month** |
> | **Exceeding Sh. 2,500 but not exceeding Sh. 15,000** | **3 months** |
> | **Exceeding Sh. 15,000 but not exceeding Sh. 50,000** | **6 months** |
> | **Exceeding Sh. 50,000** | **12 months** |

9. Section 90 of the Penal Code, which provides for the offence of Forcible Entry is subject to the aforementioned provisions in that the section does not expressly provide for an imprisonment term in default of a fine. Section 36 which provides for penalty for misdeamenors provides that maximum penalty shall be an imprisonment term not exceeding two (2) years of a fine or both. The sentence of imprisonment for two years in section 36 is a substantive sentence not a default sentence, within the meaning o of section 28(2) of the Penal Code. In exercising its discretion, the trial Court imposed a fine of Ksh 100,000/= in default of which the Appellant is to serve 2 years. Since the fine imposed was Ksh 100,000/= going by the aforementioned provisions of Section 28 (2), it appears the maximum sentence should be 12 months as the sentence equivalent to a fine of Ksh 100,000 should not be more than 12 months. For this reason, this Court's find that there is an exceptional circumstances which will warrant grant of bail pending appeal.

10. It would not matter that the Appellant is 57 years old and that he is sole breadwinner with small children as his sentence is merely a natural consequence of his conviction. This Court also observes that despite alleging that the Appellant is sickly, no evidence has been adduced to indicate the nature of this sickness to enable this Court determine whether the prison facilities would not be capable to attend to the Appellant. However for the reasons set out above, more so concerning the illegality of the sentence imposed on Count I, this Court is inclined to grant bail pending appeal.

ORDERS

11. Accordingly, for the reasons set out above, the Court makes the following orders: -

> **i. The Appellant's application for bail pending appeal dated 16th October 2020 is hereby allowed in terms of prayer 2 of the application.**
>
> **ii. The Appellant is admitted to bail pending appeal on terms that he executes a bond of Ksh.200,000/= with one (1) Surety for a similar amount.**

Order accordingly.

DATED AND DELIVERED THIS 25TH DAY OF FEBRUARY 2021

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Thuranira Atheru & Company Advocates, Advocates for the Appellant.

Ms Nandwa, Prosecution Counsel for the Respondent.