



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. E027 OF 2020

DENNIS MUTHOMI MURIITHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The principles to be considered on an application for bail pending appeal pursuant to the provisions of Section 356 and 357 of the Criminal Procedure Code were set out in *Jivraj Shah v. R* (1968) KLR 605 which considered earlier decisions of the Court and expounded on the factor of overwhelming chances of success and held as follows: -

“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) EA 476 which was referred to by this court with approval in Criminal Application 5 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. It is almost self defeating to attempt to define phrases or to establish formulae.”

2. The Appellant was convicted of the offence of stealing contrary to Section 268 as read with Section 275 of the Penal Code and was sentenced to 3 years imprisonment.

3. The Appellant argues that his appeal has high chances of success as demonstrated by the grounds of appeal in the Petition of Appeal. The Petition of Appeal raises 6 grounds of appeal as follows: -

i) THAT the Learned trial Magistrate misdirected himself in law and in fact in finding as he did, a conviction against the weight of the evidence on record and in toto disregard of the glaring discrepancies, contradictions and blatant falsehoods in the evidence tendered by the prosecution witnesses.

ii) THAT the Learned trial Magistrate erred in law in failing to find and or hold that the Prosecution did not prove its case beyond reasonable doubts as he was enjoined by the law to do so, and further erred in law in finding and or holding that the Appellant was guilty of the offence of stealing contrary to Section 268 as read with Section 275 of the Penal Code.

iii) THAT the Learned trial Magistrate erred in law in shifting the burden of proof against the Appellant throughout his judgment.

iv) THAT the Learned trial Magistrate erred in law and in fact in holding that the Appellant had not challenged the evidence of the prosecution witnesses.

v) THAT the Learned trial Magistrate erred in law and in fact in dismissing the Appellant’s defence and or failing to properly consider and apply the Appellant’s defence before arriving at a conviction.

vi) THAT the sentence of three (3) years imprisonment was manifestly excessive in the circumstances of the case before the trial Magistrate.

He further urges that due to the prevailing COVID 19 pandemic leading to slowing down of court operations, his appeal is likely to take a

long time before it is heard and determined. He urges that he lives with his parents at Gituri village, Mwichiune Sub Location within Imenti South Sub County in Meru County and he is therefore not a flight risk. He urges that during hearing in the trial Court, he was on a cash bail of Ksh 50,000/= and that he dutifully attended Court all through as required and that he is ready to similarly abide by all terms and conditions imposed by the Court for admitting his bail application.

4. The Prosecution filed Grounds of Opposition and they urge that the Appellant's application is incompetent, lacks merit and is an abuse of court process. They urge that the Appeal is weak and does not at all have any high chance of success because the prosecution proved its case beyond reasonable doubt; That the Appellant was rightly convicted as there are no inconsistencies in the witness statements and the evidence on record; That there are no compelling grounds to have the Appellant granted bail; That the Appellant's application is misleading, full of half truths and it does not disclose any special/peculiar circumstances to grant the order prayed for and ought to be dismissed.

5. This Court observes that the Appellant has not brought out with specificity the nature of the special circumstance that exhibits an overwhelming chance of success. He merely states as per the Petition of Appeal that the Prosecution's evidence consisted of glaring inconsistencies and falsehoods. He also argues that the trial Court failed to consider his defence. His defence as gleaned from the Judgment was a denial and an averment to the effect that he was only arrested when he went to collect money sent to him from an Mpesa shop.

6. Without prejudging the Appeal, this Court has perused the record and Judgment and finds no inconsistency in the evidence by the Prosecution. What may not have clearly been brought up is how the entire Ksh 86,000/= is linked to the Appellant. Other than the Ksh 40,000/= proven to have been withdrawn and the Ksh 2,000/= borrowed through Fuliza by the Appellant, there seems to be a gap in the explanation as to how the balance of Ksh 44,000/= was expended by the Accused. This was however not brought up by the Appellant. It is for the Appellant to lay down its case.

7. As to the averment that the COVID 19 pandemic may affect the speed at which this Appeal is heard and determined, this Court finds this to be untrue. In any event, there is now a policy of Court, as we have adopted in Meru Law Court to grant priority hearing for deserving cases upon consideration at a triage session conducted by the Presiding Judge every month.

8. This Court finds that the application does not disclose an overwhelming chance of success of the appeal and/or an exceptional circumstance to warrant grant of bail pending appeal. The fact that the Appellant abided by the terms of bail granted to him in the trial Court and the fact that he has a known place of abode are not relevant in determining this application.

9. In conclusion, this Court is inclined to deny the prayer for bail pending appeal. The Court nonetheless orders for an expedited disposal of the Appeal and directs that the matter be heard on priority basis.

ORDERS

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

i) The Appellant's application for bail pending appeal herein is declined.

ii) For the expeditious disposal of the matter, a hearing date for the Appeal shall be given on priority basis on dates convenient to both the Court and Counsel.

Order accordingly.

DATED AND DELIVERED THIS 25TH DAY OF FEBRUARY 2021.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Haron Gitonga & Company Advocates, Advocates for the Appellant.

Ms Nandwa, Prosecution Counsel for the Respondent.