



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARSEN**

**CRIMINAL APPEAL NO. E011 OF 2021**

**YAHYA AHMED SHEE Alias BASODE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**Coram: Hon. Justice R. Nyakundi**

**Mr. Omwancha for the Appellant.**

**Mr. Kadebe & Mr. Oruwa for the State**

**RULING**

This Ruling is in respect of the Appellant's Application dated 12<sup>th</sup> April, 2021 in which he seeks bail pending the hearing and determination of his appeal. The application is brought on the grounds;

- a) That the Appellant has a meritorious Appeal with a probability of success.
- b) That the Appellant/Applicant is a Kenyan Citizen with a known residence and family and has never absconded before the trial court.
- c) That the Appellant/Applicant is a family man who is the sole bread winner of his family of three (3) young children who entirely depend on the Appellant/Applicant.
- d) That the Appellant/Applicant also takes care of his aging mother who is a widow and a sickling suffering from High Blood pressure and Diabetes which requires intensive care in terms of medication and expenditure which entirely depends on the Appellant/Applicant.
- e) That the Appellant/Applicant is a Member of the County Assembly of Lamu County representing M Ward in Lamu Island within Lamu County and therefore his political career as a member of the County Assembly of Lamu County is at the verge of being destroyed on the ground if he continues to be in custody as the same will mean that the Speaker of the County Assembly of Lamu will proceed to pronounce the M Ward Assembly seat vacant.
- f) That the Appellant/Applicant was released on bond in the trial court with strict and harsh terms of reporting to the Lamu Police Station, to the village elder and to the Lamu Law Courts Executive Officer every Monday of every week and was also ordered not to leave Lamu County until the determination of the case, deposit his national identification card in court.
- g) That the Appellant/Applicant complied with the said terms and conditions and obediently attended Court at each and every time he was required and also on the date of Judgment hence if he is admitted to bail pending appeal, he will comply to any kind of terms that this Honourable Court shall impose on him.
- h) That intended one UKS who is the wife of the Appellant/Applicant has sworn an affidavit which is filed and she has committed herself to be a surety and that she is aware of her duties and responsibilities as a surety and further that she is willing and ready to subject herself to any terms and conditions that shall be imposed by the court.
- i) That the judgment and the sentence were virtually delivered and passed respectively hence the physical file is with the

**Trial Magistrate and therefore the same has not been availed at the Lamu Registry to enable typing of the proceedings but as a requirement the Advocates for the Appellant/Applicant immediately after the sentence and vide a letter dated 7<sup>th</sup> April, 2021 applied for the typed and certified proceedings, Judgment and Ruling on sentence.**

**j) That though the Judgment and the Ruling on sentence has been provided, the physical file is still with the Trial Magistrate and therefore it has not been possible to obtain typed and certified proceedings which therefore will take a long time for the proceedings to be typed and availed to the Appellant hence the period within which an Appeal is required to be lodged will have lapsed as a result which the Appellant will continue to be in jail and therefore suffer loss and damage.**

**k) That the Appellant/Applicant is a resident of M in Lamu Island and a representative in the County Assembly in Lamu County as the MCA of M Ward and he is a family man therefore he is not a flight risk.**

The Application is supported by the sworn affidavit of **Alfred Mirewa Omwancha, advocate for the Appellant**. The affidavit reiterates the grounds upon which the application is premised as stated above.

The Respondent opposed the Application through filing a Replying Affidavit as well as grounds of opposition. **Mr. Orwa Okaka for the Respondent** submitted that the Application does not meet the legal threshold of the orders that are being sought, that the applicant is facing a long sentence after having been convicted for various offences that he was charged with before the trial court, that the intended appeal has no chance of success whatsoever as the evidence tendered by the prosecution is overwhelming, well corroborated and sufficient to warrant the conviction arrived at by the Honourable court and that due to the long sentence that the Appellant is facing, his chances absconding is extremely high.

Bail pending appeal is available to a person entitled to appeal and is provided for under **Section 357(1) of the Criminal Procedure Code**. The Section gives the court power to grant bail or stay the execution of a sentence pending appeal. Authorities abound on the factors that the court would consider in granting bail pending appeal. Such factors include;

- i. The character of the offender;
- ii. Whether the applicant is or not a first-time offender;
- iii. Whether the offence for which the applicant is convicted involved personal violence;
- iv. That the appeal must not be frivolous and has reasonable chance of success;
- v. The possibility of substantial delay in the determination of appeal; and,
- vi. Whether the Applicant complied with bail conditions granted before the applicant's conviction during the pendency of the appeal.

The right to bail pending appeal is closely tied to an accused person's fair trial rights. I agree with the holding of the court in **Gerald Macharia Githuka vs. Republic (Criminal Appeal No. 119 of 2004)** where the court stated that **"the cornerstone of the justice system is that no one should be punished without the benefit of due process including the right to exhaust the right of appeal. Incarceration before trial or pending hearing of an appeal cuts against this principle"**. It is also correct to state that an Appellant loses the presumption of innocence which is a primary consideration as that presumption terminates upon conviction by a court of competent jurisdiction. The main consideration therefore remains his right to have his case determined finally on appeal, and the high likelihood of the appeal succeeding in the first instance. It is also trite that grant of bail at any stage of trial or appeal is at the discretion of the court, which discretion must be exercised judiciously.

In the case of **Cliff Bikeri Mokua & Another vs Republic Kisii High Court Criminal Appeals Nos 268 and 269 of 2012**, Muriithi J observed as follows:

**"In a decision in the case of, Boke Chacha v. R Kisii HC Criminal Case No. 244 of 2012, I considered the authorities on bail pending appeal and held as follows: -**

**"According to authorities on bail pending appeal, bearing in mind that the applicant has now been convicted by a competent court and is on punishment for the conviction which stands until it is set aside on appeal, the criteria for consideration is:**

**a) Whether there exists exception or unusual circumstances which justify grant of bail in interests of justice. See Jivraj Shah vs R (1986) KLR 605.**

**b) Such exceptional circumstances exist where the appeal has overwhelming chances of success or where a set of circumstances exist which disclose substantial merit in the appeal and that the sentence or a substantial part of it will have been served by the time the appeal is heard. See Jivraj Shah supra; Mutua vs R (1988) KLR 497; and Somo vs R (1972) E.A 476.**

**c) The previous good character of the applicant and the hardships facing his family, and his ill health, where there existed prison medical facilities for prisoners, are not exceptional or unusual circumstances. See Dominic Karanja vs R (1986) KLR 612.**

**d) A solemn assertion, even if supported by sureties, that the applicant will not abscond if released is not sufficient ground for releasing a convicted person on bail pending appeal.**

I have also considered the sentiments in the case of *Chimambhai v Republic 1971 EA 343*, where J. Harris made another observation in such an application when he said:

***“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.....”***

In view of the foregoing, I am of the opinion that in applications for bail pending appeal, the onus is always on the appellant to demonstrate to the court that there are good reasons why she should not be allowed to continue serving sentence but should be allowed to enjoy his liberty pending the hearing and determination of his or her appeal.

When it comes to matters bail pending appeal, I can do no better than to seek refuge in the succinct summation of the Court of Appeal in *Jirraj Shah v Republic [1980] LKR 605* where regarding the conditions to be met before such bail is granted held:

***“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. If it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on accurate 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.***

***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.”***

Under Article 49 of the Constitution an accused person who is facing a criminal charge has a right to bond because he is presumed to be innocent till proved guilty, unlike a case where one is already convicted. In the above cases, the courts also held that anticipated delay in the hearing of the appeal, together with other factors may be grounds for grant of bail pending appeal.

The issues for determination are whether the appeal has overwhelming chances of success and whether there are exceptional circumstances warranting the release of the Appellant on bail pending appeal. Thus, the burden is on the applicant to prove that he should be granted bail pending the hearing of his appeal. He should demonstrate that the appeal has overwhelming chances of success.

The Respondent argued that the Appellant was sentenced to a long sentence having been convicted for various offences, that the intended appeal has no chance of success and that once a judgment has been challenged on appeal, the presumption of innocence on part of the applicant should be applied. I am not in agreement with this argument because the conviction still stands until it is overturned on appeal.

In this case, *Mr. Omwancha* asserted in his petition of Appeal that the appellant’s appeal has high chances of success. But he did support this submission by pointing some concerns in the proceedings of the lower court that would persuade the court to find that there was a substantial point of law to be urged on appeal that would give the appeal high chances of success.

I have had an opportunity to go through both the proceedings as well as the Judgment of the trial court and taking all relevant factors into account, the case really turns on the phase of what amounts to special or exceptional circumstances. Though not defined with clarity in our statute from Case law the question principally is whether the Applicant submissions and evidence satisfies the following criteria. **“The possibility that the appeal will be successful; a missing court record; delays in the appeal process; for instance, due to the preparation of the court record; poor health of the accused; the unavailability or inaccuracy of the court record, the likelihood that the appeal cannot be concluded within a reasonably short time; the risk that the sentence will be served by the time the appeal is heard; and whether a conviction on a lesser offence would be competent. Unless ‘exceptional’, the fact that the accused person’s family will suffer hardship as a result of imprisonment does not constitute an exceptional circumstance. Good character of the Applicant is also irrelevant”.**

I have accordingly interacted with the record and the findings by the Trial Magistrate and it is apparent to me there are various inherent issues with the impugned judgment which are likely to be canvassed at the hearing of the main Appeal. The evaluation of the evidence on the record seems to indicate that the Applicant’s case hinges on the fact that he formed part of the gathering which attempted to rescue some prisoners held in custody of police officers on duty. The Memorandum of Appeal is that the Learned Trial Magistrate erred in law and fact when he misdirected himself on the evidence and convicted the Applicant without evidence of his physical participation. That is a moot question. Further on the basis of other various factors detailed in the cited case law there are circumstances like delays in the Appeal process which are likely to impact on the sentence imposed against the Applicant in the likely event the appeal succeeds and substantial period has been spent in custody by the Applicant.

For the foregoing reasons, I will exercise my discretion in the Applicants favour and admit him to bail in light of the following declarations;

**a) That the Applicant has an arguable case on appeal.**

**b) The appeal process is likely to take long in view of the preparation of the record and admitting the Applicant’s Appeal for hearing and determination.**

c) The Applicant has been previously on bail pending trial and there is no evidence that he breached any of the conditions set by the court or did not abscond to obstruct the administration of justice.

d) The Applicant has a fixed abode within the jurisdiction of the court working with the County Assembly of Lamu. In that case the court conditions the Applicant to deposit his passport with the Deputy Registrar Garsen High Court in the course of processing and depositing security for bail.

e) There are no other charges pending against the Applicant.

f) The record of Appeal be prepared by the Applicant Counsel and the same be served upon the Respondent within 30 days from today's Ruling.

g) Accordingly, the Applicant be and is hereby released on bond of Ksh. 500,000.00 with a surety of identical amount to be approved by the Deputy Registrar of the High Court at Garsen or in the alternative a cash bail of 300,000.00.

h) Each party is at liberty to apply.

Those are the orders of the Court.

DATED, SIGNED AND DELIVERED AT GARSEN THIS 29<sup>TH</sup> DAY OF APRIL 2021

.....

**R. NYAKUNDI**

**JUDGE**

**In the presence of:**

**Mr. Kadebe & Mr. Oruwa for the State**

**Mr. Omwancha for the Applicant**

**Pacho - Court Assistant**

**The Applicant**