



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KABARNET**

**CRIMINAL APPEAL NO E003 OF 2021**

**BENSON KANYUA NDIRANGU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

*(Being an application for bail pending appeal for judgment and sentence of Hon J.L. Tamar, SPM*

*delivered on 27<sup>th</sup> January, 2021 in the Senior Principal Magistrate Court at Eldama Ravine, in*

*Criminal case No. 2354 of 2019 Republic V. Benson Kanyua Ndirangu)*

**The case for the Appellant/Applicant**

1. The appellant/applicant was convicted and sentenced to 2 years imprisonment for the offence of being in position of Narcotic drugs contrary to Section 3(1) as read with Section 3(2)(a) of the Narcotic and Psychotropic Substances Control Act No. 4 of 1994. Pursuant with the provision of Section 357 (1) of the Criminal Procedure Code, he has applied for bail pending appeal through a notice of motion dated 1<sup>st</sup> March, 2021.

2. His application is supported by 7 grounds that are set out on the face of the notice of motion. The major grounds are as follows:-

First, he has stated that his appeal is arguable and has high chances of success.

Second, he religiously attended the trial court after he was released on bail pending trial without failing.

Third, he is the soul bread winner of his 2 families.

Fourth he has promised to abide by all terms of his bail if he is granted the same.

Fifth, he has stated that unless he is admitted to bail pending appeal, his family shall suffer irreparable period.

3. The application is further supported by the appellants eleven (11) paragraphs supporting affidavits. The following are the major grounds in his supporting affidavits:

First, he resides at Shauri Yako village in Koibatek Sub- County of Baringo County.

Second, he has deposed that in the month of May he was involved in a road accident while using a motorcycle and he sustained body injuries and that since then he has been sickly.

Third, the other averments in his supporting affidavits are matters which have been set out on the face of his notice of motion which I have declined to replicate them.

**The submissions for the Appellant**

4. Mr. Nyagaka, counsel for the appellant/applicant has submitted in his submissions that the applicant's appeal has overwhelming chances of success. He has cited the enabling provisions of section 357 of the Criminal Procedure Code [Cap 75] Laws of Kenya in support of his application, which read as follows: "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."

5. He has also cited the case of *Tom Omare Magutu V. Republic* [2017] eKLR, in which the Court observed that the trial court in that case did not consider the defence case, in particular the defence of intoxication as a result that court concluded that had that defence been considered the results would have been different.

6. Mr. Nyagaka also submitted there are exceptional circumstances to warrant the release of his client on bail pending appeal. These circumstances include the fact that the appellant/applicant is the soul bread winner of his families.

7. He also submitted that his families are likely to suffer if he is not released on bail pending determination of his appeal.

8. He has also submitted that appellant/application is sickly following him being involved in road accident. Additionally, he has submitted that the applicant/ application needs medical attention in respect of which there are no medical facilities.

### **The case for the Respondent**

9. Mr. Abwajo counsel for the Respondent has conceded the application which he pointed out was upon instructions from Mr. Mong'are.

10. Mr. Abwajo further informed the court that the appellant/applicant may be released on similar terms as the ones he was released on bail pending trial in the trial court.

### **Issues for Determination**

11. I have considered the affidavit of the appellant/application, the submissions of his counsel and the authorities that were cited. As a result, I find the following to be the issues of determination:

(1) *Whether the appellant/application has demonstrated that his appeal has overwhelming chances of success.*

(2) *In the alternative, whether the sentence is too short that the appellant might have served it before the appeal is heard and determined.*

(3) *Whether there are exceptional or special circumstances involved in the appeal.*

#### **Issue 1**

1. An applicant who is seeking to be released on bail pending appeal must demonstrate that his appeal has overwhelming chances of success. I find that the appellant/applicant has not demonstrated that his appeal has overwhelming chances of success. The issue as to whether the trial court considered his defence is not in itself an indication that his appeal has overwhelming chances of success.

#### **Issue 2**

2. The appellant/applicant was sentenced to two years imprisonment on 27<sup>th</sup> January, 2021. I have perused the proceedings and judgment and I find that the record of appeal has been prepared as required. It follows that all that is remaining is for the appellant/applicant to set in motion the date for the hearing of his appeal. It therefore follows that the appellant/applicant will not have served his sentence before his appeal is heard and determined.

#### **Issue 3**

3. Counsel for the appellant/applicant has submitted that there are exceptional circumstances involved in his appeal. These circumstances include the fact that the appellant/applicant religiously attended the trial court as and when required to do so. Counsel has also submitted that the appellant/applicant is sickly following his being involved in a motorcycle accident. Counsel has also submitted there are no medical facilities in prison for his treatment. In this regard, counsel has not demonstrated the non-existence of medical facility in prison for the treatment of the appellant/applicant.

12. Furthermore, counsel has submitted that the appellant/applicant's two families of eight (8) children stands to suffer irreparably if he is not release.

13. The foregoing circumstances whether singly or collectively do not amount to exceptional or special circumstance to warrant his release on bail pending appeal.

14. Furthermore, I bear in mind that the principles upon which an applicant may be granted bail pending appeal were set out in the case of *Jivraj Shah V. Republic* [1986] KLR 605, in which the Court of Appeal pronounced itself as follow: -

*“(1) The principal consideration in an application for bond pending appeal is the existence of exceptional or unusual circumstances upon which the Court of Appeal can fairly conclude that it is in the interest 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 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.*

*(3) The main criteria is that there is no different 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.”*

15. In addition to foregoing this court is also guided by the Court of Appeal decision in *Dominic Karanja V. Republic* [1986] KLR 612, in which the Court of Appeal pronounced itself in the following terms.

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

16. In view of the foregoing it is clear that the appellant/applicant has not demonstrated that there are overwhelming chances of success in his appeal. He has also failed to demonstrate that there are exceptional or special circumstances involved in his appeal. And finally I find that the appellant/applicant will not have served his sentence before his appeal is heard; since the record of appeal is ready and the appeal itself may be set down for hearing within a month.

17. In view of the foregoing considerations and the applicable law, I am unable to agree with the concession taken by the counsel of the prosecution on conceding the application.

18. In the premises, the appellant/applicant application fails and is hereby dismissed in its entirety.

**Ruling dated, signed and delivered in open court at Kabarnet this 27<sup>th</sup> day of May, 2021.**

**J. M. BWONWONG’A**

**JUDGE**

**In the presence of:**

Mr. Kemboi Court Assistant.

Mr. Nyagaka present for the appellant.

Mr. Mong’are for the Respondent.