



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. E117 OF 2021

DAME KILTA DAMEAPPELLANT

VERSUS

REPUBLICRESPONDENT

RULING

1. The appellant/applicant here was before the trial court charged with offence of trafficking in narcotic drugs contrary to Section 4(1) of the Narcotic drugs and psychotropic substances control Act, was tried convicted and sentenced to serve a jail term of 17 years without the option of a fine.

2. After lodging the current appeal, he equally filed an application under certificate of urgency and sought to be released on bond pending appeal. The application was supported by the affidavit in support sworn by his counsel one Abdilatif Mohamed Jarso, advocate. In the affidavit it is deponed that it will take long time to dispose of the appeal hence let the appellant serve full or substantial part of the sentence before the appeal is heard hence render the appeal nugatory if successful. There was a stress on fact that the appellant is the sole bread winner of his family consisting of elderly parents, siblings, two wives and five children and that the prison sentence would remove him from his income generation as a driver, to the detriment of family the prevailing pandemic situation was also said to portend the delay the appeal further yet his medical condition militate against being held in prison. He then exhibited documents including a letter from the medical superintendent, Isiolo county referral Hospital, to show that he is hypertensive.

3. The application was opposed by the prosecution on the basis of the affidavits sworn by one Brenda N. Nandwa, Advocate, a prosecutor, who asserted that the conviction was sound, bereft of any inconsistencies on the evidence, that there were no prospects of the appellant serving his sentence before the appeal is heard and determined hence no prejudice would be visited upon him if bail pending appeal is refused as there is no overwhelming chances of success disclosed. There was emphasis of the absence of any exceptional circumstances to warrant grant of bail pending appeal in that the object of retribution intended by law for offences under the Act would be lost if the appellant is released on bail. For medical needs and the pandemic situation prevailing, it was asserted that adequate measures have been taken to protect those incarcerated and that pandemic alone is not a basis to grant bail pending appeal.

4. That opposition by the prosecution invited a further affidavit also sworn by the same counsel in which it is contended that their appeal has overwhelming chances of success because the right to a fair hearing was violated for not being afforded the statements and documents to be used by the prosecution, was denied the right to record his statement with the investigator and was equally denied the right to be represented by counsel when regard is had of the gravity of the offence. He then took issue with the fact that weighing of the drugs was never conducted in his presence just like the government analysts who purportedly analyzed the drugs was never called to produce his report hence leaving it to doubt on what was the weight and value of the narcotics. On such basis the counsel formed the opinion and took the view that the conviction and sentence are likely to be overturned and if the appellant shall have served sentence in full or substantially the appeal shall have been rendered nugatory.

5. The matter was canvassed by oral submissions in which both sides reiterated their respective positions, in the affidavits with the appellant asserting that the evidence adduced was not sufficient to ground a conviction while the respondent maintained that they did meet the standard of proof set and conviction was not only safe but also well merited.

DETERMINATION

6. The applicant is a convict, one who has undergone trial and now stands convicted. His request to be released on bail pending appeal must be distinguished from the right of a person seeking bail pending trial. Such an applicant must not expect to be granted bail as of right. Bail pending trial is a right which can only be denied where the prosecutor provides compelling reasons while bail pending appeal is at the discretion of the court and the burden is placed upon the applicant to demonstrate that exceptional circumstances exist to dictate that interests of justice demand grant of bail and a further demonstration that the appeal presents a substantial point of law which presents a high

likelihood of success. In Charles Owango Aluoch Vs Director of Public Prosecutions (2015) eKLR, the court after doing a grant deal of review of past decisions on the subject did set the threshold to be met in the following words-;

“The right to bail is provided under Article 49(1) of the Constitution but is at the discretion of the court, and is not absolute. Bail is a constitutional right where one is awaiting trial. After conviction that right is at the court’s discretion and upon considering the circumstances of the application. The courts have over the years formulated several principles and guidelines upon which bail pending appeal is anchored. In the case of *Jiv Raji Shah vs. R [1966] KLR 605*, the principle considerations for granting bail pending appeal were stated as follows:

1. Existence of exceptional or unusual circumstances upon which the court can fairly conclude that it is in the interest of justice to grant bail.

2. It appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of a 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, then, a condition of granting bail will exist.

Main criteria is that there is no difference between overwhelming chances of success and set of circumstances which disclose substantial merit in the appeal – being allowed, the particular circumstances and weight and relevance of the points to be argued.

7. Here while I take the view that the appeal presents atleast one substantial point, whether it was regular to produce the analysis report without calling the maker and without compliance with the provisions of section 72 of the Evidence Act, when note is taken that the appellant was unrepresented, I do not find an exceptional circumstance that compels the release of the appellant on bail so as to serve the best interests of justice.

8. For the absence of an exceptional circumstance, I do find no basis to grant orders of bail pending appeal but consider that this is a matter that demands to be fast trucked.

9. I direct, noting that the proceedings have been typed and certified, that:-

- a. The trial court file be called for and availed within 15 days from today.
- b. The appellant files and serves both Record of Appeal and submissions within 30 days from today.
- c. Upon service the respondent also files and serves submissions within 15 days from the date of service.

10. Mention on 29/9/2021 when parties may choose to highlight submissions on appeal.

Dated signed and delivered at Meru virtually via Microsoft teams this 10th day of August 2021

Patrick J.O Otieno

Judge

In presence of

Maina for the state

No appearance for Jarso the appellant

Appellant present in custody

Patrick J.O Otieno

Judge