



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MARSABIT

CRIMINAL APPEAL NO E010 OF 2021

PHILIP NYAKUNDI KIBAGENDI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The applicant was on the 4th August 2021 convicted for the offence of trafficking narcotic drugs contrary to section 4(a) of the Narcotic and Psychotropic Substances Control Act No.4 of 1994 and sentenced to a fine of Ksh.500,000/= in default to serve 20 years imprisonment. He was aggrieved by the conviction and the sentence and filed an appeal that is pending hearing before this court. He has now filed an application dated 23rd of September 2021 seeking to be released on bond pending the hearing and determination of the appeal.

2. The grounds in support of the application are that:

(1) The appeal raises triable issues and has a high chance of success on account of substantial points of law to be argued during the appeal.

(2) That the sentence or substantial part of it will have been served by the time the appeal is heard and determined.

(3) The applicant suffers from acute kidney failure and requires to be subjected to regular medical treatment.

3. The application was supported by the affidavit of the applicant and an annexed medical report prepared by one Morris Mugambi (RCO) GK Prison, Marsabit. The medical report indicates that the applicant has a long-standing history of type 2 diabetes and hypertension. That one year ago he was diagnosed with features suggestive of kidney failure secondary to his pre-existing chronic hypertension. That three weeks ago he was presented to the prison clinic and was diagnosed with features suggestive of kidney failure which requires follow up with a nephrologist for management.

4. The application was argued in court by counsel representing the applicant, **Mr. Manwa**. He basically reiterated the grounds on the face of the application. He relied on **The Judiciary Sentencing Policy Guidelines** on sentencing terminally ill persons which require courts when doing so to ensure that the sentence imposed does not amount to an excessive sentence in view of the extent of the illness as well as in light of the offence committed. Counsel cited the Court of Appeal decision in the case of **Mohamed Famau Bakari v Republic** (2016)eKLR where a sentence of 10 years imprisonment together with a fine of Ksh. 1 million was substituted with a fine Ksh. 10,000/= in default to serve three months imprisonment. He also cited the case of **Sofia Duke v Republic** (2014)eKLR where the court granted bond pending appeal on the ground that the appeal may have had high chances of success.

5. The learned state counsel **Mr. Ochieng** did not oppose the application on the strength of the medical status of the applicant but reserved the right to oppose the appeal during the hearing.

6. The court has power under section 357 of the Criminal Procedure Code to grant a convict bond pending appeal. The principles applicable in an application for bond pending appeal are that the applicant has to demonstrate to the court that:-

1) There exist exceptional circumstances to warrant grant of bail/bond.

2) The appeal has overwhelming chances of success.

7. In **Somo Vs Republic (1972) EA 476** the Court of Appeal held that the most important ground is that the appeal has an overwhelming chance of being successful, in which case there is no jurisdiction for depriving the applicant of his freedom.

8. These principles were re-stated by the same court in **Jivraj Shah Vs Republic (1980) eKLR** where the court stated that:-

“(a) 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 interest of justice to grant bail.

(b) 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.

(c) 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.”

Also see *Mundia Vs Republic (1986) KLR 623*.

9. It has also to be borne in mind when considering an application for bond pending appeal that the applicant has at that stage been convicted of the offence and therefore that the presumption of innocence until proven guilty does not apply. In **Douglas Mutunga Muthenya Vs Republic (1988) KLR 497**, the Court of Appeal held that –

“It must be remembered that an applicant for bail has been convicted by a properly constituted court and is undergoing punishment because of that conviction which stands until it is set aside on appeal. It is not wise or to set the applicant at liberty either from the point of view of his welfare or of the state unless there is a real reason why the court should do so.”

Also see *Chimambhai v Republic (No.2) (1971) EA 343*.

10. The main ground in support of the application is that the applicant suffers from acute kidney failure and that he requires intensive medical treatment. In the case of **Karanja v Republic (1986) EA 612** the Court of Appeal held that ill-health would not constitute an exceptional circumstance where there existed medical facilities for prisoners. See also **Sofia Duke V Republic (supra)**. The applicant was therefore under duty to show that there were exceptional or unusual circumstances to his illness that warranted him to be granted bond pending appeal.

11. The medical report that was filed with the application was prepared by a Clinical Officer at GK Prison Marsabit where the applicant is currently incarcerated. Whereas the clinical officer seems to have relied on some findings made a year earlier (when the applicant was not in prison) that the applicant exhibited signs suggestive of kidney failure, no such documents were filed with the court to substantiate the claim. More so, the findings by the clinical officer were not conclusive as he states that the findings are “suggestive” of kidney failure. The applicant was not examined by an expert in renal field for a conclusive diagnosis. It is also important to note that no such kidney illness was brought to the attention of the court during mitigation even though the applicant was represented by counsel. The applicant is only quoted in the proceedings to have stated that he was asthmatic and that he suffered from ulcers. It is surprising that the applicant would have failed to mention such a crucial matter during mitigation only to raise it in this application. I do not find conclusive proof that the applicant suffers from a life-threatening illness that cannot be managed by medical facilities available in prisons. Consequently the applicant has not shown that he has exceptional medical condition that warrants him to be admitted to bail pending appeal.

12. The onus was on the applicant to demonstrate that the appeal has high chances of success. I have perused the proceedings and judgment of the trial court. I cannot outrightly say that the decision of the trial magistrate was without basis or that the appeal can only result to an automatic acquittal.

13. The applicant was sentenced on the 4th August 2021. His advocate has promised to process the hearing of the appeal within the shortest time possible. There are hearing dates available in this court as early as next month. The appeal can therefore be heard without undue delay. I do not anticipate that the applicant will have served a substantial part of the sentence before the appeal is heard and determined.

14. The upshot is that the application has not met the threshold for grant of bond pending appeal. The same is bereft of merit and is accordingly dismissed. I do order that the appeal be heard on priority basis.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT MARSABIT THIS 19TH DAY OF OCTOBER 2021.

JESSE N. NJAGI

JUDGE

In the Presence of:

Mr. Otwal HB Manwa for Applicant

Mr. Ngigi for Respondent

Applicant Present

Court Assistant Mr. Godana

14 days Right of Appeal.