REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

MISCELLANEOUS CRIMINAL APPLICATION NO. E153 OF 2021

HANNAH WAITHERA NGIGE……...…….APPLICANT

VERSUS

REPUBLIC…….……RESPONDENT

RULING

1. Before me for determination is the Notice of Motion application dated 8th October, 2021 by which the Appellant/Applicant prays to be admitted to bail pending the hearing and determination of the instant appeal. The application is brought under **Article 50** and **165** of the **Constitution**, **Section 347** of the **Criminal Procedure Code** and all enabling provisions of the law.

2. The application is supported by the grounds on the face of it and the Supporting Affidavit of the Applicant sworn on 8th October, 2021.

3. In summary, the Applicant states that the appeal has very high chances of success, that it is in the interests of justice to grant the bail and that the Respondent will not be prejudiced if the application is granted.

4. The application was canvassed by way of oral submissions. Learned counsel, Miss Kinyanjui held brief for Mr. Wainanina for the Applicant whilst Miss Maingi was for the Respondent.

5. Miss Kinyanjui submitted that the Applicant was entitled to bail unless there were compelling circumstances to warrant a denial. She relied on the case of **R v Francis Kimanti (2017) e KLR** in which she submitted that the Court therein whilst considering compelling reasons stated that the standard used is high because it draws from the constitutional philosophy that any restrictions of rights and freedoms of persons must be sufficiently justified. She further relied on **Section 367** of the **Criminal Procedure Code** which gives the right to accused persons to be granted bail pending appeal.

6. Counsel submitted that, at the trial the Applicant was granted bail and never absconded and she therefore, was not a flight risk. She added that prior to her being charged, the Applicant had no previous record of convictions.

7. Miss Maingi on her part submitted that she had no reasons to compel her to either oppose or concede to the application. She submitted that the Applicant was now a convict and that if the court was inclined to grant bail, to grant in favourable terms and fast tracks the Appeal. She thus left it to the court to make its own decision.

8. I have considered the application, the record of the trial court and the respective submissions. The argument advanced by learned counsel, Miss Kinyanjui is that bail is a constitutional right. Her submission was premised under **Article 49(1) (h)** of the **Constitution** which provides that an accused/arrested person should be released on bail/boil on reasonable terms unless there are compelling reasons not to be released.

9. Learned counsel failed to appreciate that **Article 49(1) (h)** is only applicable to persons who have not been tried. At that point bail becomes a matter of right unless there are compelling reasons not to grant the bail/bond. Unlike in this scenario, bail pending appeal is not a constitutional right. The basic rationale is that a person seeking bail pending appeal has already been tried and convicted. He/she is serving a lawful sentence and unless that conviction or sentence is set aside by a superior court, the person must serve the sentence. Such is person therefore, does not enjoy the presumption of innocence until proven guilty which is an entitlement to persons awaiting trial. An Appellant has already been found guilty and remains so until vindicated by a superior court.

10. Case law has also evolved on the principles to be considered for grant of bail pending appeal. For instance, in the case of **Jivraj Shah v Republic (1986) e KLR**, **605**, the Court of Appeal stated as follows:

> **"(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 face 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 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."

11. **Also** in **Dominic Karanja v Republic (1986) KLR 612**, the Court of Appeal stated, inter alia,:

"(a) 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;

(b) The previous good character of the applicant and the hardships if any facing his family were not exceptional or unusual factors. Ill health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners;

(c) A solemn assertion by an applicant that he will not abscond if released, even if it is supported by sureties, is not sufficient ground for releasing a convicted person on bail pending appeal;

(d) ……..."

12. In the present case, it follows that merely because the Applicant was of good character and did not abscond the trial does not warrant her to be granted bail pending appeal. The same case applies as regards that she had a good record with no previous convictions. In summary, I find that no exceptional or unusual circumstances exist to warrant the grant of bail pending appeal.

13. On whether the appeal is likely to succeed, I have read the trial proceedings. Without delving into the merit of the appeal, I find that taking into account the circumstances of the case, the Applicant is likely to succeed as regards the sentence. It is on this ground alone that I would find merit in the application. However, this is not to say that, on re-analysis of the evidence the court may not arrive at a different verdict.

14. In the result, I admit the Applicant to a bond of Ksh. 200,000/= with one surety of a similar amount or a cash bail of Ksh. 50,000/=.

14. It is so ordered.

DATED AND DELIVERED AT NAIVASHA THIS 18TH NOVEMBER, 2021.

G.W. NGENYE-MACHARIA

JUDGE

IN THE PRESENCE OF:

1. MS/ KINYANJUI H/B FOR MR.WAINAINA FOR THE APPLICANT.

2. MISS MAINGI FOR THE RESPONDENT.