



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

MISC. CRIMINAL CASE NO. 9 OF 2019

JEMIMA WAWIRA CUMA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDEN

RULING

1. The appellant was convicted of the offence of conspiracy to defraud contrary to **Section 317 of the Penal Code** which was the 1st count and a 2nd count of Theft of a Motor vehicle contrary to **Section 278 (A) of the Penal Code**. On the 1st count, the accused was sentenced to serve One year imprisonment and on the 2nd count he was sentenced to serve Two years imprisonment. The sentence were ordered to run concurrently.

2. The applicant was tried and convicted in the Principal Magistrate's Court Gichugu Criminal Case No. 716/2014 where she was jointly charged with Stephene Mutisia Ngumbi.

3. The applicant filed an application dated 8/4/2019 under **Section 357 of the Criminal Procedure Code** seeking an order that he be admitted to bail pending the hearing and determination of the appeal.

4. He was also seeking an order that he be granted leave to file an appeal out of time and that upon grant of such leave the applicant to file and serve the petition of appeal within 3 days of being supplied with the certified typed proceedings and judgment. The application was based on the following grounds:-

1. The applicant has been tried convicted and sentenced to a total of one (1) year in count 1 and two (2) years in Count II to run concurrently in prison by the Hon. L. Kabaria sitting at the Magistrate's Court at Gichugu in Criminal Case No. 716 of 2014.

2. The applicant being dissatisfied with the Judgment and sentence have intends to file an appeal.

3. Given the time it will take to hear the appeal and the nature of the sentence, if successful the appeal will be rendered nugatory.

4. The conviction and sentence of the applicant was arrived at without consideration and due regard to the defence evidence on record.

5. The appeal lodged by the applicant raises salient and pertinent issues of law and hence same has overwhelming chances of success.

6. The applicant is a single mother of two and hence requires to be close at home based care of the children and in the circumstances there exists special and peculiar circumstances and/or conditions to warrant granting of bail pending appeal.

The application was also supported by the affidavit of Musa Mugo sworn on 8/4/2019 where he has expounded on the above grounds.

5. The State opposed the application and Mr. Obiri Assistant Director of Public Prosecution for the State submitted that the applicant did not demonstrate that the appeal had chances of success. He referred the court to page 81 of the handwritten proceedings before the trial court which show that the applicant is the one who gave indication that the vehicle was hers and she looked for a buyer. She then negotiated the price while well aware that the vehicle was not hers.

6. He further submitted that the applicant had absconded during trial and she was reprimanded by the trial Magistrate. That since she has now been convicted, her chances of absconding are higher.

7. For the applicant it was submitted that it was not the applicant who sold the vehicle and so the appeal has high chances of success. He submits that the appeal has high chances of success. That the applicant will have served a substantial part of the sentence before the appeal is heard and determined.

8. I did consider the application and gave a ruling on 20/12/2019. I ruled that the application did not meet the threshold for the grant of bail pending appeal and promised to issue a detailed ruling. I proceed to give the ruling.

The application is brought under **Section 357 of the Criminal Procedure Code** which provides:-

“(1) 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.”

9. There is a condition precedent before filing the application for bail pending appeal. The applicant must first of all file the appeal before filing the application. In this case the applicant has not filed an appeal before this court as one of the prayer in the application is for leave to file appeal out of time. Where the statutes provides a condition precedent for doing something, the 1st step the applicant must undertake is to comply with that condition. Failure to comply with the condition inevitably render the application incompetent. The applicant has not filed appeal. The application is therefore fatally defective and is not properly before this court.

10. The application for bail pending appeal is not a constitutional right unlike bail pending trial. The court exercises discretion to release the applicant on bail pending appeal. For the court to exercise discretion in favour of applicant she must demonstrate that:-

- **The appeal has overwhelming chances of being successful.**
- **There is a high likelihood of the sentence being served before the appeal is heard.**
- **There are exceptional or unusual circumstances to warrant the courts exercise of its discretion.**

11. These principles were laid down in the case of **Somo –v- Republic (1972) E. A 476** where the court in refusing to grant bail held that the most important ground in deciding whether or not to grant bail pending appeal is whether an appeal has an overwhelming chances of being successful and whether there were exceptional or unusual circumstances to justify the grant of bail. This is important to ensure that a situation does not arise where the court would order that a person is sent back to prison after the determination of the appeal. In the case of **Samuel Macharia Njagi –v- R (2013) eKLR** the court stated:-

“The principles for admission to bail pending appeal in Kenya have for over 40 years been clustered around the decision in Somo –v- R 1972 E.A 476. According to this case the applicant must demonstrate the existence of overwhelming chances of success.”

12. The principles are predicated on the fact that once an accused person has been convicted of an offence by a court of competent jurisdiction his constitutional rights to presumption of innocence is extinguished and he is deemed to have been lawfully convicted unless and until his conviction is quashed on appeal.

13. In determining whether an appeal has overwhelming chances of success, this court is called upon to go through the evidence which was presented before the lower court to determine whether the appeal has overwhelming chances of success and whether there are some special circumstances.

14. I have considered the judgment of the trial Magistrate. The appeal cannot be said to be one that has overwhelming chances of being successful. The applicant has also not shown that there are exceptional or unusual circumstances. There is a related appeal where the proceedings of the lower court have been forwarded to this court. There is therefore no likelihood that the appellant will serve the entire sentence before the appeal is heard and determined. There are no merits on the application for release of the applicant on bail pending appeal. The appeal can be heard and determined before the sentence is served.

15. On the application for leave to appeal out of time, the State did not oppose it. The applicant has a right of appeal. **Section 349 of the Criminal Procedure Code** gives this court jurisdiction to extend time of lodging the appeal where the applicant was unable to obtain a copy of the Judgment appealed against and the proceedings within a reasonable time of applying to the court. **Section 349 Criminal Procedure Code** provides:-

“An appeal shall be entered within fourteen days of the date of the order or sentence appealed against:

Provided that the court to which the appeal is made may for good cause admit an appeal after the period of fourteen days has elapsed, and shall so admit an appeal if it is satisfied that the failure to enter the appeal within that period has been caused by the inability of the appellant or his advocate to obtain a copy of the judgment or order appealed against, and a copy of the record, within a reasonable time of applying to the court therefor.”

16. There is no dispute that the applicant applied for the proceedings on 21/03/2019 and as at 23/05/2019 it is only a copy of the Judgment that had been supplied. The delay was not of the applicants making.

17. It is the trial court which failed to supply the proceedings and Judgment within the time limited for filing the appeal. I should therefore exercise discretion in favour of the applicant. There will be no prejudice whatsoever on the part of the respondent.

In Conclusion:-

1. I find that the prayer for the release of the applicant on bail pending appeal is declined and is dismissed.

2. The application for leave to file the appeal out of time is allowed. The appeal be filed without undue delay.

Dated at Kerugoya this 24th day of April 2020.

L. W. GITARI

JUDGE