



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. 30 OF 2019

HILLARY MUNENE MOSES.....APPLICANT/APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

A. Introduction

1. This is a ruling for the application dated 14/11/2019 seeking for orders for bail pending hearing and determination of this appeal.
2. The application was premised on the grounds that the applicant's appeal is arguable and has overwhelming chances of success and that he was likely to serve a substantial part of his sentence before the appeal is heard and determined. Further that there exists exceptional circumstances warranting bail and that no prejudice would be occasioned to the prosecution. The said application was supported by the affidavit sworn by the applicant and wherein he reiterated the grounds on the face of the application.
3. At the hearing of the application, the parties elected to canvass the application by way of written submissions.

B. Submission by the parties

4. The Applicant submitted that he was convicted on 25/09/2019 and remanded in custody until when he was sentenced on 6/11/2019 to serve seven (7) years imprisonment and after which he started serving the said sentence. That if the bail is not granted and delay is occasioned in determining the appeal herein, the appellant might have served a substantial part of his sentence and that the appeal is successful and further that he would be prejudiced. As such the same presented exceptional circumstances warranting grant of bail pending appeal. Further that the appeal has overwhelming chances of success. Reliance was made on section 357(1) of the Criminal Procedure Code and the case of **Jivraj Shah –vs- Republic [1986] KLR 605**.
5. Ms. Mati for the respondent submitted that the appeal has no overwhelming chances of success. Further she submitted that the Applicant had not proved the overwhelming probability of success. Reliance was made to article 49(1)(h) of the Constitution of Kenya, Bail and Bond Policy Guidelines, **Krishan –vs- The People** (Supreme Court of India's decision) and **Gerald Macharia Githuka –vs- Republic**. The Respondent submitted that the Applicant was undergoing punishment due to a conviction which has not been set aside on appeal and as such he ought to remain behind bars. Reliance was made on the case of **Mutua –vs- Republic (1988) KLR 497**.

C. Issues for determination

6. I have considered the application herein and the submissions by both the applicant and the Respondent and it is my opinion that the main issue for determination is **whether the application is merited**.

D. Analysis of the law and determination

7. **Article 50(2)(q) of the Constitution of Kenya 2010** provides that an accused person has the right, if convicted, to appeal to, or apply for review by a higher court as prescribed by law. Further **Section 357 (1) of the Criminal Procedure Code** bestows the High Court or the subordinate court which convicted or sentenced a person with discretion to **order that the said person be released on bail with or without sureties, or, if that person is not released on bail, order that the execution of the sentence or order appealed against be suspended pending the hearing of the appeal**.

8. **The Court in exercising this jurisdiction has discretionary powers which** must be exercised judicially bearing in mind that an applicant

who has been convicted by a competent court and is serving sentence cannot be presumed innocent. The said conviction stands until 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 (See Mutua –vs- R, [1988] KLR 497). **Further it should be noted that the right to bail pending appeal is not a guaranteed constitutional right and ought to be distinguished from bail pending trial as once a trial court has made a determination and found an accused guilty of the offence, he is no longer considered innocent for his guilt has already been established.**

9. The applicant has filed his petition of appeal dated 13/11/2019 and thus he has met the condition as set by the law before an application of this nature can be filed. This court is therefore vested with jurisdiction to entertain the instant application.

10. The factors or principles to be considered by a court in exercise of discretion to grant bail pending appeal were established in the case of Jivraj Shah –vs- Republic (supra) and are: -

a. Whether the appeal has overwhelming chances of success.

b. Whether there are exceptional or unusual circumstances to warrant the court's exercise of its discretion.

11. In Dominic Karanja v. Republic [1986] KLR 612 the Court of Appeal also held that: -

“The most important issue here is if the appeal has such overwhelming chances of success that there is no justification for depriving the applicant of his liberty. The minor relevant considerations would be whether there are exceptional or unusual circumstances....”

12. The burden of proof of the above conditions in such an application (so as to persuade the court to exercise the above discretion in his favour) is always on the applicant. As such the main question which ought to be answered is whether the applicant discharged this burden?

13. On whether the appeal has overwhelming chances of success, the rationale for considering the chances of success was given in Somo v. Republic [1972] EA where the court held thus: -

“There is little if any point in granting the application if the appeal is not thought to have an overwhelming chance of being successful, at least to the extent that the sentence will be interfered with so that the applicant will be granted his liberty by the appeal court. I have used the word “overwhelming” deliberately for what I believe to be good reason. It seems to me that when these applications are considered it must never be forgotten that the presumption is that when the applicant was convicted, he was properly convicted. That is why, where he is undergoing a custodial sentence, he must demonstrate, if he wishes to anticipate the result of his appeal and secure his liberty forthwith, that there are exceptional or unusual circumstances in the case. That is why, when he relies on the ground that his appeal will prove successful, he must show that there is overwhelming probability that it will succeed.”

14. The duty of the court considering the application ought not to delve into the merits of each ground but it should suffice that all the grounds are examined, and a conclusion is made that *prima facie* the prospects of success are either dim or high.

15. I have carefully examined the grounds of appeal raised by the applicant, the application, submissions as well as the judgment of the trial court. I have further read through the proceedings of the trial court and considered each of the grounds of appeal as against the evidence on record and without preempting the appeal, I am of the considered opinion that the appeal does not have overwhelming chances of succeeds. The trial Court convicted the applicant on the basis of evidence adduced by the Prosecution. Further the sentence for seven (7) years imprisonment was in my opinion reasonable as the same was not the mandatory as provided by the law.

16. On whether there are exceptional or unusual circumstances to warrant the court's exercise of its discretion, the Applicant deposed that he was a young man wishing to join college to further his education for a better life. In his written submissions, he submitted that to the effect that by the fact that he shall have served substantial part of his sentence before the appeal is heard and determined presented exceptional circumstances. It is my opinion that this is not an exceptional circumstance sufficient to persuade this court to exercise its discretion in the applicant's favour. As was held in Mutua –vs- R (supra), it is not wise 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. **It is my opinion that the applicant has not established existence of any exceptional circumstances to warrant grant of bail pending appeal.**

17. The applicant deposed that he was likely to serve a substantial part of the sentence before the appeal is heard and determined. I note that the applicant was sentenced on 6/11/2019 to serve seven (7) years imprisonment. He did not prove that by the time the appeal is heard and determined, substantial time will have lapsed. In my opinion, were it not for the application herein, the appeal would have already been finalized. The court's diary is in a position to accommodate hearings of appeals and as such no substantial delay is likely to occur. There was no proof to the contrary tendered.

18. It is my considered opinion that taking into account the above factors, the applicant has failed to satisfy this court as to grant to grant of bail pending appeal.

19. I find no merit in this application and it is hereby dismissed.

20. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 28TH DAY OF JULY, 2020.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mati for Respondent

Ms. Migwi for the Applicant/Appellant

Applicant through Video Link