



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 7 OF 2019

RONALD NYAGA KIURA..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

A. Introduction

1. This is the application dated 20/06/2019 seeking for orders that the applicant be admitted to bail pending the hearing and determination of the appeal.

2. The application was premised on the grounds on the face of the application and by the affidavit of the applicant. In a nutshell, the applicant's case was that he is serving a sentence of fourteen (14) years with no option of fine and that his appeal is arguable and has high chances of success. He further states that he is not a fright risk going by his faithful compliance with the bond terms set by the trial court, that he was suffering from a serious heart condition requiring specialized treatment. He is apprehensive that the hearing and determination of the appeal is likely to delay.

3. The application was opposed by the respondent vide the replying affidavit sworn by Ms. Mati. She deposed that the applicant was rightfully convicted as the evidence therein was reliable and consistent. The counsel further submitted that the applicant had not demonstrated that the appeal had high chances of success and further that the medical condition he suffers can be treated at the prison dispensary or medical facility near the prison. It was her disposition that the applicant's acts had led to breakdown of moral fabric in the society and hence the sentence was retributive enough.

4. At the hearing of the application, the parties elected to canvass the application by way of written submissions. The applicant, despite his advocate on record having sought time to file his submissions did not file the same. On her part, Ms. Mati reiterated her position in the replying affidavit.

B. Application of the law and determination

5. Every accused person has the right, if convicted, to appeal to, or apply for review by, a higher court as prescribed by law. This right is guaranteed under **Article 50(2)(q) of the Constitution of Kenya 2010**. On the other hand, **section 357 (1) of the Criminal Procedure Code** provides for admission to bail pending appeal. It states as thus:

“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.”

6. At the outset it must be borne in mind that the jurisdiction to grant bail pending appeal is a discretionary 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 and thus 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**).

7. Further it should be borne in mind that the right to bail pending appeal is not a guaranteed constitutional right and the same 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.

8. **The only issue for determination is whether the applicant has made a case for this court to invoke its nary discretion in his favour.**

9. The principal factors and principles to be considered by a court in exercise of discretion to grant bail pending appeal the court ought to take into account in deciding on an application for bail pending appeal were established in the case of **Jivraj Shah –vs- Republic [1986] KLR 605**. They are as follows: -

- 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.
- c) Whether there exists a high probability of the sentence or substantial part of it, having been served by the time the appeal is heard.

10. 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. The previous good character of the applicant and the hardship, if any, facing the wife and children of the applicant are not exceptional or unusual factors: see Somo v. Republic [1972] EA 476.

A solemn assertion by an applicant that he will not abscond if he is released is not sufficient ground, even with support of sureties, for releasing a convicted person on bail pending appeal.”

11. The burden of proof is always on the applicant to establish the above cited factors for grant of bail.

12. The rationale for considering the chances of success of an appeal was given in **Somo vs. R (supra)** 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.”

13. 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. I have carefully examined the grounds of appeal raised by the applicant, in his supplementary petition of appeal, the application 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.

14. Does this appeal have overwhelming chances of success? The trial Court convicted the applicant on the basis of the evidence on record which in my opinion does not give the impression of far-fetched, inadequate or unreliable. The issue of the sentence being harsh and excessive will depend on the law and on the arguments presented during hearing of the appeal.

15. On whether there are exceptional or unusual circumstances to warrant the court's exercise of its discretion, the applicant deposed that he was not a flight risk going by his faithful compliance with the bond terms set by the trial court and further that he is suffering from a serious heart condition requiring specialized treatment. In **Dominic Karanja v. Republic (supra)** the court held as thus; “.....A solemn assertion by an applicant that he will not abscond if he is released is not sufficient.....”. Further in **Peter Hinga Ngatho versus Republic [2015] eKLR** it was held that the fact that the Applicant did not breach the bail conditions in the court below, is not an exceptional circumstance which would warrant a decision to admit an applicant to bail pending appeal.

16. It is my opinion further that the fact the applicant is suffering from a serious heart condition requiring specialized treatment does not in itself present exceptional or unusual circumstances to warrant the court's exercise of its discretion. It is my opinion that ill-health of the applicant, is not a basis for granting a convicted person bail pending appeal. (See **R K T –v- Republic [2017] eKLR** where Mumbi Ngugi J did not find suffering from HIV as exceptional or unusual circumstances). The applicant has been in prison for about one and half (1½) years and did not present any evidence as to the fact that the prison authorities are not capable of managing his heart condition through the nearest county hospital which I suppose is well equipped to hand heart condition as well as other underlying conditions.

17. From the foregoing, I find that the applicant has not established existence of any exceptional circumstances to warrant grant of bail pending appeal.

18. On whether there exists a high probability of the sentence or substantial part of it, having been served by the time the appeal is heard, I note that the applicant is serving a fourteen (14) years’ imprisonment having been sentenced on 27/02/2019. the appeal has already been fixed for hearing on 01/09/2020 and which is barely within one and a half years. It is my opinion that by the time the appeal is heard and determined, the appellants will not have served a substantial part of the sentence and such no substantial delay is likely to occur.

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

20. I find no merit in the application and hereby disallow it.

21. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 18TH DAY OF AUGUST 2020.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mati for Respondent

Applicant through video link