



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CRIMINAL APPEAL NO. 53 OF 2019

(From original conviction and sentence in Criminal Case No. 190 of 2017 of the Principal Magistrate's Court at Gichugu- G. K. Odhiambo – R.M)

GRACE WAIRIMU NGOTHO.....APPELLANT/APPLICANT

– VS –

REPUBLIC.....RESPONDENT

RULING

1.The application before the court is an *ex-parte* **Notice of Motion** dated and filed on the 13th of December 2019 by the Applicant herein praying for the orders that ;

- a. **This application be certified as urgent and heard ex-parte in the first instance.**
- b. **The Court be pleased to grant the applicant bail pending hearing and determination of the Appeal.**

2. The application is premised on the following grounds:-

- a. **THAT the Applicant/Appellant was convicted & sentenced on 15th November 2019 in Gichugu Criminal Case No. 190 of 2017.**
- b. **THAT the applicant/Appellant being aggrieved by the conviction filed an Appeal on 28th November 2019 being Kerugoya Criminal Appeal Number 53 of 2019.**
- c. **THAT the grounds disclosed in the Memorandum of Appeal demonstrate on Appeal that has reasonable and overwhelming chances of success.**
- d. **THAT the prosecution evidence was full of contradictions, inconsistencies and conjectures and could not prove the complainant's case beyond any reasonable doubt neither would it sustain a conviction against the accused.**
- e. **THAT the applicant is not a flight risk as she has physical address and residence at known places and that she is married and has a family with three children.**
- f. **THAT the applicant was during her trial was granted a bond of Kenya Shillings Two Million (Kshs 2,000,000/=) with one surety and was faithful to the entire Judicial process and she is ready and willing to abide with any such bond/bail terms as the superior court may deem fit, pending the hearing and determination of this Appeal.**

3. The application is supported by the affidavit of the applicant Grace Wairimu Ngotho sworn on 13/12/2019 where she has reiterated the above grounds among others.

The Application

4. The application is brought under **Section 357 (1) of the Criminal Procedure Code**. The Section 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: Provided that, where an application for bail is made to the subordinate court and is refused by that court, no further application for bail shall lie to the High Court, but a person so refused bail by a subordinate court may appeal against refusal to the High Court and, notwithstanding anything to the contrary in sections 352 and 359, the appeal shall not be summarily rejected and shall be heard, in accordance with such procedure as may be prescribed, before one judge of the High Court sitting in chambers.

5. The applicant was convicted on two counts for the offence of stealing by servant contrary to **Section 268(1) as read with section 281** and two counts for the offence of conspiracy to defraud contrary to **Section 317 of the penal code**. She was sentenced to three years' imprisonment. She now has filed an appeal on both conviction, through her memorandum dated 27th November 2019.

6. The complainant Jackline Karimi Comba, filed a replying affidavit dated 10th March 2020 in which she relied on **Section 9(1) of the Victims Protection Act** that accords her the right to be heard. She also stated that the appeal has no likelihood of success as the sentence meted out on the appellant was lenient and that the co-conspirators evidence was corroborated.

7. **Section 9(1) of the Victims Protection Act (No. 17/2014)** provides that the victim has a right to be present at the trial, have his views and concerns heard and considered at any stage of the proceedings among others. It also provides that the victim maybe represented by a legal counsel.

8. The state relied on the complainant's replying affidavit, based on **Section 20 of the Victim Protection Act** and opposed the application for bail. The section gives the victim the right to submit any information to court for consideration during bail hearing and determination. The state though not opposing the application reiterated that the applicant has been convicted and sentenced to serve (3) years by a competent court. That bail is at the discretion of the court. He left the matter to court.

9. The applicant submitted that the complainant's replying affidavit was filed out of time and should therefore not be considered by the court. In her replying affidavit the complainant stated that she became aware of the appeal per chance through her advocates, and that the court should accord her an opportunity to be heard.

Analysis and determination

10. The issues for determination are:

i. Right of the complainant to be heard and whether the replying affidavit should be considered by this court.

ii. Whether the application for bail pending appeal should be granted.

11. On the first issue the law as laid down in the **Victim's Protection Act section 20(1)(b)** the victim has a right to submit information during plea bargaining, bail hearing and sentencing. The bail and bond policy guidelines acknowledge that the victim should be accorded an opportunity to submit information that the court can consider in its bail decision. The fact that the replying affidavit was filed out of time is a technicality, that should not deprive the victim an opportunity to be heard, as explained in her affidavit she became aware of the intention to appeal by chance through her advocates on record.

12. The Judiciary bail and bond Policy guidelines states that a victim(s) of crime is entitled to be informed of the developments in their case. It would be draconian to strike out the affidavit. The courts are called upon to do substantive justice and avoid determination of cases on procedural technicalities. **Article 159 (2)(d) of the Constitution** provides:-

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(d) justice shall be administered without undue regard to procedural technicalities;

13. On the second issue it is trite law that bail pending appeal does not exist as of right but is at court's discretion. It is granted based on principles which have been developed by courts over the years as the appellant's presumption of innocence is devoid. The appellant must therefore show overwhelming chances of success in the appeal. The appellate court will not normally interfere with the discretion of the trial court in sentencing the appellant by a competent court unless there are overwhelming chances of success for the appellant to regain his or her liberty.

14. The leading authority on the subject of bail pending appeal is the case of **Somo –v- Republic (1972) E. A. 476** where the principles for admission to bail pending appeal have been laid out. These principles are –

The applicant must demonstrate the existence of overwhelming chances of the appeal being successful. In that case there is no justification for depriving the applicant of his freedom.

In **Jivraj Shah –v- Republic (1986) KLR** the Court of Appeal stated that the principal consideration 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.

15. This means that the applicant must persuade the court that his/her appeal is so strong and is meritorious such that in the final analysis the

appeal will be successful. The burden is on the applicant to demonstrate that there are sound issues of law and facts which arise from the charge(s) and the evidence tendered.

16. This principle has been upheld in various authorities. In the Botswana & Uganda Supreme Court quoted in Cr. Appeal No. 50/2013, H. C. Nyeri in Samuel Macharia Njagi –v- Republic 2013 eKLR –

In Laing –v- State (1989) BLR 54 H.C consideration for bail pending appeal were stated as:-

- 1. If there is likelihood or reasonable prospect of the appeal succeeding.**
- 2. If there are exceptional or unusual grounds for application.**
- 3. If having regard to the sentence there is going to be considerable delay either in preparing the record of appeal or because of undue delay resulting in the appellant serving the whole or substantial portion of the sentence.**
- 4. If it was a case of the nature that it would require the applicant free to confer with his counsel in the preparation of the appeal.**

17. In Supreme Court of Uganda Arvid Patel –v- Uganda S. C Cr. Appeal No. 1/2003 the court set out the principles as follows:

Whether the applicant is or not a first offender.

Whether the offence for which the applicant was convicted involved personal violence.

The appeal must not be frivolous and has reasonable chance of success.

The possibility of substantial delay in the determination of the appeal.

Whether the applicant complied with the conditions granted before the applicant’s conviction during the pendency of the appeal.

18. The issue of the appeal having overwhelming chances of success cuts across these authorities and it emerges as the key consideration when determining whether to grant bail or not.

19. The applicant need not demonstrate that all the conditions exists, if he satisfies the court that one or more of the condition exists, it will be sufficient.

20. In Abdi vs R 1991 KLR 171 The court held that bail pending appeal should be granted only in rare and exceptional circumstances. In the case of Daniel Dominic Karanja v Republic (1986) KLR 612, the Court of Appeal stated that:

“(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 exceptional or unusual circumstances existed;

(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.”

21. Recent case law has also held that granting of bail pending appeal is discretionary, depending on the circumstances of each case in Nyeri High Court Criminal Appeal No. 1 of 2018 George Wambugu Thumbi vs Republic. Lady Justice Matheka relied on the case of Arvind Patel -vs- Uganda Supreme Court Criminal Appeal no. 1 of 2003. Where the Supreme Court of Uganda, Justice Oder, set out the circumstances under which bail pending appeal will be considered(supra).

22. The court also stated that an applicant need not demonstrate all these considerations in order to be granted bail. A combination of two or more of the conditions would be sufficient.

23. Other secondary factors that the court should consider are as set out in Nathan Browne Birundu v Republic High Court Criminal Appeal No. 896 of 2001 they include **“the medical condition of the applicant, the nature of the offence, the sentence imposed, delay in the preparation of the appeal record and hearing of the same, the disappearance of the original record or the entire record etc.”**

24. In the case of Peter Hinga Ngatho versus Republic [2015] eKLR it was held that the fact that the Applicant did not breach the bail conditions in the trial court, is not an exceptional circumstance which can warrant a decision to admit an applicant to bail pending appeal. The applicant had not proved any exceptional circumstances to warrant grant of bail pending appeal.

25. Having carefully examined the grounds raised in the memorandum of appeal and the supporting affidavit, where the appellant submits that the case was not proved beyond reasonable doubt, the charges were defective and duplex and that reliance was placed on contradictory evidence of co-conspirators and that too much weight was placed on the evidence of the handwriting expert these do not disclose overwhelming chances of success. Other factors that the appellant raises in her supporting affidavit is that she was faithful in her bond at the initial trial, and that she is a mother of three children one of tender age of five years. The Court of Appeal in the case of **Daniel Dominic Karanja –v- R** (supra) has ruled that these factors do not constitute exceptional circumstances.

26. There is no record of the trial court proceedings but upon perusal of the judgement, I cannot say that the appeal has an overwhelming chance of success. The applicant contends that her family is suffering and fears that her business may collapse. In the binding decision in **Dominic Daniel Karanja –v- R (supra)** these are not the envisaged exceptional or unusual circumstances. The applicant has been convicted of offences and presumption of innocence no longer applies. There is no likelihood that the applicant may serve her sentence before the appeal is heard and determined.

CONCLUSION

27. I find that, the applicant has failed to establish that her appeal is not frivolous but has high chances of success. The appellant has failed to show that exceptional circumstances exist to warrant grant of bail pending appeal.

28. I find no merit in this application. I order that -

(1) The application is dismissed.

Dated at Kerugoya this 11th day of August 2020

L. W. GITARI

JUDGE