



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 37 OF 2019

ISAACK BAGAJA MOHAMED.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING ON BAIL/BOND PENDING APPEAL

1. The Applicant was convicted and sentenced to a fine of Kshs.10,000,000/- and in default serve 15 years in jail. In addition, he was sentenced to serve 15 years for the offence of trafficking narcotic drugs contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act No. 4 of 1994.
2. Being aggrieved by the aforesaid verdict he lodged an appeal No. HCCRA No. 37 of 2019 in High Court at Garissa in which after it was heard fully the same was dismissed.
3. He has now lodged a notice of appeal to manifest his interest to appeal to Court of Appeal.
4. Meanwhile he has lodged an application under section 357 of the Criminal Procedure Code Cap. 75 Laws of Kenya seeking to be admitted to bail/bond pending appeal.
5. The same is premised on grounds that he is sickling and as such he needs a constant medical check-up and medication. That he will suffer irreparable loss in that by time appeal is heard and determined as he will have served a substantial portion of his sentence which may be a great punishment should the appeal succeed. The application is supported by the affidavit of **Paul Minishi Shivachi** sworn on 10/6/2020.
6. In brief it is deponed to as follow -

[9]. That owing to the existing Covid-19 pandemic the Court of Appeal process is barely functional and further to the directive of the Chief Justice in so far as crowding in the prisons, it is in the best interest to have the applicant released on the existing bail and bond terms.

[10]. That the Applicant is epileptic and needs constant observation and medication to prevent a relapse.

[11]. That the Applicant has always attended court when required and will always continue to do so if released on bail pending appeal and on any other such condition that this Honourable Court may deem fit in the circumstances.

[12]. That the Applicant has a young family that he is the sole bread winner with the last born only a month old and he's continued incarceration will cause the family pain and suffering.

7. Mr. Magero State Counsel opposed the application on the ground that this court has rendered the judgment dismissing appeal thus matter out of this court's hands.

ISSUES, ANALYSIS AND DETERMINATION

8. The sole issue discerned herein is whether the bail/bond pending appeal can be granted by this court and ancillary to that is if yes, has the applicant met the threshold to warrant sought grant?

9. I have considered the pleadings and submissions by the Applicant and Prosecution. The provision of law that applies to bond/bail pending appeal is section 357 of the Criminal Procedure Code which provides as follows:

“(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.

(2) If the appeal is ultimately dismissed and the original sentence confirmed, or some other sentence of imprisonment substituted therefor, the time during which the appellant has been released on bail or during which the sentence has been suspended shall be excluded in computing the term of imprisonment to which he is finally sentenced.”

10. In **Mutua vs R, [1988] KLR 497** the Court of Appeal stated thus as regards the exercise of the Court’s discretion in an application for bond/bail pending appeal:

“It must be remembered that an applicant for bail has been convicted by a properly constituted court and is undergoing punishment because of that conviction which stands until it is 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.”

11. A different test from that applied in bail pending trial is therefore applied in bail pending appeal. When considering an application for bail pending appeal, the court has discretion in the matter which must be exercised judicially taking into consideration various factors as follows:

a) Whether the appeal has overwhelming chances of success. See **Ademba vs Republic (1983) KLR 442, Somo vs R [1972] E.A 476, Mutua vs R [1988] KLR 497** in this regard.

b) There are exceptional or unusual circumstances to warrant the court's exercise of its discretion. In this regard see **Raghubir Singh Lamba vs R [1958] E.A 337; Somo vs R (supra.); Mutua vs R (supra.)**

c) There is a high probability of the sentence being served before the appeal is heard as held in **Chimabhai vs R, [1971] E.A 343.**

12. The Applicant submitted that that owing to the existing Covid-19 pandemic the Court of Appeal process is barely functional and further to the directive of the Chief Justice in so far as crowding in the prisons, it is in the best interest to have the applicant released on the existing bail and bond terms.

13. That the Applicant is epileptic and needs constant observation and medication to prevent a relapse.

14. That the Applicant has always attended court when required and will always continue to do so if released on bail pending appeal and on any other such condition that this Honourable Court may deem fit in the circumstances.

15. That the Applicant has a young family that he is the sole bread winner with the last born only a month old and he’s continued incarceration will cause the family pain and suffering.

16. However, on strength of his appeal, the applicant has already lost in lower court and this court and he will only be heard in court of appeal on legal point only. This court thus can’t weigh his chances of success. The court of appeal is the most suitable court to entertain the bail application on that issue.

17. On issue of exceptional circumstances, he submits that he is epileptic and in the prevailing Covid 19 circumstances it will be risky for him to be in prison. On epileptic ailment/condition and need for observation, no evidence has been adduced but just mere statement which this court cannot rely on.

18. On sentence, he cannot say that by the time is heard he will have served substantial part of the same. He can still move court of appeal under certificate of urgency and he can secure a near date.

19. Thus, this court has found no merit in the application and thus dismisses the same and directs that the applicant be arrested and handed over to the prisons to continue with service of his sentence.

20. Thus, court makes the following orders;

i) The application is dismissed.

ii) The Applicant to be arrested and handed over to prisons to continue with his sentence.

iii) He is at liberty to seek same orders in the Court of the Appeal.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 28TH DAY OF OCTOBER, 2020.

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C. KARIUKI

JUDGE