



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. E002 OF 2020

EVELYNNE JOHNSON.....APPELLANT/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Intended Appeal from the Judgment on conviction and sentence

in Criminal Case No. 69 of 2018 at Hola PM's Court presided over

by Hon. A.P. Ndege (PM)

Coram: Hon R. Nyakundi

Mr. Mungatana for the Applicant

RULING

Evelynne Johnson, the Applicant herein, was convicted on a charge of stealing contrary to Section 275 of the Penal Code and subsequently sentenced to two (2) years imprisonment by the trial court. Aggrieved by this finding, she filed the Motion dated 24th November 2020 under Certificate of Urgency on the same day. It is brought under Sections 349 and 357 of the Criminal Procedure Code.

Essentially, the Application seeks to for enlargement of time to admit the Record of Appeal and that it be deemed as duly filed. The Application additionally prays that the Applicant be granted bail pending the hearing and determination of the intended appeal. The Motion is premised on the grounds adduced therein and further articulated in the affidavit sworn by Danson Mungatana, Advocate on the 24th November 2020 on the authority and on behalf of the Applicant, Evelynne Johnson.

It is contended that when the Applicant was sentenced on the 2nd of September 2020, her relatives were not aware of her conviction. Upon learning of this, they approached the court registry for inquiries and were advised to peruse the Record of Appeal first. That the Record of Appeal was certified on 21st October 2020, well beyond the 14-day period within which appeals are allowed. It is further contended that the relatives of the Applicant were financially constrained as to be unable to raise the requisite fees for court proceedings to be typed hence occasioning further delay. That it is only upon learned Counsel's intervention and willingness to take conduct of the matter on a pro bono basis that the Applicant's relatives could continue to follow up the matter.

Regarding the issue of bail pending appeal, the case is made that the intended appeal has an overwhelming chance of success. This, it is contended, is on account of the fact that there are exceptional circumstances warranting the release of the Applicant, to wit she was jailed with a baby who was eight months old in November 2020. That further, the Applicant complied with all the bail conditions imposed on her during the course of her trial and is therefore likely to continue should the bail be granted. It is also contended that this being a new appeal, there was a possibility of delay in its determination. That this is the Applicant's first conviction and therefore it was in the interests of justice that the Applicant be granted bail pending the appeal.

Submissions

Pursuant to directions issued by this Court sitting at Malindi on the 25th November 2020, Counsel for the Applicant filed submissions addressing the twin issues of enlargement of time and bail pending appeal.

On enlargement of time, learned Counsel reiterated the facts alluded to in the Motion regarding the Applicant and her relatives' indigent

circumstances as well as the fact that the relatives were not aware of the Applicant's conviction. Reliance was placed on the case of **Jamleck Kirimi Kinoti vs Republic Meru High Court Misc. Criminal Application No. 133 of 2018** where it was held that all an applicant needed to satisfy the requirements of Section 349 of the CPC was to show good cause. It was submitted that in this instance the Applicant had done so.

Turning to bond pending appeal, the Court was asked to take judicial notice of the fact that throughout the hearing of the case in the lower court, the Applicant was out on a cash bail of Ksh 5,000. The Court is urged to adopt the same approach on appeal.

Reference is made to **Tom Omare Magutu V Republic, Mombasa High Court Criminal Appeal No 89 Of 2017** where the Learned Judge quoted from **Jivraj Shah V Republic (1986) KLR 605** for the submission that for bail pending appeal to be granted, the appeal should have overwhelming chances of success and consideration ought to be given to the existence of exceptional circumstances warranting the release of the Applicant on bail pending appeal.

It is submitted that the Appeal has overwhelming chances of success on account of the Learned Trial Magistrate ignoring the relationship of husband and wife that existed when the alleged theft took place. That the Applicant kept on referring to the complainant as her husband throughout the trial and kept on bitterly wondering how a wife can actually steal her husband's phone. That the Applicant did not really steal the phone as alleged but rather was in the middle of a domestic dispute with her husband, a matter that could be resolved at home. That in furtherance of this line of argument, nothing was presented to the court as proof of purchase or strict ownership of the phone. That the charge sheet was defective in that the particulars themselves were drafted badly and could not form the basis of a conviction. It was further submitted that there was presented to the Trial Court a probation report recommending at most a non-custodial sentence with one-year probation. This Report was ignored by the Learned Trial Magistrate.

It is also submitted that there are exceptional circumstances warranting the release of the Applicant on bail pending appeal given that the Applicant is now a single woman who needs to take care of two children on her own. Secondly, that she had been taken into custody with a baby who she complained was experiencing a lot of problems in the conditions of custody. The baby was not part of this and ought not to be exposed to life in custody because the father and mother have a disagreement.

The Law, Analysis and Determinations

I have considered the application, the grounds in support and submissions of Counsel. The two questions sought to be answered are

- a. Whether the Court ought to enlarge the time within which the Appeal may be filed*
- b. Whether the Court should grant bail pending appeal*

For the first issue, the operative law is **Section 349 of the Criminal Procedure Code Cap 7 Laws of Kenya** which provides that:

“349. 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.”

Per **Section 349**, the court is clothed with discretionary powers to be exercised for the interest of justice to the parties in a litigation. Illuminative principles that the Court ought to keep in mind in the exercise of its discretion may be drawn from **Sila Mutiso v Rose Hellen Wangari Mwangi Civil Application No. 255 of 1997 UR** where the Court stated:

“It is now well settled that the decision whether or not to extend time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are:

First, the length of the delay.

Secondly, the reason for the delay;

Thirdly possibly the chances of the appeal succeeding if the application is granted; and

Fourthly the degree of prejudice to the respondent if the application is granted.”

Drawing from comparative jurisprudence on the matter of enlargement of time pending appeal, the Supreme Court of Appeal of South Africa in the case of **S.V Smith [2012] 1SACR 567** elaborated the test to be applied on applications for leave to appeal in the following manner:

What the rest of reasonable prospect of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore the applicants must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding, more is required to be established than there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorized as hopeless. There must, in other words, be a sound, a rational basis for the conclusion that there are prospects of success on appeal.

Juxtaposing the Applicant's Motion against the foregoing principles, my conclusion is that the Applicant has satisfactorily expressed herself within the provision of section 349 of the Criminal Procedure Code. The court is satisfied that the delay in filing the appeal was not inordinate. In any case, it was occasioned by the delay in the certification of the Record of Appeal which in turn was on account of the financial constraints faced by the Applicant. This Court would be remiss to deny the Applicant their right to appeal in the circumstances.

Being of the anterior persuasion, the issue that remains to be resolved is whether the Applicant should be granted bail pending the intended appeal. The law on this issue is **Section 357. (1) of the Criminal Procedure Code** which provides:

357. (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.

When it comes to matters bail pending appeal, I can do no better than to seek refuge in the succinct summation of the Court of Appeal in **Jirraj Shah v Republic [1980] LKR 605** where regarding the conditions to be met before such bail is granted held:

“The principal consideration in an application 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 interests of justice to grant bail. If it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on accurate of some substantial point of law to be urged and that the sentence or substantial part of it will have been served by the time the appeal is heard conditions for granting bail will exist.

The main criteria is that there is no difference between overwhelming chances of success and a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed and the proper approach is the consideration of the particular circumstances and weight and relevance of the points to be argued.”

In the matter before this Court, I am inclined to believe that the exceptional circumstances test has been met. The Applicant is the young mother with a child of less than a year old. She is currently incarcerated with her baby and the Court cannot ignore that these are indeed exceptional circumstances that warrant the intervention of the Court.

I am further enamoured by my finding that overwhelming chances of the appeal being successful have been demonstrated. This has been done by Counsel for the Applicant's line of argument, which I am inclined to accede to, that the Learned trial Magistrate did not consider that the Applicant and the complainant had an intimate relationship of husband and wife and that they got into a domestic dispute over the mobile phone the Applicant was accused of stealing. That further, there is a report on record that recommended a non-custodial sentence for the Applicant.

Further, given that the Applicant was sentenced to two years imprisonment, it is not farfetched to surmise, as I do now, that she is likely to have served a substantial term of the two-year sentence imposed on her by the time her appeal is dispensed with.

As such, I find that the threshold for grant of bail pending appeal as demonstrated in the **Jirraj Case (Supra)** has been satisfied by the Applicant.

Disposition

In the result, I find the Application dated 24th November 2020 has merit and is allowed in the following terms:

- a. The appeal is admitted out of time and the Record of Appeal dated 24th November 2020 is hereby deemed as duly filed.***
- b. The Applicant is granted bail of Ksh. 5,000 pending the hearing and determination of the appeal.***
- c. ...***

It is so ordered.

Judgment delivered, dated and signed at Malindi this 18th day of December, 2020.

.....

R. NYAKUNDI

JUDGE

In the presence of:

Komara for Mungatana for the Applicant

Kamara for Mungatana.