



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL MISC. APPLICATION NO. 82 OF 2019

ISAACK BAGAJA MOHAMED.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. By notice of motion dated 24/10/2019 the applicant seeks to be released on bail/bond pending appeal.

2. The same is anchored on the provisions of section 357 of the Criminal Procedure Code (Cap. 75 Laws of Kenya). It is based on the grounds on the face of the motion namely: -

1. That the applicant has been tried, convicted and sentenced to 15 years in jail and a fine of Kshs.10,000,000/= in default to serve 15 years in jail by the Honourable M. Nyaga (SRM) sitting at Magistrate's Court at Wajir in Criminal Case No. 50 of 2018.

2. The applicant being dissatisfied with the judgment and sentence has lodged an appeal vide High Court Criminal Appeal No. 37 of 2019, Garissa.

3. That the appellant has high chances of success as illustrated in the petition herein annexed.

4. The applicant is a sickling and as such in need of constant medical check-up and medication.

5. The applicant is likely to suffer irreparable loss in that by time the appeal is heard and determined he may have served substantial portion of his sentence which may be a great punishment should the appeal succeed.

3. The same is supported by affidavit of Paul Minishi Shivachi sworn on 7/10/2019. The same reiterates the grounds in the application and particularly: -

1. That he is an advocate of the High Court of Kenya retained by the appellant/applicant to conduct the appeal on his behalf.

2. That he also had conduct of the trial on behalf of the appellant herein and he is thus well versed with the facts and have instructions and authority to make this application on behalf of the applicant.

3. That the applicant was charged with trafficking in a narcotic drugs contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act No. 4 of 1994.

4. That the applicant was convicted and sentenced to 15 years in jail and a fine of Kshs. 10,000,000/= in default serve 15 years in jail.

5. That the appellant is dissatisfied with the conviction and sentence and has lodged an appeal in this honourable court as appears in the petition of appeal and proceedings on record.

6. That the appeal herein has a high probability of success.

7. That the appellant is apprehensive that if not granted bail his appeal may be rendered nugatory should he succeed given

that he may have served most of his sentence by the time the appeal is heard and determined.

8. That the appellant is epileptic and needs constant observation and medication to prevent a relapse.

9. That the appellant 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.

10. That the appellant has a young family that he is the sole breadwinner with the last born only a month old and his continued incarceration will cause the family pain and suffering.

4. During hearing of the same the respondent opposed the application and submitted that the elements of overwhelming chances and exceptional circumstances have not been demonstrated to warrant the grant of bail pending appeal.

5. The appellant during alleged commission of crime he was in company of 3 others. The other 3 were attacked by militia on the way and they sustained injuries. The 3 persons with accused were Robert, Abdul and Abdi. They were rescued by police and taken to hospital. They were witnesses but were not called to testify in court. They never testified in defence but statements were produced. They confirmed motor vehicle they were in. See the statements they were released that their statements were admitted as the truth.

6. From time of arrest it took 24 hours for motor vehicle to be inspected. It was in police station. The keys were also with police. Accused was still detained of the reason of detention. The subsequence of events shows prosecution failed to produce 2 witnesses.

7. Kikuni & Alibashir who recorded statements. They were the ones who collected samples and took same to Nairobi and returned the same. all prosecution witnesses were only policemen despite the fact that there were civilian witnesses who were around. The appellant phone was taken for analysis and no implicating evidence was noted. The trial court just said it was believing the prosecution evidence. He was on bond of Kshs.1 million.

8. He never absconded. Applicant's medical report was annexed for showing his treatment. He thus seeks court to allow application. He avers that he will comply with any terms court may impose.

9. Mr. Mulatia for the respondent submitted that there are no overwhelming chances at all disclosed. The witnesses called were sufficient and proved the case beyond reasonable doubt.

10. In trial court bond was a right but now circumstances have changed. He is a convict. Medical issue can be handled by prisons.

ISSUES:

11. After perusing the trial court record, instant application and parties' submissions, I find the singular issue is **whether the thresh-hold of grant of bail pending appeal has been established?**

12. 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. In this regard, if such a convict dissatisfied with the outcome, his recourse is to appeal against the decision.

13. Consequently, the conditions applicable for bail pending trial and bail pending appeal are not the same. After trial and conviction, an accused can no longer be presumed as innocent and bail is no longer an automatic right.

14. Such an applicant must demonstrate that his appeal has overwhelming chances of success to be entitled to bail pending appeal. Of course, there may be other considerations such as poor health of an applicant which the prisons authorities may not be able to deal with in prison or that the sentence is too short that by the time the appeal is concluded, the term may have been served.

15. In the case of *Jivraj Shah vs Republic [1986] KLR 605*, the Court of Appeal held:-

“There is not a great deal of local authority on this matter and for our part such as we have seen and heard tends to support the view that the principal consideration is if there exist exceptional or unusual circumstances upon which the court 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 an account of some substantial point of law to be urged, and the sentence or substantial part of it, will have been served by the time the appeal is heard, conditions for granting bail will exist.”

16. In *Dominic Karanja vs. Republic [1986] KLR 612* the Court of Appeal also held: -

“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.”

17. Thus, the burden is on the applicant to prove that he should be granted bail pending the hearing of his appeal. He should demonstrate that

the appeal has overwhelming chances of success. I have considered the application and the submissions of Learned Counsel. I have also considered the judgment of the trial court and the grounds set out in the petition of appeal.

18. Without preempting the appeal, I am of the considered view that the appeal has an overwhelming chances of succeeding, though the same chances is not a guarantee that the appeal must succeed. At the end of the hearing the entire appeal, the court will determine whether appeal succeeds or not on materials before the court and the law applicable.

19. In the premises, I find the application to be meritorious and allow the same. Thus the court makes the following orders;

i. The applicant shall execute a bond of Ksh. 5 million with a surety of similar amount or deposit cash Ksh. 2million.

ii. The appeal shall be heard on priority basis.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 28TH DAY OF NOVEMBER, 2019.

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C. KARIUKI

JUDGE