



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 33 OF 2017

JOSEPH MACHARIAAPPELLANT/APPLICANT

VERSUS

REPUBLIC RESPONDENT

RULING (Bail pending appeal)

Before me is a Notice of Motion dated 13th June 2017 brought under Article 49(1)(h) of the Constitution of Kenya 2010, and section 357 of the Criminal Procedure Code, and all other enabling provisions of the law. It is supported by the affidavit of Ombongi O. Douglas the advocate for the appellant/applicant, and the annexed proceedings judgment of Hon C. Mburu Resident Magistrate in Nyeri CMCRC no. 1087 of 2016, delivered on 25th May 2017.

The applicant was charged with the offence of hotel breaking and committing a felony contrary to section 306(a) of the Penal Code He was found guilty and sentenced to 3years' imprisonment.

The main prayer is that the applicant be released on bail or bond pending the hearing and determination of his appeal.

The grounds for the application are set out on the face of the application as follows;

- a. That the appeal has overwhelming chances of success
- b. That the conviction is based on aailable offence
- c. That it is in the interests of justice that the applicant be granted bail pending appeal.

In his affidavit Mr. Ombongi deposes that the appellant having filed his appeal seeks release on bond or bail pending appeal. That the applicant, a first offender was sentenced to three years imprisonment without the option of fine, part of which he has already served and in any event he had been on bond of Ksh 50,000 during the trial in the lower court , and he was absolutely not a flight risk.

The state represented by Ms. Jebet did not file any affidavit in response but chose to make oral submissions.

The application was argued on 22nd November 2017 by Mr. Macharia holding brief for Ombongi for the applicant and Ms. Jebet for the State.

Mr. Macharia submitted that Mr. Ombongi was relying wholly on his affidavit.

In response Ms. Jebet submitted that the application was opposed. That the applicant was convicted of the offence of hotel breaking and committing a felony and also, for handling stolen property. That the evidence in the lower court was overwhelming that he had stolen the said properties, two solar panels which he was found in possession of. Hence his appeal had no chance of success.

She further pointed out that there was a difference between bail pending appeal and bail pending trial. In the latter there was a presumption of innocence, which the applicant did not enjoy for now because he was already convicted of an offence. She further submitted that she had perused the pre bail report ordered for by this court from the Department of Probation and After Care Services and filed on the 2nd August 2017. That the description of the applicant as a responsible and socially stable person could not be correct, as it contradicted the evidence on record, where he was a suspect in a series of house breakings.

Mr. Macharia in response urged the court to rely on the PBR and the affidavit sworn by Mr. Ombongi.

Section 357 of the Criminal Procedure Code provides for admission to bail or suspension of sentence pending appeal. It states at sub section (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:

Bail pending appeal is a recourse available in law to an accused person already convicted of an offence and serving sentence.

In **Gerald Macharia Githuka vs Republic Criminal Appeal No. 119 of 2004**, the Court stated;

‘The cornerstone of the justice system is that no one will be punished without the benefit of due process including the right to exhaust the right to appeal. Incarceration before trial or pending hearing of an appeal cuts against this principle... ‘

The right to bail pending trial is a Constitutional right under Article 49 of the Constitution which provides for the rights of arrested persons. These include the right;

“(1) (h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.”

The main difference between bail pending trial or charge as indicated at Article 49(1) h) and bail pending appeal under section 357 can be seen in the words of by Haris J in **Chimambhai vs Republic (No 2) {1971} E.A.343**;

“The case of an appellant under sentence of imprisonment seeking bail lacks one of the strongest elements normally available to an accused person seeking bail before trial, namely, the presumption of innocence, but nevertheless the law of today frankly recognizes, to an extent at one-time unknown, the possibility of the conviction being erroneous or the punishment excessive, a recognition which is implicit in the legislation creating the right of appeal in criminal cases.” (emphasis added).

These words are in resonance with the Constitutional provision that an accused person has the right, if convicted, to appeal to, or apply for review by, a higher court as prescribed by law at article 50(2) (q). This is among the constitutional rights under article 50 that collectively amount to the right to a fair trial.

Thus, although the right to bail pending appeal is not specifically provided for under this Article 49(1) (h), this provision has been applied in numerous cases to support the same. I would add that Article 51 of the Constitution which provides for the rights of persons detained, held in custody or imprisoned clearly states at sub article (1) that such a person

... retains all the rights and fundamental freedoms in the Bill of Rights, except to the extent that any particular right or a fundamental freedom is clearly incompatible with the fact that the person is detained, held in custody or imprisoned.

The person who is imprisoned will appear in court on an application for review, revision, appeal or retrial. Hence, in my view, one of those rights referred to above, is the right to bail pending these proceedings, and the only limitation would be the existence of compelling reasons.

These compelling reasons have been prescribed again in numerous cases as conditions for granting bail pending appeal. A search at kenyalaw.org brings up number of decisions that have cited the case of **Arvind Patel -vs- Uganda S.C Cr. Appeal No. 1 of 2003** from where I also draw guidance, where the Supreme Court of Uganda set them out as:

1. The character of the offender
2. Whether the applicant is or not a first offender;
3. Whether the offence of which the applicant is convicted involved personal violence;
4. The appeal must not be frivolous and has reasonable chance of success;
5. The possibility of substantial delay in the determination of appeal and;
6. Whether the applicant complied with bail conditions granted before the applicant's conviction during the pendency of the appeal.

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

The applicant would also need to demonstrate that his appeal had high chances of success, and would be rendered nugatory because the appellant will have served a substantial part of his sentence by the time the appeal is heard.

(See Jeremiah Wachira Muchiri v Republic [2016] eKLR, Samuel Macharia Njagi v Republic [2013] eKLR).

The applicant has complied with the provisions of section 357(1) of the Criminal Procedure Code and has filed an appeal.

I have considered the application, the rival submissions. I have also considered the pre bail report. There is sufficient information on the applicant. For a first offender it may not be contradictory for the social inquiry to find that he still has good ties with the community, and the community may still be willing to have the offender back in it for rehabilitation. Hence the probation officer's observations may not really be considered as contradicting the record.

Secondly, the one of the state's ground for objection is that the applicant was convicted for both hotel breaking and committing a felony and handling stolen property. My perusal of the record revealed that he was convicted only of the former offence. That submission to bring out the applicant as a serial burglar was not borne out by the record, or the evidence.

Hence, the applicant has several factors as set out in the Arvind case in his favour.

1. He has been described by his mother as an obedient, hardworking and responsible person. She is ready to stand surety for him and ensure that he comes to court. The area assistant chief says that the applicant was known as a person of good character, and would not be considered a threat to the community if released.
2. The applicant is a 1st offender,
3. The applicant is a youthful offender aged 19 years old,
4. The applicant was out on bond during the trial in the lower court. He abided by the bond terms and attended court as required. Though the difference now is that he is a convict and would be motivated to abscond, these fears are allayed by the pre bail report which clearly shows that he is not a flight risk,
5. Regarding the views of the victim, the report indicates that had no objection to the release of the applicant on bond,
6. Is the intended appeal frivolous? From the counsel's supporting affidavit, and the submissions made by the state, and my perusal of the record of appeal, the appeal raises both questions of law and fact. For instance, the fact of being a youthful, first offender, vis-a-vis the sentence of imprisonment without an option of fine, yet whatever was allegedly stolen was recovered. I cannot say it is frivolous.

The upshot is that the application for bail pending appeal is allowed in the following terms;

The applicant may be released on a bond of Ksh 100,000 with one surety of the same amount or two sureties of Ksh 50,000 each.

- (1) The Deputy Registrar to approve the surety or sureties. The applicant to provide his recent full photo for the record in addition to other documents for the surety.
- (2) Upon release on bond the applicant to be under bail supervision by the Probation Officer Nyeri Central pending the hearing and determination of the appeal. The officer to make appropriate arrangements with the offender and to immediately notify the court should the offender fail to comply with those directions.
- (3) The Deputy Registrar to ensure order no. 2 is extracted and served accordingly.

It is so ordered.

Dated, delivered and signed this 22nd day of January 2018 at Nyeri.

Teresia M. Matheka

Judge

In the presence of

Court Assistant Hariet

Kinuthia holding brief for Ombongi for the applicant

Muranga for state

Applicant present.