



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 34 OF 2018

YUSSUF SALAT MOHAMED.....APPLICANT/APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. Before me is an application brought by way of a Notice of Motion dated 28th June 2018 filed by Nyasani & Co. Advocates The application was filed under certificate of urgency and seeks the following substantive orders:-

1)

2) **The Honourable court be pleased to grant and/or admit the appellant herein to bail pending the hearing and determination of Garissa High Court Criminal Appeal No. 34 of 2018.**

3) **That upon granting prayer 2 above, the Honourable Court be pleased to suspend the execution of the sentence and/or order appealed against pending the hearing and determination of the appeal herein.**

4) **Costs of this application be borne by the applicant.**

5) **Such further and/or other orders be made as the court may deem fit just and expedient, in the interest of justice.**

2. The application was filed with a supporting affidavit sworn by Yussuf Salat the appellant on 28th June 2018. In the affidavit, the three charges on which the appellant was convicted and sentenced were highlighted. In brief the appellant was convicted of causing grievous harm contrary to section 234 of the Penal Code, malicious damage to property contrary to section 339 of the Penal Code, and stealing contrary to section 275 of the Penal Code.

3. At the hearing of the application, Mr. Migele learned counsel holding brief for Mr. Nyasani for the appellant submitted that this application was brought under section 357 (1) of the Criminal Procedure Code and relied on various cases such as **Jivraj vs Republic [1986] KLR 605** and the case of **Mundia Michubu vs Republic – Meru High Court Criminal Appeal No. 100 of 2013** as well as the case of **Dominic Karanja vs Republic [1986] KLR 612**.

4. Counsel submitted that an applicant has to persuade the court that there exist unusual circumstances in order to justify bail pending appeal. Other considerations are whether there is overwhelming chances of the success of the appeal, and whether there is anticipated delay in hearing the appeal. Counsel submitted that bail pending appeal is an exercise of discretionary power of the court.

5. Counsel submitted that the appellant had been on bail in the trial and had complied with all the requirements. He attended court as when required. According to counsel, the appellant was also the breadwinner of a family whose members were present in court. Counsel submitted further that there were serious legal issues to be considered in the appeal, and as such there was justification for allowing the application for bail pending appeal.

6. Counsel submitted lastly, that it was not presently certain how quickly the appeal would be heard and determined.

7. Mr. Okemwa the learned Principal Prosecuting Counsel submitted that bail pending appeal was not a right. Counsel felt that since proceedings had been typed there would no delay in hearing the appeal. He also said that there were no overwhelming chances of success in the appeal, and that hardship to dependent was not unexceptional circumstance. Counsel suggested that directions be given for hearing of the appeal at an early date.

8. This an application for bail pending appeal brought under section 357 of the Criminal Procedure Code, which provides as follows:-

“357 (1) After 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 the appeal;

.....”

9. Under the Constitution of Kenya 2010 Article 49, all arrested persons have a right to bail pending trial or pending hearing. In this regard Article 49 (1) of the Constitution provides as follows:-

“49 (1) A arrested person has the right –

(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.”

10. Bail pending trial is thus a constitutional right for everyone who has been arrested. Bail pending appeal is not a constitutional right, but is a statutory right.

11. I have perused the cases cited to me. The jurisprudence is uniform that the grant of bail pending appeal is the exercise of discretionary power by the court. The presumption of innocence stops when a person has been convicted for an offence. The presumption therefore is that the convicted person is guilty, unlike in the case of bail pending trial where the presumption of innocence applies.

12. Therefore, there is need for applicants for bail pending appeal to demonstrate certain matters before a court can grant bail pending appeal. First, the applicant has to have a right of appeal. Therefore, where a person is barred from appealing, such person cannot be considered for bail pending appeal. Secondly, an appeal has to have been filed before an application for bail pending appeal can be entertained.

13. Counsel for the applicant in oral submissions stated that the appeal had not been filed. However, I note that in actual fact the petition of appeal had been filed on 22nd June 2018. Maybe, counsel made this mistake because he was holding brief for another lawyer. If an appeal had not been filed by the time the application was filed on 28th June, 2018, then this court would not proceed further with the application and it would be for striking out for being premature. However, because the application for bail pending appeal was filed after the appeal was filed, this court has to consider it as valid.

14. The main consideration in an application for bail pending appeal is whether the appeal has overwhelming chances of success as a convicted person is presumed to be guilty. That consideration can be beefed up by existence of exceptional circumstances such as the length of time it will take to finalize the appeal, where the sentence is a short sentence; and also where for example the applicant has serious health issues to be attended to.

15. I agree with the Prosecuting Counsel that the fact that a convict is a breadwinner in a family is not an exceptional circumstance. I will add that the fact that the applicant was on bail pending trial and he attended court dutifully without fail, is not on its own an exceptional circumstance because every person is expected to be law abiding and, complying with court orders is an aspect of abiding by the law.

16. In the present case, I have perused the petition of appeal which has four grounds. There is no ground for example that the charge was fatally defective. There is no ground alleging any illegality or unconstitutionality committed by the trial court or the prosecution. In my view, though the appeal filed is arguable, the applicant has not demonstrated to this court that the appeal has overwhelming chances of success, considering that the onus is on him to demonstrate to this court that the appeal has overwhelming chances of success.

17. With regard to exceptional circumstances, at the risk of repeating myself, I find that the applicant being the sole breadwinner of a large family is not an exceptional circumstance. Having been placed on bond at the trial and complying with the bond terms also is not an exceptional circumstance. I thus find that the applicant has also not discharged his burden of demonstrating to this court any exceptional circumstances that would justify his being released on bail pending appeal.

18. On the sentence, the applicant was sentenced on each of the three counts that is 8 years imprisonment on Count 1, 1 year imprisonment on Count 2, and 2 years imprisonment on Count 3. The sentences were ordered to run concurrently, which means a total prison sentence of 8 years. It is thus unlikely that the sentence will have been served by the time the appeal is heard since the sentence was pronounced on 11th June 2018.

19. To conclude, I find no merits in the application for bail pending appeal and dismiss the same. The appeal will proceed in the normal manner. The Deputy Registrar will therefore process the appeal for hearing as same has not yet been admitted.

Dated, and delivered at Garissa this 27th day of September, 2018.

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George Dulu

JUDGE