



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCCRA NO. 33 OF 2018

FRANCIS KARANJA MWANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal from judgment and sentence dated 21st June, 2018 in Eldama Ravine Traffic Case No. 171 of 2014 delivered

by Hon. J.L. Tamar (Principal Magistrate)]

RULING ON BAIL PENDING APPEAL

1. The principles for the grant of bail pending appeal are clear:

- a. Although the appellant has lost the right to presumption of innocence by his conviction, the right to bail is still available **pending trial**, including the appeal process (see this court's decision in **Peter Wanjiku Njiraini v. R.**, Machakos HCCRA No. 56 of 2015).
- b. The applicant must show unusual circumstances in the interest of justice justifying the grant of bail pending appeal (see **Jivraj v. Shah** (1986) KLR 605) such as -
 - i. erroneous conviction or excessive punishment (see **Chimambhai v. R. (No. 2)** (1971) EA 343, or
 - ii. exceptional circumstances in that the appeal has overwhelming chances of success or that the appeal has substantial merit in the appeal; or
 - iii. the possibility that the appellant will have served a substantial portion of sentence before the appeal can be heard and determined. See **Jivraj**, supra.

See the application of these principles in Nyeri HCCRA No. 35 of 2016, **Jeremiah Wachira Muchiri v. R.**; Nyeri HCCRA No. 2 of 2015 **Peter Hinga Ngatho v. R.**; and Kisii HCCRA No. 56 and 57 of 2014 **Dennis Yobesh Ombogo v. R.**; and this court's own decision in KBT HCCRA No. 129 of 2017, **Mohammed Abdulahi Ali v. R.**

2. In offering "overwhelming chances of success", Counsel for the Applicant, Mr. Kamwaro, urged that the only eye-witness at the scene (PW3) was asleep and cannot tell what transpired at the scene of the accident. He submitted that there was "no direct evidence as to how the accident occurred [and] there is no reason why the court did not give benefit of the doubt" to the appellant. It was further urged that a substantial part of the sentence may likely be served by the time the appeal is heard as he had been following up on the proceedings of the trial court without much success.

3. For the Respondent, Ms. Macharia, Ass. DPP, urged that with the 6 year sentence passed on 21/6/18 for the 11 counts of causing death by dangerous driving, the appellant who had been in custody for only (1) month at the time of hearing of the application, could not be said to stand a risk of serving a substantial part of the sentence before the appeal is heard. On the chances of success of the appeal, the DPP submitted that the prosecution's evidence against the appellant was overwhelming and referred to the evidence of the Investigating Officer PW16 who testified at page 15 line 10 – 17 that the scene was a sharp and blind corner with a continuous yellow line a sign barring any motor vehicle from overtaking, and that his decision to overtake even in the conditions of mist and poor visibility was reckless, and it had led to loss of 11 lives.

4. I consider that the court is not required to examine in minute detail the evidence presented by the Prosecution and the Defence before the trial court in order to discover the possibility of success of the appeal. That is the duty of the court when considering the appeal itself, but for an appeal to be said to have overwhelming chances of success, the evidential or legal argument in support of the appeal must be by clear and obvious. There is nothing unusual or exceptional in the circumstances of this appeal, discernible by this court at this stage, as to warrant

grant of bail before appeal.

5. There is nothing in the decision of the trial Court herein that, in the words of Harris, J. in *Chimambhai*, supra, discloses the possibility of the conviction being plainly erroneous or the punishment excessive, as to justify intervention by bail pending appeal. The decision of the Court on appeal will be determined by an exhaustive examination and reconsideration of the evidence before the trial Court, consistently with the duty of a first appellate court (*see Okeno v. R (1972) EA 32*) and *insufficiency of evidence*, as opposed to *lack of evidence* to convict is not an unusual circumstance but one which the first appellate court shall consider in deciding the merits of the appeal. It is all part of the appellate process. The sentence of 6 years for the offence of causing death by dangerous driving contrary to section 46 of the Traffic Act which carries a penalty of imprisonment for ten (10) years is not excessive as to be erroneous.

6. I have noted that the Trial Court has presented its record of the proceedings by letter dated 6/8/18 and received on 9/8/18, and the appeal is ripe for admission and hearing. There is no possibility of the appellant serving substantial part of the sentence before the appeal is heard and determined.

7. In view of the decision of the court in this application for bail pending appeal, the court does not discuss the evidence in any detail to avoid prejudicing the hearing and determination of the pending appeal.

Orders

8. Accordingly, for the reasons set out above, the appellant's application by Notice of Motion dated 13th July 2018 for bail pending appeal is declined. The Appeal, which has already been filed shall be processed to hearing with usual priority having regard to the length of sentence.

Order accordingly.

DATED AND DELIVERED THIS 18TH DAY OF OCTOBER 2018.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Kamwaro, Advocate for the Appellant.

Ms. Macharia, Ass. DPP for the Respondent.