REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO. 70 OF 2018

JUSTUS MUTHAMA PETER.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The appellant herein, **Justus Muthama Peter,** was charged with the offence of vandalism of electrical apparatus contrary to Section 64(4)(b) of the ***Energy Act*** No. 12 of 2012 before Mavoko Senior Principal Magistrate's Court, Mavoko in Criminal Case No. 496 of 2018. On his own plea of guilty, he was convicted of the said offence and sentenced to ten (10) years imprisonment and his motor cycle forfeited to state.

2. Aggrieved by the said decision, the appellant has now appealed to this Court based on the following grounds:

> **1) THAT the Honorable Magistrate erred both in law and in fact by relying on the Appellant's plea of guilty without availing the Appellant an interpreter.**
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> **2) THAT the Honourable Magistrate erred both in law and in fact by convincing the appellant based on a plea that was not unequivocal.**
>
> **3) THAT the Honorable Magistrate erred both in law and in fact by failing to provide an interpreter for the Appellant.**
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> **4) THAT the Honorable Magistrate erred in both law and in fact in failing to find out whether the Appellant understood the charges brought against him.**
>
> **5) THAT the Honorable Magistrate erred both in law and in convicting the appellant on a plea based on facts the Appellant did not clearly understand.**
>
> **6) THAT the Honorable Magistrate erred both in law and in fact by imposing a sentence based on a plea that was not unequivocal.**

3. The appellant, through his Learned Counsel, **M/s Nyaata & Nyaata Company Advocates**, now seeks by his application filed dated 23rd August, 2018, that this court be pleased to admit the applicant to bail pending the hearing and determination of his intended appeal. He also seeks an order that this court be pleased to grant leave to file this appeal.

4. According to the appellant, his advocates on record applied to be supplied with the copies of the typed proceedings and has been duly supplied with the same. He was however of the belief that his appeal raises serious points of law and fact and has overwhelming chances of success. According to the appellant, owing to the applicant's lack of an interpreter and representation at the trial court, he was apprehensive that unless the application is heard forthwith and the orders sought are granted he shall suffer irreparably.

5. The appellant however disclosed that he was ready and willing to stand surety for the applicant if so required.

6. The application was however opposed by the Respondent by way of a replying affidavit sworn by **Mogoi Lilian**, a Prosecution Counsel in the Office of the Director of Public Prosecutions and counsel handling this Appeal. According to the Respondent the supporting affidavit was sworn by a stranger to the proceedings in question and the Court was urged to disregard the same.

7. It was the Respondent's position that the appellant has been in custody for barely 3 months since his sentencing. To the Respondent, the appellant has not demonstrated at all that his appeal has high chances of success or at all. At this stage, it was contended, the appellant is a convict and not an accused person hence bond is not a matter of right but is purely based on the likelihood of successfulness (sic) of the Appeal and other compelling reasons which reasons the Applicant herein has not raised.

8. In the Respondent's view, the appellant ought to set down his appeal for hearing at the earliest opportunity and if successful will suffer no prejudice in view of the fact that the applicant was convicted (sic) to 10 years imprisonment and is not likely to serve a substantive amount of the sentence before the hearing and determination of this Appeal. The Respondent therefore prayed that this application be dismissed.

9. I have considered the application and the affidavits both in support thereof and in opposition thereto.

10. Article 49(1)(h) of the Constitution provides that:-

> ***An accused 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.***

11. It is however true that a different test applies where the matter before the Court is an application for release on bail pending the hearing of the appeal. Section 357(1) of the ***Criminal Procedure Code*** provides as follows:

> ***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.***

12. It was therefore held in **Masrani vs. R [1060] EA 321** that:

> **"Different principles must apply after conviction. The accused person has then become a convicted person and the sentence starts to run from the date of his conviction."**

13. I therefore agree with the position in **Charles Owanga Aluoch vs. Director of Public Prosecutions [2015] eKLR** where it was held that:

> **"The right to bail is provided under Article 49(1) of the Constitution but is at the discretion of the court, and is not absolute. Bail is a constitutional right where one is awaiting trial. After conviction that right is at the court's discretion and upon considering the circumstances of the application. The courts have over the years formulated several principles and guidelines upon which bail pending appeal is anchored. In the case of *Jiv Raji Shah vs. R [1966] KLR 605*, the principle considerations for granting bail pending appeal were stated as follows:**
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> **(1) Existence of exceptional or unusual circumstances upon which the court can fairly conclude that it is in the interest of justice to grant bail.**
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> **(2) It appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of a substantial point of law to be argued and that the sentence or substantial part of it will have been served by the time the appeal is heard, then, a condition of granting bail will exist.**
>
> **Main criteria is that there is no difference between overwhelming chances of success and set of circumstances which disclose substantial merit in the appeal – being allowed, the particular circumstances and weight and relevance of the points to be argued."**

14. This position was restated in **Mutua vs. R [1988] KLR 497**, the Court of Appeal stated:

> **"It must be remembered that an applicant for bail has been convicted by a properly constituted court and is undergoing punishment because of that conviction which stands until it is set aside on appeal."**

15. It is therefore clear that a different test from that applied in bail pending trial is applied in bail pending appeal. When considering an application for bail pending appeal, the Court has discretion in the matter which must be exercised judicially taking into consideration various factors as follows:

> a) Whether the appeal has overwhelming chances of success. See **Ademba vs. Republic [1983] KLR 442**, **Somo vs. R [1972] EA 476**, **Mutua vs. R [1988] KLR 497**;
>
> b) There are exceptional or unusual circumstances to warrant the Court's exercise of its discretion. See **Raghbir Singh Lamba vs. R [1958] EA 37**; **Jivraj Shah vs. R [1986] eKLR**; **Somo vs. R (supra)**; **Mutua vs. R (supra)**;
>
> c) There is a high probability of the sentence being served before the appeal is heard. See **Chimabhai vs. R [1971] EA 343**.

16. What constitute exceptional circumstances were dealt with in **R vs. Kanji [1946] 22 KLR**, where **De Lestang, Ag.J** (as he then was) held that:

> **"The appellant's appeal is not likely to be heard before the end of March or beginning of April by which time I am informed he shall have served one fourth to one-third of his sentence. The mere fact of delay in hearing an appeal is not of itself an exceptional circumstance, but it may become an exceptional circumstance when coupled with other factors. The good character of the appellant may, for example, together with the delay in hearing the appeal constitute an exceptional circumstance. The appellant in this case is a first offender and his appeal has been admit to hearing showing thereby that it is not frivolous. In addition to that there is the fact that his co-accused, who is in no respect in different position from him as regards bail, has been admitted to bail."**

17. According to **Trevelyan, J** in **Somo vs. R [1972] EA 476:**

> **"…the single fact of having been two identical applications with one being allowed and the other being refused was, of itself, an unusual and exceptional circumstance."**

18. Good character alone, however, it was held in the same case:

> **"can never be enough. There is nothing exceptional or unusual in having such a character."**

19. The rationale for considering the chances of success of the appeal was given in **Somo vs. R** (supra) at page 480 as follows:

> **"There is little if any point in granting the application if the appeal is not thought to have an overwhelming chance of being successful, at least to the extent that the sentence will be interfered with so that the applicant will be granted his liberty by the appeal court. I have used the word "overwhelming" deliberately for what I believe to be good reason. It seems to me that when these applications are considered it must never be forgotten that the presumption is that when the applicant was convicted, he was properly convicted. That is why, where he is undergoing a custodial sentence, he must demonstrate, if he wishes to anticipate the result of his appeal and secure his liberty forthwith, that there are exceptional or unusual circumstances in the case. That is why, when he relies on the ground that his appeal will prove successful, he must show that there is overwhelming probability that it will succeed."**

20. In this case I must say with respect that the application was rather casually drawn. All the pleadings originally filed herein were never signed by the firm of advocates who purported to have drawn the same. Further, the proceedings in the suit appealed from were never exhibited. Thirdly, both the affidavit in support of the application and the further affidavit were sworn by one **Timothy Nganga Naason**, who deposed that he was an uncle to the appellant herein and that he was authorised to swear the same. He did not however disclose who had authorised him to do so. He further did not disclose his source of the information he was deposing to and his grounds for the beliefs he harboured. In addition, the body of the application sought leave to file this appeal. Why this prayer was thought necessary is beyond my comprehension.

21. It is therefore clear that the applicant has not disclosed at all why he believes that his appeal has overwhelming probability of success. In fact apart from a mere mention, it was not demonstrated by him in what manner he believed his appeal would succeed. It is not enough in such matters to simply make an allegation that the appeal will succeed. As was stated in **Somo vs. R** (supra) the fact that the appeal is not frivolous is of no consequence on its own in support of the application though the fact that it is thought to be frivolous, on the other hand, is for consideration in favour of its rejection. In this case, I must say that the applicant's application with due respect does not offer the court much help in terms of consideration of the chances of success of his appeal. In my view applications for bail pending appeal are not a run of the mill and ought to be made with a lot of circumspection by or on behalf of the applicants. Applicants ought not to simply throw an application at the Court and expect the Court to grant such applications.

22. In the premises, this application is clearly devoid of merits, fails and is hereby dismissed.

23. Orders accordingly.

Ruling read, signed and delivered in open court at Machakos this 30th day of November, 2018.

G V ODUNGA

JUDGE

In the presence of:

Miss Kae for the Appellant

Miss Mogoi for the Respondent

CA Geoffrey