



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
MISC. CRIMINAL APPLICATION 44 OF 2017
JOSEPH MUREITHI KANYITA.....APPLICANT
VERSUS
REPUBLIC.....RESPONDENT
RULING

Introduction

Joseph Mureithi Kanyita, the applicant herein, filed a Chamber Summons application dated 14th February, 2017 under a Certificate of Urgency seeking, *inter alia*, that he be admitted to bail pending appeal to the Court of Appeal. The appeal to the Court of Appeal is pursuant to a dismissal of his appeal to this court of Nairobi High Court Criminal Appeal No. 185 of 2013. The same was heard before me. The application is brought under Sections 357(1) and 361(1) of the Criminal Procedure Code, Section 6(a) of the Appellate Jurisdiction Act, Article 50(2)(q) of the Constitution and all enabling provisions of the law.

The application was based on the grounds that he had filed a Notice of Appeal on 20th September, 2016 against this court's decision upholding his conviction on two counts and its consequent enhancement of the sentences in the counts from a non-custodial sentence to custodial sentences, namely 2 years and 6 months imprisonment respectively.

The application is premised on grounds that the applicant has been in custody for 6 months and that taking into consideration the time it would take to prepare for the appeal he would likely serve the remainder of his sentence before it was heard, rendering it nugatory. Further that he was a director and manager of Benir International Limited which was on the verge of collapse on account of his incarceration and this would likely negatively impact on his employees and their dependents.

Annexed to the application was an affidavit sworn by the applicant's advocate, one Stanley Kang'ahi of Kang'ahi Associates & Co. Advocates in which he reiterated the issues raised in the application. He emphasized that the applicant was granted bail in the trial court whose terms he followed till the determination of the case. Further that the applicant was free during the hearing of the appeal before this court by virtue of his payment of the fines meted out by the lower court. He pleaded for the release of the applicant given that the applicant was likely to serve the sentence before the intended appeal was heard and determined thus rendering the appeal nugatory. He urged the court to take into account that the applicant was the sole bread winner on account of his ownership of Benir International (K) Limited which is the sole source of the family income. The judgment of this court in Criminal Appeal Number 181 of

2013, a profile of Benir International (K) Limited and a bundle of authorities were annexed to the Supporting Affidavit.

Submissions

The application was canvassed before me on 27th February, 2017 with Mr. Kang’ahi representing the applicant whilst learned State Counsel, Ms. Nyauncho represented the respondent. Mr. Kang’ahi submitted that the applicant had been in custody since September, 2016 and he was afraid that he might serve the remainder of the sentence before the appeal was heard, rendering it nugatory. He referred the court to Section 6(a) of the Appellate Jurisdiction Act, Cap 9, as the basis of the application. He submitted that the offence in question was not of a personal nature and that the applicant had not disobeyed the terms of the bond/bail at the trial. He submitted that in **Misc. Criminal Application No. 34 of 2017, Samuel Bett v. Republic** the High Court considered that the applicant had filed an appeal against a sentence of one year and held that he had a right to exhaust all avenues of appeal. He concluded by submitting that the applicant was willing to abide by any terms the court may grant. Other case law cited included, **Jivraj Shah v Republic (1986)e KLR, Tony Dhiman v Republic (2007)e KLR, Dominic Sibi Peter v Republic (2014) e KLR and Peter Hinga Ngatho v Republic (2015) e KLR.**

Ms. Nyauncho opposed the application. She submitted that although the applicant was convicted he had not pointed out any substantial reasons which demonstrated that his appeal was likely to succeed. She submitted that he had only filed a Notice of Appeal and a Record of Appeal. She submitted that the fact that the appeal may be rendered nugatory was not a substantial ground on which bail should be granted. She relied on **Joseph Mwathi Nyanjui v. Republic, Criminal Revision No. 109 of 2015** to buttress this point.

She submitted that it was also not sufficient to submit that the applicant would abide by any potential bond terms. This, she argued, was because the Applicant was now a convicted person who had lost the presumption of innocence. She concluded by submitting that the ruling in the case of **Samuel Bett**(supra) having been made by a court of concurrent jurisdiction was not binding to this court.

Mr. Kang’ahi, in reply, submitted that the merits of the appeal could not be argued before this court. He submitted that once a notice of appeal is filed the registry files the record of appeal. He submitted that the authority in **Samuel Bett v R** (supra) was meant to be persuasive to the court. He conceded that the applicant did not have the presumption of innocence. He urged the court to refer to the case of **Peter Hinga Ngatho v. Republic[2015] eKLR** Mativo J. which enunciated grounds that would constitute exceptional circumstances that would necessitate the grant of bail.

Determination

I have considered the application and the respective submissions. I will first address myself to the issue of jurisdiction; whether the court can entertain the application as presently filed. It was held in **Owners of the Motor Vessel “Lillian S” v. Caltex Oil(Kenya) Ltd.[1989] KLR 1**, (Nyarangi J.A.) that:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

The matter before the court was brought under Section 6(a) of the Appellate Jurisdiction Act which states:

The High Court may, if it thinks fit, pending the determination of an appeal from the High Court to the Court of Appeal

(a) admit the appellant to bail;

It is clear from this section that in order for this court to exercise its jurisdiction to admit the applicant to

bail an appeal must be pending for determination. (See Section 157 of the Criminal Procedure Code which I will revisit later in this ruling). The question that flows then is, what constitutes a pending appeal? The applicant contends that the Notice of Appeal filed is a *prima facie* indication that the appellant has instituted an appeal. This court concurs with this submission. However, I noted that the Notice of Appeal in question was filed under Rule 75 of the Court of Appeal Rules which falls under Part 4 which, by dint of Section 74 relates to civil cases and matters relating thereto. The correct procedure for filing the Notice of Appeal in respect of criminal matters is Section 59 of the Rules.

It is trite that under Article 159 of the Constitution this court in the administration of justice should not pay undue regard to procedural technicalities. This is however tempered by the Court of Appeal's finding in **Faisal Mohammed Ali alias Feisal Shahbal v. Republic**[2015] eKLR that:

“There is nothing unconstitutional about rules of procedure that regulate the exercise of jurisdiction conferred by the Constitution or by any law.”

The court went ahead and held, regarding notices of appeal, that:

“It is trite therefore, that the device of the notice of appeal invokes the appellate jurisdiction of this Court... Omollo J.A. observed that where there is no appeal or intention to appeal, as manifested by a lodged notice of appeal, the court has no basis for meddling in the decision of the High Court.

...

The lodging of the notice of appeal is not irrelevant or ritualistic formality. Beyond initiating the appeal, it also serves to notify the prospective respondent that the intended appellant has opted to escalate the legal battle to the appellate court...”

That being said, given that the application was also brought under Section 357(1) of the Criminal Procedure Code, it is also important that I interrogate the provision. It is my candid view that the provision would be applicable in the instant case only if there lies an appeal before the Court of Appeal. I restate the same as under;

“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:”

As framed, the provision contemplates that there must be in existence an appeal filed before a court of higher jurisdiction before an application for bail pending appeal can be considered. As I have found, no appeal lies to the Court of Appeal, a Notice of Appeal therein having been filed under the wrong provision of law. I would hope then that the applicant will take the earliest opportunity to amend the said Notice of Appeal before the date of the hearing of the appeal to mitigate against any likelihood of a negative outcome. As at now, I belabor repeat myself that the application is fatally flawed and this court therefore lacks the jurisdiction to entertain it.

The foregoing notwithstanding, this court has stumbled on an order of the Court of Appeal in **Criminal Application NAI 5 of 2016 (UR5/2016) between Joseph Mureithi Kanyita and Republic** issued by Hon. Githinji, Visram & Murgor, JJA on 22nd March, 2017. The same was issued pursuant to an application dated 13th October, 2016 by the Applicant herein for bail pending appeal. As at the time of hearing that application, the Applicant had not filed a substantive appeal. Learned counsel for the Applicant Mr. Owang informed the court that he would be in a position to file a substantive appeal within seven days. He accordingly withdrew the application under Rule 52 of that Court's Rules. The court then directed that the appeal be filed within seven days and the same be heard on priority basis at the beginning of the new term.

I have taken the liberty to mention the above because of two things. One, the Applicant filed the current application with full the knowledge that he had filed a similar application before the Court of Appeal. Whereas that is his right, his action may be construed to imply that he is hopping from court to court seeking a favourable outcome. I say so because going by the record, as at the time he filed the instant application, he had not withdrawn the application before the Court of Appeal. His action definitely amounts to an abuse of court process. Two, since the Court of Appeal has directed that the appeal to that court be heard on priority basis at the beginning of the next term which commences in April, this year means that the Applicant will not be prejudiced by a delay in hearing the appeal. He is not therefore likely to serve the sentence before the appeal is heard and determined.

In the end, I find the application without merit and the same is dismissed.

DATED AND DELIVERED THIS 28th DAY OF MARCH, 2017.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

1. Mr. Kang'ahi for the Applicant
2. M/s Sigei for the Respondent.