REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEALS

CRIMINAL MISC. APPLICATION NO. 7 OF 2017

PAUL KANAI…….....1ST APPLICANT

DAVID NDOLO……...……..2ND APPLICANT

Versus

REPUBLIC…...……RESPONDENT

(Being an intended appeal from the judgement on conviction and sentence in criminal Case No. 695 of 2013 at Loitokitok PM's Court presided over by Hon. M. Okuche (PM)

Criminal procedure:

- Leave to appeal out of time

- Bail pending appeal

- Grounds for the court to consider on both applications

RULING

PETER KANAI and **DAVID NDOLO** hereinafter referred as the applicants were charged and convicted with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. The two applicants were each sentenced to death under the provisions of section 296 (2) of the Penal Code. The applicants were allowed fourteen (14) days right of appeal as demonstrated by the trial court record. The applicants never complied with the deadline of 14 days right of appeal as provided for under section 349 (1) of the Criminal Procedure Code.

As can be deduced from the application to enlarge time to lodge an appeal out of time the applicants are aggrieved with judgement of the lower court delivered on 27/10/2016 on both conviction and sentence. The two applications therefore on both enlargement of time under the proviso of section 349 of the Criminal Procedure Code and the application to have each one of them released on bail pending appeal were consolidated. Both counsels agreed to canvass the two applications together for purpose of expediency and proportionate utilization of judicial time.

In order to sequence the determination of these two applications i begin first with the one on extension of time for filing an appeal to this court against the judgement of the principal magistrate court at Lotitokitok.

The application filed in court by the applicants and supported by their respective affidavits deposed as follows:

> **(1) That the applicants were aware of the fourteen (14) days limitation period to file an appeal but were constrained due to the family involvement to have an advocate retained to represent them on appeal.**
>
> **(2) That the hiring of an advocate was later thwarted as a result of the failure on the part of the family members to raise the prerequisite legal fees to pay counsel as a condition for take up the mater.**
>
> **(3) That it was in the process of looking for an advocate that they were caught up with affliction of time of fourteen (14) days to file an appeal.**
>
> **(4) It is in their contention relying on the annexed memorandum of appeal that he same raises both substantial legal issues and evidential matters of a nature that only the appeal court has jurisdiction to entertain the appeal.**

Mr. Kamau learned counsel who was seized of instructions to represent the applicants caused each one of them to file supplementary affidavits dated 23//2/2017. The applicants' supplementary affidavits were in all circumstances similar in content as to the averments in support of the application.

The applicants deposed that the prevailing circumstances at Kamiti Prison were not favourable for them to secure and retain counsel within the stipulated period of 14 days. They further deposed that application to obtain copies of proceedings and judgement was filed within time but the trial court was unable to supply the record as requested. This made it impossible to prepare the memorandum of appeal to accompany the notice of appeal from the impugned judgment. The applicants further contended that in the whole process they were not indolent nor guilty of laches as alluded to by the respondent counsel. The applicants referred the court the time lapse between reaching the deadline of fourteen days and the day the appeal was filed had an overreach of 5 days. That according to the applicants is excusable given the prevailing situation of them being locked up in prison custody which restricted each one of them an opportunity to secure or hire counsel to stand in for their appeal.

The appellants urged this court to find that the respondent would not be prejudiced in the event extension of time to file an appeal out of time is allowed in their favour.

Mr. Akula, the senior prosecution counsel filed a replying affidavit and vigorously opposed the application. The learned prosecution counsel contended that the applicants have failed to provide sufficient reasons as provided under section 349 of the Criminal Procedure Code as to: why they failed to file the appeal within time. The learned counsel argued that the applicants have not filed any certificate of delay from the trial court. Learned counsel further submitted that there has been inordinate delay on the part of the applicants to comply with the provisions of law on the period of 14 days to file an appeal from the judgement of the primary court. The learned counsel further argued on the issue by referring to the intended memorandum of appeal as containing no grounds with a likelihood of success in the event the appeal is admitted for hearing.

I have considered the application on enlargement of time and rival submissions by both counsels. The law on enlargement of time is clearly outlined under section 349 proviso therein which states as follows:

> **"Provided that the court to which the appeal is made may for good cause admit an appeal after the period of fourteen days has elapsed and shall so admit an appeal if it is satisfied that the failure to enter the appeal within that period has been caused by the inability of the applicant or his advocate to obtain a copy of the judgement or order appealed against, and a copy of the record, within a reasonable time of the applying to the court therefore."**

The reading of the provision to section 349 of the Criminal Procedure Code lays emphasis on the

offender/accused to obtain a copy of the judgement and or record within a reasonable time from the time of conclusion of the matter. This is also echoed under the Republic Constitution. In Article 50 (5) (b) which states:

> **"The accused has the right to a copy of the record of the proceedings within a reasonable period after they are concluded, in turn for a reasonable fee as prescribed by law."**

In this application filed by the intended appellants there is no evidence that copies of judgement and certified court proceedings for appeal purposes were ready or supplied to the applicants within a reasonable time. The provisions of Article 50 (5) (b) of the Constitution has no conditional precedent to be fulfilled by an accused person before a copy of the record of the proceedings is issued to him within a reasonable time. The time requisite of 14 days within which an applicant has to lodge an appeal to the High Court is under section 348 and the rime required to obtain a copy of the judgement or record of proceedings in my view will be excluded.

The reason i say so is because an appeal has two targets. The first one involves a notice of appeal and the second one the actual petition itself. What is the legitimate expectation of section 349 on 14 days limited period an aggrieved party would be compelled to file a notice of appeal of being dissatisfied with conviction/sentence of the trial court. By that action alone the appellant would have satisfied the provisions of section 349 as to the 14 days period.

Under section 350 (1) it provides interalia that:

> **"Every petition to the High Court unless the court so desires be accompanied by a copy of the judgement or order appealed against."**

What this to me means that an applicant in filing the petition should attach the copy of the judgement of the trial court which is intended to be contested on appeal. The time to file an appeal begins to tick from the date such a ruling or judgement has been pronounced, dated and signed in open court as provided for under section 169 of Criminal Procedure Code and not the day the copy of judgement or order appealed from was obtained. The applicants are therefore caught up on time reference of 14 days under section 349 (a) and in the provisions of section 350 (a) requirement of attaching a copy of order or judgement appealed from.

From the record the learned trial magistrate delivered his judgement on 27/10/2016. The 14 days period within which to file the petition under section 350 (a) of the Criminal Procedure Code ended on 10/11/2016. There is no evidence that the appellants had received the extracted order or copy of judgement to be attached to the petition of appeal. The petition with a copy of judgement seemed to have been despatched to the High Court registry immediately after the 15/11/2016 though the acknowledgement stamp is missing. This court has been presented with the key reason for the delay being a need to hire an advocate to represent the applicants on appeal. It cannot be ignored by this court that the applicants had been convicted of a serious offence under section 296 (2) of the Penal Code and sentenced to death. These are weight matters to be considered by unrepresented party at the trial who on reflection sometimes feels the case was lost because of lack of legal representation. As the application demonstrates from the averments in their affidavits the applicants' overshot the period of appeal by 5 days. That cannot be said that they were negligent nor guilty of laches to file the intended appeal within the prescribed period of 14 days.

Therefore weighing one factor after another the applicants have demonstrated good cause for me to exercise discretion conferred by the code to find that the interest of justice would be best served by allowing this application to allow the appeal by the applicants to be filed outside the period of 14 days.

It is so ordered.

The final issue in this appeal touches on the notice of motion dated 13/12/2016 pursuant to section 357 (1) of the Criminal Procedure Code where the applicants sought the following orders:

(1) That pending the hearing and determination of this appeal, the hounourable court be pleased to order the release of the applicants on the same bail terms granted by the trial court on 13/11/2013 in Kajiado Criminal Case No. 695 of 2013 and the cognizance of their surety namely Francis Saitoti Supet and that the cash bail of Ksh.300,000 for each accused paid in the lower court be utilized accordingly.

(2) That in the alternative pending the hearing and determination of this appeals the hounourable court be pleased to order the sentences meted out by the trial court on the applicants on 27/10/2016 in Kajiado Criminal Case No. 695 of 2016.

The subject matter of appeal being conviction and sentence be suspended and the applicants duly released. In this regard the applicants aver that they have been diligently attending the trial before the lower court until the conclusion of their case. The applicants acknowledge that the trial proceedings proceeded conclusively where they were found guilty convicted and sentenced to death for the offence of robbery with violence contrary to section 296 (2) of the Penal Code.

As far as the final decision is concerned the applicants deposed that they are aggrieved by both conviction and sentence which they have prepared and filed a memorandum of appeal a copy of which herein is attached. The applicants further contend that the lower court proceedings and judgements are yet to be typed to facilitate admission and hearing of the appeal by this court hence the need to have them released on bail pending interpaties hearing of the appeal.

The main contention advanced by Mr. Kamau Maina learned counsel for the applicants is that while appearing before the trial court they demonstrated good character and behaviour until conclusion of the trial and subsequent conviction and sentence. Mr. Kamau Maina invited the court to take notice that the applicants' father – Francis Saitoti Supet who stood surety for them in the lower court is a man of meagre resources and such even raising the cash bail deposit was quite strenuous on his part.

On the other hand Mr. Kamau Maina learned counsel submitted that the proposed surety – Francis Saitoti Supet is ailing and under treatment which requires that a prompt decision be made so that he can fulfil his obligation as a surety for the applicants. Learned counsel referred to the decisions for this court to consider which included ***Kajiado High Court Criminal Misc. No. 1 of 2017, Agnes Sabastian v Republic [2017] eKLR, Kericho Criminal Misc. No. 2 of 2014 Republic v Martha Nyaboke Bosire [2015] eKLR.***

The application was vigorously contested by the senior prosecution counsel for the respondent Mr. Akula for failure to meet the conditions for grant of bail pending appeal. Mr. Akula contended that the court should take judicial notice that there is a judgement on conviction and sentence against the appellants which has not been overturned. The court therefore according to Mr. Akula ought to be satisfied that all factors relevant for grant of bail at this stage of post-conviction do exist in order to exercise discretion in favour of the applicants. Mr. Akula senior prosecution counsel for the respondent submitted that no such exceptional circumstances to warrant the applicants to be released on bail pending appeal.

I have considered the application, grounds in support and rival submissions by both counsels in this matter. The question which this court must answer is whether or not the applicants are entitled to bail pending hearing and determination of the appeal. The application to be admitted to bail pending appeal is governed by section 356 (1) as read together with section 357 of the Criminal Procedure Code. These provisions under the code allow for suspension of sentence imposed by the trial court. What was so clear from the provisions an accused person has a right to seek bail from the court of first instance which convicted and sentenced him to prison custody or non-custodial sentence. In the event the trial court declines to grant bail pending appeal, an accused has another shot at it before High Court.

In the instant case the applicants did not apply for bail pending appeal or stay of execution of sentence by the order of the learned trial magistrate. It seems that they reserved the entire application for this courts consideration. Under section 356 and 357 of the Code (Cap 75 of the Laws of Kenya) the general principle of law is that the fact that an accused person has filed a petition of appeal on conviction and

sentence is not by itself a ground to entitle him to bail pending appeal.

The superior courts in this country have discussed and considered the principles and guidelines in exercise of discretion under the stipulated sections of the code to grant bail pending hearing and determination of the appeal. The Court of Appeal in ***Jirraj Shah v Republic [1980] LKR 605*** succinctly held as follows on the conditions to be met:

> **"The principal consideration in an application for bail pending appeal is the existence of exceptional or unusual circumstances upon which the Court of Appeal can fairly conclude that it is in the interests of justice to grant bail. If it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on accurate of some substantial point of law to be urged and that the sentence or substantial part of it will have been served by the time the appeal is heard conditions for granting bail will exist.**
>
> **The main criteria is that there is no difference between overwhelming chances of success and a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed and the proper approach is the consideration of the particular circumstances and weight and relevance of the points to be argued."**

In the high court decision by **Abuodha J** in the case ***of Samwel Macharia Njagi v Republic [2013] eKLR*** the court held thus:

> **"The appellant/applicant is a prima facie a convict and his constitutional freedom and rights are thus significantly circumscribed by his conviction. He no longer enjoys the absolute presumption of innocence available to person facing trial at the first instance.**
>
> **In admitting such a person to bail the court ought to in addition to the principles governing admission to bail pending appeal, bear in mind the possible dilemma of resending such a person to prison in the event that his/her appeal fails."**

What these authorities point at is that ball pending appeal as a right is available to the applicants upon fulfilling the exceptional circumstances brought on a case to case basis to persuade the appellate court or trial court to exercise discretion in favour. As the principles further illustrate that the presumption of innocence under Article 50 (2) (a) of the Constitution is not available as a right to convicted persons. Thirdly the court has to factor the petition and the judgement whether there exist an overwhelming chance of the intended appeal of being successful on the merits. See also ***(Somo v Republic [1972] EA 476).***

The applicants in this case relied on the following grounds to establish exceptional circumstances:

> **(1) Being aggrieved with conviction and sentence from the judgement of the trial court delivered on 27/10/2016.**
>
> **(2) That the applicants while being tried before the lower court were enjoying bail facilities granted by the same court until conclusion of the case.**
>
> **(3) That during the pendency of the hearing they did not fail to appear of endanger the safety of the victim or community.**
>
> **(4) That the proposed surety in this application is ailing and under medication hence he desires to consider the application to allow him to stand surety for the applicants.**
>
> **(4) That there will be delay in determining the appeal for reason that the typed record is yet to be served upon the applicants.**

From the principles governing bail pending appeal, they support the proposition that the applicants must demonstrate that special or exceptional circumstances exist justifying exercise of discretion to be allowed

to continue right to bail pending the determination of the appeal. This has beeen weighed against the risk test that the applicants who has tested prison custody as convicts are likely to abscond from the jurisdiction of the appellate court. The applicants have not shown cause that they would not take flight in the event they are released on bail from prison where they are condemned to death.

Mr. Kamau Maina extensively submitted and relied on the strength of the appeal grounds. The court should bear in mind under this proposition that the merit of the intended appeal involves a combination of many factors which at this stage cannot be ascertained or determined in advance. The chances that the applicants would have served substantial term of their sentence is non-applicable to them in view that they are on death row. The views taken by the applicants that the surety Francis Sitoti Supet is ailing and under treatment is likely to attract some sympathy by this court but falls short of an exceptional circumstances to persuade this court to release the applicants in their favour.

In my opinion the health of a surety will be one of the considerations to be factored in during the admission and cognizance of bail agreement. It is a requirement of the law that a surety enters into a covenant with the court to guarantee to superintend attendance of an applicant or appellant appearance before court when required. The ill health of the proposed surety does not therefore assist the applicants in support of their application. It would be an erosion of public confidence in the administration of criminal justice were this court to allow an interim release of the applicants on bail on the strength that the case has an overwhelming chances of success, only that ground to be disabused at the main appeal and the same is dismissed for lack of merit.

I am of the conceded view that appellate courts should thread carefully in relying on the ground of overwhelming success when the matter and arguments have not been advanced on the merits at the hearing. The right to bail at any stage of the trial or appeal has got to balanced taking into account the aim and objectives of criminal law, the overwhelming chances of success of an appeal. Besides that in my view the court has to go a step further for the applicant demonstrate that miscarriage of justice will result if the appeal filed is not overturned.

In the circumstances upon which this application on bail pending appeal is premised, i am satisfied that the exceptional circumstances test has not been fulfilled. The overwhelming chances of the appeal being successful has not been demonstrated by way of prima facie evidence. Thirdly, the ground on delay to occasion the applicants serve a substantial term of the death sentence is not probable in this case by nature of the sentence imposed. The threshold under our criminal justice system for grant of bail pending appeal as demonstrated in the case law cited i.e***. Jirraj Case (Supra)*** does not apply in this case.

The applicants' motion falls far short of the requirement of the law. The application is therefore dismissed for lack of merit.

It is so ordered.

Dated, delivered and signed in open court at Kajiado on 23rd day of March, 2017.

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R. NYAKUNDI

JUDGE

Representation:

Mr. Kamau Maina – present

Mr. Akula for Director of Public Prosecutions present

Applicants present

Mr. Mateli Court Assistant