



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 36 OF 2017
STEPHEN NYANOTI.....APPLICANT.
VERSUS
REPUBLIC.....RESPONDENT.
RULING

The Applicant came to court by way of Notice of Motion dated 4th April, 2017 brought under Article **49(1)(h) and 2 of the Constitution** and all other enabling provisions of the law. The main prayer by the applicant is that he be released on bail pending the hearing and determination of the appeal herein. The main grounds on which the application is premised are that; the applicant is a person of good conduct who has no likelihood of absconding the proceedings if bail is granted, during the trial he was released on bail and he never absconded the trial and that the main perpetrators of the offence were never charged thereby pleading his innocence.

The Application is supported by the Applicant's own affidavit sworn on 12th April, 2017. The same reiterates the grounds on which the application is premised. In addition, he deposed that during the investigations he co-operated with the police with a view to ensuring that the main perpetrators of the offence were brought to book.

The application was canvassed before me on 25th May, 2017 by way of oral submissions. Counsel for the Applicant, Mr. Omari, argued the application on exceptional and unusual circumstances obtaining so as to warrant the grant of bail pending appeal. His submission was that the Applicant had worked for 45 years as a civil servant and was of good standing before his arrest. Furthermore, he has only three years left before he attains the retirement age of 60 years. Counsel submitted that the Applicant never absconded although he was granted bail during the trial court. He urged that if the application is allowed the surety deposited in the trial court be used to secure the release of the Applicant.

Learned State Counsel, Ms. Nyauncho for the Respondent conceded to the application. Firstly, she argues that the sentence imposed was illegal. The Applicant was sentenced to pay a fine of 2 million in default serve two years imprisonment. She argued that this did not comply with Section 28(2) of the Penal Code. Secondly, she urged the court to note that the Applicant was about to complete his sentence which ends in August, 2017 on considering the 1/3 remission offered by the Prison. She argued that if the Application is not allowed, the appeal would be rendered nugatory.

I have accordingly considered the application and the respective submissions. The principles to be considered in an application for bail pending appeal were set out by *Trevelyan J. in Somo v.*

Republic[1972] E.A 476 thus:

“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 and 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 if 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 an overwhelming probability that it will succeed. That the appeal has not summarily been rejected, taken in isolation, is of no account in the view of what I have said. ... Nor is the fact that the appeal is not frivolous of any consequence on its own in support of the application...

What of other grounds? I do not doubt that such matters as the applicant's good character, delay in the hearing of his appeal and hardship are for weighing in the balance in favour of the grant of the application. But they can only avail the applicant if, on the facts presented, unusual or exceptional circumstances are shown to exist.”

Also in the case of **Jivraj Shah vs Republic [1986] eKLR** the Court of Appeal held that:

“1. The principle 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.

2. If it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account 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.

3. 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.”

The Applicant did not at all argue that the application should be granted on account of the appeal having overwhelming chances of success. Be that as it may, as rightly argued by the learned State Counsel Ms. Nyauncho, the sentence imposed by the learned trial magistrate was illegal as the default sentence did not comply with Section 28(2) of the Penal Code. In addition, a perusal of the court proceedings does attest that the Applicant was charged in circumstances that pointed to his being a scapegoat. This was demonstrated by the fact that the store where the properties, subject of the charge were taken from was accessible to other members of staff other than himself. Therefore, the offence of stealing by servant which he was charged with may not have been proved beyond reasonable doubt.

With regard to unusual and exceptional circumstances, I agree with the Respondent that if this application is not granted, the appeal is likely to be rendered nugatory. This is because the Applicant who was not able to afford the fine imposed will complete the default sentence in the month of August 2017. I add that this ground has succeeded as pointed out in the case of **Jivraj Shah vs Republic (Supra)** because on consideration of other factors, the appeal will most likely succeed.

In the result, this application succeeds, the Applicant is admitted to a bond of Kshs. 200,000/= with one surety of a similar amount or cash bail of Kshs. 50,000/=. On the request that the security document being a Title Deed deposited at Kibera Law Courts be used to secure the release of the Applicant, my view is that this may pose an administrative hitch. This is because the title in respect of this application must be

deposited in this court. I would only therefore order that the same be released by the Executive Officer Kibera Law Courts to the holder of the same after which he shall present himself to the Deputy Registrar of this court for assessment. Accordingly, the Deputy Registrar shall assess the surety. It is so ordered.

Dated and Delivered at Nairobi this 29th day of May, 2017.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

- 1. Mr. Agwenyi h/b for Omari for the Applicant.*
- 2. M/s Sigei for the Respondent.*