



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 121 OF 2016

BETWEEN

ISHMAIL SHINYAKA.....APPELLANT

AND

REPUBLIC.....PROSECUTOR

**(Being an appeal from the Judgment and decision of Hon. J. Ongondo Principal Magistrate
delivered on 30.11.2016 in Kakamega CMC Cr. Case 4385 of 2016)**

RULING

Introduction

1. On 28.11.2016, the appellant herein pleaded guilty to a charge of house breaking and stealing contrary to Section of 304(2) and 279(b) of the Penal Code. Upon conviction, he was sentenced to serve 5(five) years imprisonment. He has since filed this appeal and prays through the Notice of Motion dated 30.01.2017, that he be admitted to bail pending appeal.

The Application.

2. The application is brought pursuant to Section 357(1) of the Criminal Procedure Code which provides as follows;-

“ 357(1) 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.”

3. The application is supported by grounds on the face of the application in which is contended that the appeal has high chances of success and further that unless the orders sought are granted, the appellant's appeal shall be rendered nugatory.

Applicable Principles.

4. Whether to grant bail pending appeal is a matter of discretion of the court. For the instant application to succeed, the applicant must prove that;-

i. there exist exceptional circumstances to warrant grant of bail/bond

ii. his appeal has overwhelming chances of success.

5. In the case of **Dominic Karanja – vs – Republic** the court held inter alia, that:-

1. The most important issue was that if the appeal has such overwhelming chances of success, there was no justification of depriving the applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances.

2. The previous good character of the applicant and the hardships, if any, of his family, were not exceptional or unusual factors. Ill health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners.

3. A solemn assertion by an applicant that he will not abscond if released, even if it is supported by sureties is not sufficient ground for releasing a convicted person on bail pending appeal.

Analysis and Determination

6. The appeal herein arises from a plea of guilty before a court of competent jurisdiction. The only issue that would arise on this appeal is whether the plea of guilty taken by the learned trial Magistrate was unequivocal, because if it was not, then the applicant's appeal would have high chances of appeal.

7. The applicant contends in his supporting affidavit that if he is not released on bail, his appeal might be rendered nugatory and further that he is ready and willing to comply with any bond terms that may be imposed by this Honourable Court.

8. Upon careful consideration of the record before the trial court, and further by applying the principles in the **Dominic Karanja** case (above) I am not satisfied that the appellant's appeal has any overwhelming chances of success. Nor has the applicant demonstrated the existence of any exceptional or unusual factors to warrant grant of bail pending appeal. The fact that the appellant is serving a prison term is not an exceptional circumstance. The sentence of five (5) years imprisonment remains legal and lawful unless and until overturned on appeal.

Conclusion.

9. For the above reasons, and although the state conceded the application, I find that the application is lacking in merit. The position taken by the state regarding the facts are subject to proof during the hearing of the appeal. The application is accordingly dismissed.

It is so ordered.

Ruling delivered, dated and signed in open court herein at Kakamega this **20th day of June 2017**

RUTH N. SITATI

JUDGE

In the presence of:-

...Mr. Khayumbi (present).....for Applicant/Appellant

...Mr. Juma (present).....for Respondent

...Mr. Polycap.....Court Assistant