



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KABARNET
CRIMINAL APPEAL NO. 159 OF 2017

NOAH KIPKOSGEI KIPROP APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

[An appeal from the Judgment/decree of Hon. E. M. AYUKA Resident Magistrate delivered on 30th August 2011 in Kabarnet PMCCri. Case No. 371/2016.]

RULING

Application

1. By a Notice of Motion dated 29th June 2017, the appellant seeks release from custody by bail pending appeal from his conviction and sentence of imprisonment for four (4) years for the offence of theft of motor cycle contrary to section 278A of the Penal Code. In support of the application, the appellant urges the grounds that the appeal has overwhelming chances of success and that the sentence may substantially be served before the hearing of the appeal.

2. The DPP opposes the application and responds that there are no exceptional circumstances to warrant the release on bail pending appeal, and urges that there is no possibility of the appellant serving a substantial part of his sentence before the appeal is heard and determined, pointing out that they were ready to argue the appeal, which may be heard on priority basis.

Principles

3. In a recent decision, ***Mohamed Abdullahi Ali v. Republic***, Kabarnet Criminal Appeal No. 129 of 2017, this Court said the following as regards bail pending appeal:

[2] “Section 357 of the Criminal Procedure Code provides for bail pending the hearing and determination of an appeal from conviction and sentence as follows:

“357. Admission to bail or suspension of sentence pending appeal

(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:

Provided that, where an application for bail is made to the subordinate court and is refused by that court, no further application for bail shall lie to the High Court, but a person so refused bail by a subordinate court may appeal against refusal to the High Court and, notwithstanding anything to the contrary in sections 352 and 359, the appeal shall not be summarily rejected and shall be heard, in accordance with such procedure as may be prescribed, before one judge of the High Court sitting in chambers.

(2) If the appeal is ultimately dismissed and the original sentence confirmed, or some other sentence of imprisonment substituted therefor, the time during which the appellant has been released on bail or during which the sentence has been suspended shall be excluded in computing the term of imprisonment to which he is finally sentenced.

(3) The Chief Justice may make rules of court to regulate the procedure in cases under this section. [Act No. 22 of 1959, s. 37, Act No. 27 of 1961, Sch.]”

Principles

*[3] In MACHAKOS HC CRI. APPEAL NO. 56 OF 2015, **PETER WANJOHI NJIRAINI v. R**, this Court examined the principles for the grant of bail pending appeal as follows:*

“Principles for the grant of bail pending appeal

3. Article 49 (1) (h) provides as one of the rights of arrested persons –

*“(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.”*

4. *Although the applicant’s right to presumption of innocence has been extinguished by his conviction by the trial court, the right to bail pending trial must meaningfully be taken to be co-extensive to the criminal trial process, which includes appeal. However, in determining whether there are compelling reasons for refusal of bail, the fact that the applicant is now a convict must be taken to be a compelling reason in that a convicted person is likely to abscond because his guilt has already been established and certainty of punishment which has already been imposed.*

5. *In **Boke Chacha v. Republic**, Kisii H.C. Cri. Appeal No. 244 of 2012, I considered the principles for the grant of bail pending appeal*

“According to authorities on bail pending appeal, bearing in mind that the applicant has now been convicted by a competent court and is on punishment for the conviction which stands until it is set aside on appeal, the criteria for consideration is:

*a. Whether there exists **exception or unusual circumstances** which justify grant of bail in interests of justice. See **Jivraj Shah v. R** (1986) KLR 605.*

*b. Such exceptional circumstances exist where the appeal has **overwhelming chances of success or where a set of circumstances exist which disclose substantial merit in the appeal and that the sentence or a substantial part of it will have been served by the time the appeal is heard.** See **Jivraj Shah**, *supra*; **Mutua v. R** (1988) KLR 497; and **Somo v. R** (1972) E.A 476.*

*c. The previous good character of the applicant and the hardships facing his family, and his ill health, where there existed prison medical facilities for prisoners, are not exceptional or unusual circumstances. See **Dominic Karanja v. R** (1986) KLR 612.*

d. A solemn assertion, even if supported by sureties, that the applicant will not abscond if released

is not sufficient ground for releasing a convicted person on bail pending appeal. See **Dominic Karanja, supra.**

Determination

4. From the grounds of appeal in this case listed in the Petition of Appeal dated 9th June 2017, the appeal is presented on the primary objection of insufficiency of evidence. The appellant did not attach to his application the proceedings of the trial court and, therefore, no submissions were made by the parties with specific references thereto.

5. However, this Court has obtained the proceedings from the trial court file, and established that in convicting the appellant, the trial magistrate held as follows:

“The Penal Code cap 63, in section 268 defines stealing as:

“A person who fraudulently and without claim of right takes anything capable of being stolen or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal the thing or property.”

I have carefully considered the evidence placed on record by both sides. I am strongly persuaded that the accused hatched a scheme to steal the motor cycle and executed the same. The conduct of the accused and or the sequence of events preceding the disappearance of the motor cycle tells it all. The accused designed every step and move leading to the disappearance of the motor cycle. It is inconceivable for instance to believe that the accused parked the motor cycle outside the gate yet the evidence before the court established that he could have rode it right to his doorstep or at least into the compound. PW3 was categorical and emphatic in his testimony that the plot in which he and the accused stayed had a gate and that even a motor vehicle could be driven into the compound, a fact conceded to by the accused. Furthermore, the accused failed to return the motor vehicle to the complainant at the agreed time, even after being requested to do so by PW2. He showed a lot of indifference on the issue in cross-examination and merely stated that he instead proceeded to watch a football match. I find it this illogical and it was just but a step towards the stealing of the motor cycle by the accused.”

6. Having perused the Record of Proceedings before the trial Court, and **without prejudice to the outcome of the appeal**, I do not find that the appeal has **overwhelming** chances of success as to amount to exceptional or unusual circumstances to warrant the release of the appellant who, as a convict, has now lost the presumption of innocence.

7. Moreover, the appeal may be heard on usual priority list of this court among old appeal cases and appeals in cases where the imprisonment terms are short. I have also noted that the typed record of proceedings is ready and the Record of Appeal may quickly be put together and served on the appellant and the DPP. In addition, there being an upcoming service week for priority hearing of appeals by the Court on 18 -22 September 2017, the appeal may be heard and determined within four (4) months since date of conviction and sentence.

8. I do not, therefore, find exceptional or unusual circumstances within the test in **Jivraj Shah v. R, supra**, to warrant the grant of bail pending appeal.

ORDERS

9. Accordingly, for the reasons set out above, the appellant’s application for bail pending appeal by Notice of Motion dated 29th June 2017 is declined.

10. There shall be no order as to costs.

DATED AND DELIVERED THIS 28TH DAY OF JULY 2017.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Tarus for the Appellant.

Ms. Macharia Ass. Deputy Director of Public Prosecution for the Respondent.