

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPL. NO.423 OF 2015

JAMES MACHARIA KANENE.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, James Macharia Kanene was convicted of the charge of **causing death by dangerous driving** contrary to **Section 46** of the **Traffic Act**. He was sentenced to serve four (4) years imprisonment. His driving licence was ordered cancelled for a period of four (4) years. The Applicant was aggrieved by his conviction and sentence. He has filed an appeal to this court. That appeal is pending hearing and determination. Pending the hearing of the appeal, the Applicant has applied to be released on bail pending the hearing of the said appeal. The Applicant states that the conviction and sentence was wholly and fundamentally wrong, both legally and factually. He was of the view that his appeal has an overwhelming chance of success. He stated that, if bail pending appeal is not granted, by the time the appeal is heard, he would have served a substantial portion of his sentence which in his view would constitute an injustice on his part. The application is supported by the annexed affidavit of the Applicant. The application was opposed by the State. The State was of the view that the prosecution had adduced sufficient culpatory evidence to secure the Applicant's conviction. The State contested the view advanced by the Applicant to the effect that his appeal has overwhelming chance of success.

During the hearing of the appeal, this court heard oral rival submission made by Ms. Kemunto for the Applicant and by Ms. Aluda for the Respondent. This court has carefully considered the said submission. The principles to be considered by this court in determining whether or not to release the Applicant on bail pending appeal is well settled. The principles to be considered by this court in deciding whether or not to release the Applicant on bail pending appeal were set out by the Court of Appeal in **Jivraj Shah – vs- Republic [1986] KLR 605** at page 606:

*“There is not a great deal of local authority on this matter and for our part such as we have seen and heard tends to support the view that the principal consideration is if there exist exceptional or unusual circumstances upon which this court can fairly conclude that it is in the interest 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 account of some substantial point in law to be urged, and that the sentence or a substantial part of it, will have been served by the time the appeal is heard, conditions for granting bail will exist. The decision in **Somo –vs- Republic [1972] E A 476** which was referred to by this court with approval in **Criminal Application No.NAI 14 of 1986, Daniel Dominic Karanja –vs- Republic** where the main criteria was stated to be the existence of overwhelming chances of success does not differ from a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed. The proper approach is the consideration of the particular circumstances and the weight and relevance of the points to be argued. It is almost self-defeating to attempt to define phrases or to establish formulae. There is a helpful passage in Archbold, Criminal Pleading Evidence and Practice, 41st Edition page 783, paragraph 7 – 86.”*

In the present application, the Applicant essentially put forward two broad grounds in support of the

application to be granted bail pending appeal. The Applicant argued that his appeal has overwhelming chance of success. This court has perused the petition of appeal. On the face of it, this court is of the view that the appeal cannot be dismissed as being frivolous. It raises substantial questions of law and fact that may or may not result in the appeal being allowed. The Applicant was convicted of a traffic offence. The principle governing sentencing in traffic offences, generally, is that courts should in the first instance sentence the offender to pay a fine unless the particular offence is aggravated. It may well be that the court may dismiss the appeal lodged by the Applicant on conviction but may make a finding in the Applicant's favour on sentence. In that regard, this court is of the view that the Applicant's appeal's chances cannot be dismissed offhand. This court further agrees with the Applicant that if bail pending appeal is not granted, the likelihood that he would have served a substantial part of the sentence before the appeal is heard is high. This possibility would prejudice the Applicant's constitutional right to liberty.

The upshot of the above reasons is that the Applicant's application for bail pending appeal has merit and is hereby allowed. The Applicant is released on bail pending appeal on condition that he deposits a cash bail of Kshs.200,000/- or in the alternative a bond of Kshs.1,000,000/- with one surety of the same amount. The Applicant shall be required to appear before the Deputy Registrar of this court once every two months for the mention of his appeal until the hearing of the appeal or until further orders of this court. It is so ordered.

DATED AT NAIROBI THIS 28TH DAY OF JANUARY 2016

L. KIMARU

JUDGE