



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 51 OF 2015

PAUL MUTHIE MUNENE..... APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

1. **PAUL MUTHIE MUNENE**, the appellant/applicant herein has brought a Chamber Summons application dated 4th December, 2015 under *Article 49 (1) (h)* of the **Constitution** of Kenya and *Section 357* of the **Criminal Procedure Code** to be admitted to bail pending appeal.
2. The grounds as listed on the face of the application are as follows:
 - i. *That the appellant has a constitutional right to bail pending the hearing of his appeal.*
 - ii. *That the appellant has good grounds to appeal with extremely high chances of success.*
 - iii. *That the appellant shall abide by any condition set by this hon. Court.*
 - iv. *That there are no compelling reasons that may render the appellant person unsuitable for bail.*
3. The appellant/applicant through learned counsel Mr. Magee relied on his supporting affidavit deposing that his appeal has high chances of success pointing out what the learned counsel termed as flaws in the conviction of the appellant. These are as follows:
 - a. *That the charge sheet under which he was tried and convicted did not disclose an offence known in law because according to him cannabis sativa – the drug he is accused of trafficking - is not a narcotic drug. In his view the 1st Schedule of the Narcotic Drugs and Psychotropic Substances Control Act does not list cannabis sativa as a prohibited drug and relied on the case of DANIEL NDERITU WACHIRA –VS- REPUBLIC to persuade this court to go by his view.*
 - b. *That the charge sheet did not indicate the year the offence was allegedly committed as according to him it only indicated 31st July. Mr. Magee opined that in the light of the same the charge was fatally defective and a violation of Section 134 of the Criminal Procedure Code Cap 75.*
 - c. *That the proceedings were conducted in a language the appellant did not understand and this in his view violated his rights under Article 50(2) (m) of the Constitution and Section 198 (1) of the Criminal Procedure Code. On this point, Mr. Magee cited 3 authorities in the case of:*
 - i. *Antoine Ernesta –Vs R (1962) 1 E.A. 505*
 - ii. *Samuel Githua Ngari –Vs Republic [2014] eKLR*

iii. **Bernard Wachira Kamonye –Vs- Republic [2008] eKLR**

4. **Mr. Sitati**, learned counsel for State conceded to the application for bail pending appeal but it is desirous for this Court to consider the application and determine it on its merit rather than the fact that it is unopposed.

The applicant has grounded his application *inter alia* under *Article 49 (1) (h)* of the Constitution but constitutional right to bail only apply to suspects or accused persons in a criminal trial. The constitutional right under the cited provisions does not cover persons who have been found guilty and lawfully been convicted of an offence and serving a sentence meted out in accordance with the law.

The guiding principles in applications of this nature are found under *Section 357 (1)* of the **Criminal Procedure Code** and were laid out in the Court of Appeal in the case of **DOMINIC KARANJA –VS- R [1986] K.L.R. 612** and the case of **JIRVAJ SHAH –VS- R [1986] KLR** where the following criteria for granting bail pending appeal was set:

- i. ***The existence of exceptional or unusual circumstances upon which an appellate court can fairly conclude that it is in the best interest of justice to grant bail.***
- ii. ***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 and that a substantial part of the sentence will have been served by the time the appeal is heard and determined.***
- iii. ***That the previous good conduct of the appellant and the hardship if any facing his family were not exceptional or unusual factor neither is a solemn assertion by an applicant that he will not abscond if released on bond is not sufficient ground for releasing a convicted person on bail pending appeal.***

5. I have carefully considered the appellant's application despite the fact that it ought to have been made through a Notice of Motion rather than Chamber Summons. This is because courts of law now put more emphasis on substance rather than technicalities. The applicant's view that charge sheet under which he was convicted does not disclose an offence, with due respect submissions by learned counsel and the authority cited (and without preempting arguments that will later be canvassed at the hearing of the appeal herein) does not appear on the face of it to be well founded if the the wording and/or description given by the relevant statute (*Section 2* of The Narcotic Drugs and Psychotropic Substances Control) Act No. 4 of 1994 is anything to go by.
6. I have also looked at the charge sheet and the particulars therein that faced the appellant during the trial and it does appear from the proceedings that the learned counsel for the appellant may have missed the amendment done in court on 28th September, 2015 and endorsed on the charge sheet on the same day. This should clearly come out during the hearing of this appeal but what is crucial to note at this stage this ground does not in my view meet the set criteria as enumerated in the two cases this Court has quoted above.
7. I have however, at the same time considered the other grounds cited particularly the issue of language used at the trial and this Court is satisfied that the appeal from the totality of the circumstances obtaining is not frivolous and the chances in the appeal to say the least, are not remote. I am persuaded as held in the case of **SOMO –VS- REPUBLIC 1972 E.A.** where the court considered that where there was high chances of appeal succeeding, there is no justification to deprive an applicant his/her freedom. In the light of this I do find that there is sufficient justification to have the appellant released on bail. He may be released on a bond of Kshs. 500,000/= with one surety of the same amount. The appellant is also through counsel required to expedite the hearing of his appeal by ensuring that the record is prepared and forwarded to the Deputy Registrar for action.

Dated and delivered at Kerugoya this 27th day of January, 2016.

R. K. LIMO

JUDGE

27.1.2016

Before Hon. Justice R. Limo

State Counsel Omayo

Court Assistant: Willy Mwangi

Appellant present

Interpretation: English/Kikuyu through court clerk

Magee for appellant/applicant

Omooria for State present

COURT: Ruling signed, dated and delivered in the presence of Magee for appellant/applicant and Omooria Omayo for State.

R. K. LIMO

JUDGE