



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CRIMINAL APPEAL NO. 56 OF 2015
PETER WANJOHI NJIRAINI APPLICANT
VERSUS
REPUBLIC RESPONDENT
RULING

1. This is a ruling on an application for bail pending appeal brought under Article 49 (1) (h) of the Constitution and section 357 (1) of the Criminal; Procedure Code. The applicant was convicted for the offence of stealing a motor bike contrary to section 278 (4) of the penal Code and sentenced to imprisonment for four (4) years on 9th April 2015 in Tawa Senior Resident Magistrate’s Court criminal case 268 of 2014.
2. The Counsel for the applicant and the respondent – D. M. Mutinda & Co. advocates for the applicant and Cliff Machogu Prosecution Counsel for the DPP - filed written submissions respectively dated 27th November 2015 and 4th December 2015.

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.**”
6. In the High Court decision of **Njagi v. Republic**, Nyeri HC Cr. Case NO. 50 of 2013 (2013) eKLR Aboudha, J. Cited a Ugandan case **Arvind Patel v. Uganda** SC Cr. Appeal No. 1 of 2013 which is stated to have listed whether the applicant is a first offender and the offence of which the applicant is convicted involved personal violence. The full text of the Ugandan case was not provided and I was unable to take benefit of the decision. Moreover as the learned judge notes “From teh two authorities, it is discernible that the prospect of success of an appeal still remain of paramount consideration just like in **Somo’s** case.”
 7. The applicant has in his supporting affidavit of 28th May 2015 set out his grounds for the bail application deponing that he was on bail during the lower court trial and did not fail to attend any court session; that he has a family that depend on him; that he has a permanent place of abode at Kalundu within Kitui County; that his appeal has high chances of success; and that he was willing to abide by any terms of bond and will attend court whenever required to do so.
 8. The appellant/applicant has set out his grounds of appeal in his Memorandum of Appeal filed herein as follows:
 1. That the evidence adduced by the complainant was not corroborated by any independent witnesses(es) present at the alleged scene.
 2. That prosecution’s evidence was riddled with contradictions and inconsistencies.
 3. That the burden of proof responsibility was shifted to accused persons contrary to accepted legal practice/principles.
 4. That the case was not proven beyond a reasonable doubt.
 9. In his written submissions, counsel for applicant concluded that –

“The appellant submits that his appeal has more than overwhelming chances of success. Though not pre-empting his appeal, the appellant submits that there was no single direct evidence linking him to the offence he was convicted on and that there were a lot of contradictions in the proceedings. The appellant urges the Court to take judicial notice of the fact that the offence [for which] he was convicted does not involve personal violence and that he dutifully attended Court sessions in the lower court where he was out on bond. The appellant’s family has also continued to languish in his absence as he is the sole breadwinner.”
 10. Without prejudice to the appeal, the court is not able to hold that the appellant’s appeal has such overwhelming chances of success and or that the sentence of imprisonment for four (4) years is such that the appellant should forthwith be released from custody so that he does serve his imprisonment term before his appeal is heard and determined.
 11. The applicant has not demonstrated that there exists exceptional or unusual circumstances which justify grant of bail in interests of justice. The circumstances have now changed with the conviction and sentence of the applicant upon trial so that the applicant’s good conduct in attending all trial court sessions, the consequent hardship for his family who depend on him and his undertaking to abide by conditions of bail and to attend court whenever required to do so are not exceptional circumstances, as held by the authorities cited above.
 12. The concern that the applicant does not serve his entire sentence or substantial part of it before his appeal is heard and determined will be addressed by an order that his appeal be heard on priority

basis. I have noted that the lower court record has been availed and this court can now set the appeal for hearing on a convenient date in consultation with the parties.

ORDERS

13. Accordingly, for the reasons set out above, the applicant's application herein dated 28th August 2015 is declined.

DATED AND DELIVERED THIS 26TH DAY OF JANUARY 2016.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Musyimi for the Applicant

Ms Saoli for the Respondent

Ms Doreen - Court Assistant