



REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL NO. 127 OF 2015

JOHN GATHU NYINGI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant was charged in Mavoko Law Courts with the main count of breaking into a building and committing a felony contrary to section 306(a) as read with section 306(b) of the Penal Code in Criminal Case Number 1277 of 2013. He was also charged with an alternative offence of handling stolen goods contrary to section 322 (1) as read with section 322(2) of the Penal Code, and with a second count of giving false information to a person employed in the public service contrary to section 129(a) of the Penal Code. The Applicant was convicted of the main count by the trial court, and thereafter sentenced to two (2) years imprisonment without the option of a fine on 25th May 2015.

The Applicant subsequently filed an appeal against the judgment of the trial Court by way of a petition of appeal dated 2nd September 2015 filed in Court on 3rd September 2015. He also filed an application by way of a Chamber Summons dated 3rd September 2015 seeking orders that he be released on bail pending the hearing and determination of his appeal. The main grounds for his application were that he was jailed to imprisonment without the option of a fine or other non-custodial sentence; he is the sole breadwinner of his family with young children who need parental care; and that he did not abscond while on bail during his trial in the lower court.

The Applicant also relied on a supporting affidavit sworn by his Advocate, Kanyi Gakuya on 3rd September 2015. The said Advocate stated that the Applicant's appeal has overwhelming chances of success, and that it was unjust and unfair to jail the Applicant for two years when there were other options available to the court to have him enjoy the constitutional requirements of providing care, protection and security to his children. Further, that the Applicant was granted bond of Kshs 20,000/= in the lower Court and he never absconded.

The Applicant's learned counsel also filed written submissions dated 8th January 2016, wherein it was argued that the proof required of beyond reasonable doubt was not met in the Applicant's trial, and there was no evidence led linking him to the crime he was convicted of.

The Prosecution did not file any replying affidavit and/or submissions even after being given ample opportunity to do so, and the Applicant's application was consequently reserved for ruling without the benefit of their response.

I have considered the pleadings and submissions by the Applicant. I note that unlike an application for

bail pending trial where the Applicant has a constitutional right to be considered innocent until proved guilty, an Applicant for bail pending appeal stands on the premise that he has already been found guilty of the offence. In **Mutua vs R, [1988] KLR 497** the Court of Appeal stated thus:

“ It must be remembered that an applicant for bail has been convicted by a properly constituted court and is undergoing punishment because of that conviction which stands until it is set aside on appeal. It is not wise or to set the applicant at liberty either from the point of view of his welfare or of the state unless there is a real reason why the court should do so.”

A different test from that applied in bail pending trial is therefore applied in bail pending appeal. When considering an application for bail pending appeal, the court has discretion in the matter which must be exercised judicially taking into consideration various factors as follows:

- a. Whether the appeal has overwhelming chances of success. See **Ademba vs Republic (1983) KLR 442, Somo vs R [1972] E.A 476, Mutua vs R [1988] KLR 497** in this regard;
- b. There are exceptional or unusual circumstances to warrant the court's exercise of its discretion. In this regard see **Ragbir Singh Lamba vs R [1958] E.A 337; Somo vs R (supra.); Mutua vs R (supra.)**
- c. There is a high probability of the sentence being served before the appeal is heard as held in **Chimabhai vs R, [1971] E.A 343.**

In the instant application, I have perused the record of the trial Court, and read section 306 of the Penal Code pursuant to which the Applicant was convicted and note that it provides as follows:

“Any person who—

(a) breaks and enters a schoolhouse, shop, warehouse, store, office, counting-house, garage, pavilion, club, factory or workshop, or any building belonging to a public body, or any building or part of a building licensed for the sale of intoxicating liquor, or a building which is adjacent to a dwelling-house and occupied with it but is not part of it, or any building used as a place of worship, and commits a felony therein; or

(b) breaks out of the same having committed any felony therein, is guilty of a felony and is liable to imprisonment for seven years.”

The Court notes that the Applicant was sentenced on 15th October 2015 to imprisonment for eight months, and it is therefore likely that he might serve a substantial part of his prison term before the appeal is heard and determined. I however note that the offence that the Applicant was convicted of does not have the option of a fine, and the decision whether there was insufficient evidence to convict him of the offence as alleged cannot be made at this stage, without further analysis of the said evidence and applicable law.

Given the above circumstances, I am not satisfied that this is a proper case in which to exercise this court's discretion in favour of the Applicant. I accordingly decline to grant the prayer for bond pending appeal in the Applicant's Chamber Summons dated 3rd September 2015.

There shall be no order as to costs.

It is so ordered.

DATED AT MACHAKOS THIS 22nd DAY OF FEBRUARY 2016.

P. NYAMWEYA

JUDGE