



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 57 OF 2015

(An appeal from the judgment of the Senior Resident Magistrate, Embu in CMCR. Case No. 348 of 2013 delivered on 22/6/2015)

STEPHEN NJUE NYAGA.....APPELLANT/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

1. The applicant lodged this appeal against the judgment of Embu Senior Resident Magistrate where he was convicted of 12 counts of stealing by servant and sentenced to serve 8 years imprisonment.
2. This application before me seeks for orders for bail/bond pending appeal. The application is supported by the affidavit of the applicant Stephen Njue Nyaga. In the affidavit he states his appeal has high chances of success and that he never failed to attend court during trial. He further states that if bail is not granted his aged, disabled and widowed mother will suffer as she solely depends on him for her maintenance.
3. The application was argued orally between the parties. The applicant submitted that his appeal has high chances of success as the charge sheet was defective since the beneficiaries of the money were not identified. He further argued that no exhibits were produced in court by the prosecution which weakened the case. He further said that the case was not proved beyond reasonable doubt and his defence was rejected for weak reasons. He also stated that he is going to engage the services of an advocate to represent him in the appeal.
4. The state counsel Ms. Nandwa submitted that the principles for bail pending appeal were explained in the case of **DOMINIC KARANJA VS REPUBLIC 1986 KLR 162** which was cited in the case of **DOMINIC SIBI PETER VS REPUBLIC [2014] eKLR**. She argues that the applicant must prove that his case has overwhelming chances of success, that he had a previous good character and that he will not abscond if released.
5. It was further submitted that the applicant has not demonstrated that the state lacks medical facilities to take care of his medical condition.
6. As to whether the appeal has high chances of success, Ms. Nandwa argued that the the people who received money testified in court and identified the applicant as the person who gave them the money. The applicant failed to point out any contradictions in the evidence in his submissions. The prosecution gave evidence and documents that show that the applicant wired the money electronically which was strong evidence of theft. The respondent further submitted that it was not important to show that any of the stolen money was recovered from the applicant.

7. Ms. Nandwa stated that the defence was considered and the reasons for its rejection given in the judgment. The applicant was accorded fair hearing and was even represented by an advocate. The applicant was convicted in similar criminal cases. He has appealed against the said convictions in HCRA No. 45 of 2015 and 63 of 2015. The applicant in his reply stated that there were contradictions in the figures given by the auditors and those given by the complainant. However, he did not bring out the said figures in order to show the alleged contradictions.

8. It is important for this court to bear in mind that unlike bail pending trial which is a constitutional right, bail pending appeal is granted on discretion of the court and upon meeting certain conditions. The following cases illustrate the principles for granting bail pending appeal:-

(a) **ADEMBA VS REPUBLIC [1983] KLR** where the court held that;

- *Bail pending appeal may only be granted if there are exceptional or unusual circumstances.*
- *The likelihood of success in the appeal is a factor taken into consideration in granting bail pending appeal. Even though the appellant showed serious family and personal difficulties, in view of the unlikelihood of success in this appeal, the application could not succeed.*

(b) In **CHIMAMBHAI 1971 EA 343** the court held that bail pending appeal may be granted where there is an anticipated delay in the hearing of appeal which ground should be considered together with other factors which constitute good grounds for granting bail pending appeal.

(c) In **DOMINIC KARANJA VS REPUBLIC [1986] KLR 612**, the court held that:-

- *The most important issue was that if the appeal had such overwhelming chances of success, there is no justification for depriving the Applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances.*
- *The previous good character of the applicant and the hardships, if any, facing his family were not exceptional or unusual factors. ill health **per se** would also not constitute an exceptional circumstance where there existed medical facilities for prisoners.*
- *A solemn assertion by an Applicant that he will not abscond if released, even if it is supported by sureties, is not sufficient ground for releasing a convicted person on bail pending appeal.*

9. The applicant alleges that his appeal has high chance of success. On the allegation that the charge sheet was defective, I wish to state that defect in a charge cannot render a trial a nullity. Any error in the charge sheet may be corrected under Section 382 of the Criminal Procedure Code which deals with errors, irregularities or mistakes discovered on appeal.

10. The applicant argues that the beneficiaries of the money were not identified in a parade. It was not a requirement to identify the beneficiaries of the money in an identification parade. However, the prosecution adduced evidence to show that the applicant transferred money from the complainant's account which he controlled to other people who were third parties.

11. On the allegation that no exhibits were produced in court, this is not correct since the court record shows that there were several exhibits which were produced in evidence. The list of exhibits is part of the court record.

12. On the allegations that the case was not proved beyond any reasonable doubt, the trial court found that the prosecution had discharged the burden of proof beyond reasonable doubt. The decision was based on the evidence adduced in court. However, this court is not pre-empting the appeal and it will re-evaluate the evidence during the hearing of the appeal and reach its own findings.

13. The applicant further stated that he is going to engage the services of an advocate for the hearing of the appeal. It is noted that the applicant does not have to be out on bail to engage the services of an advocate.

14. An application for bail pending appeal stands on the premise that the applicant has already been found guilty of the offence. It is different from an application for bail pending trial where the applicant is still enjoying the legal presumption that he is innocent until proven guilty. For this reason, the court must ensure that the applicant has shown that his appeal has high chances of success.

15. Firstly, I find that the appellant has not satisfied the requirement that his appeal has high chances of success considering the foregoing summary and analysis of the issues he raised. Secondly, the appellant has not shown existence of any exceptional circumstances that would justify release on bail. I rely on the **DOMINIC KARANJA** case (*supra*) where the court held that ill health *per se* does not constitute exceptional circumstances.

16. Furthermore, the appellant may be treated in prison for his illness and in government hospitals including Kenyatta National Hospital should the need arise.

17. I am of the considered opinion that delay in hearing this appeal is not likely to occur since the proceedings have been typed and the appeal already admitted.

18. The applicant alleges that the prosecution opened a new file for him about eight months after he was charged. He said that the act was a violation of Section 82 of the Criminal Procedure Code. I found the section not relevant to this subject in that it deals with the power of the Attorney General to enter *nolle prosequi*. The applicant did not refer the court to the relevant law. The law for framing, joinder and amendment of charges is contained in Sections 134 – 136 of the Criminal Procedure Code which in my view were complied with. I find no substance in this argument.

19. It is my considered opinion that this application must fail for the foregoing reasons. It is hereby dismissed.

20. The registry is hereby directed to fix the appeal for hearing on priority basis.

DELIVERED, DATED AND SIGNED AT EMBU THIS 30TH DAY OF MARCH 2016.

F. MUCHEMI

JUDGE

In the presence of:-

Appellant/Applicant

Ms. Nandwa for the Respondent