



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

MISC. CRIMINAL APPLICATION NO. 20 OF 2016.

ELIZABETH MWIKALI :::::::::::::::::::: APPLICANT.

VERSUS

REPUBLIC :::::::::::::::::::: RESPONDENT.

R U L I N G.

1. The applicant has moved this court under article 50 of the Constitution, sections 349 and 356 of the Criminal Procedure Code for orders that:-

- i. *Spent;*
- ii. *Spent;*
- iii. *Spent;*
- iv. *The applicant be allowed to file an appeal out of time;*
- v. *At inter parties hearing the orders prayed for in No. 2 or 3 above or any of them if granted remain in force and be extended until the final determination of the intended appeal.*

2. The application is premised on the grounds that:-

- i. *The applicant was convicted on plea (sic) on the 9th day of March, 2016 and sentenced to 1 year imprisonment without a fine (sic);*
- ii. *The applicant, who is in prison has been unable to obtain copies of the court proceedings timely (sic) despite several attempts;*
- iii. *The appeal raises substantial issues of law and is not founded in vain;*
- iv. *The applicant suffers from hypertension, ulcers and diabetes which state of health she was not given opportunity to mitigate (sic) and which may not allow her to live long enough to the day the application is heard interparties or her intended appeal is heard;*
- v. *If the applicant manages to service the prison life (sic) with the hypertension, ulcers and diabetes she may as well have completed the prison term by the time the intended appeal is heard thereby defeating the purpose of the intended appeal and rendering it nugatory;*
- vi. *The State stands to suffer no prejudice if the orders sought are granted; and*
- vii. *The orders sought are in the best interest of justice.*

Applicant's submissions

3. Mr. Kubebea, learned counsel for the applicant submitted that the applicant seeks leave to appeal out of time as she was not able to obtain copies of the proceedings at the time she filed her petition of appeal. She had however managed to obtain the same as at the time of hearing this application. Her prayer was for the petition of appeal on record to be deemed as properly filed.

4. Mr. Kubebea submitted that the second prayer was for bail pending appeal on the grounds that the appeal has high grounds of success in that the plea of guilty that was recorded was equivocal. It was submitted that the charge the applicant was facing and all the elements thereof were not explained to her and that if bail pending appeal is not granted the appeal herein will be rendered nugatory. Mr. Kubebea explained that the applicant suffers from diabetes and had attached a medical report marked as annexure **EM1** to her affidavit. It was submitted that the sentence of 12 months imprisonment was harsh because the applicant was not given the option of a fine.

Respondent's submissions

5. Mr. Oroni, learned prosecuting counsel did not object to the application for leave to appeal out of time. He however opposed the application for bail pending appeal and submitted that when the applicant was given room to mitigate she did not raise the issue of ill health. Mr. Oroni submitted that the medical report dated 20th April, 2016 was made after the applicant was jailed on 9th March, 2016. The applicant has 2 previous convictions of being in possession of chang'aa. He prayed for an early hearing date after the learned counsel for the applicant compiles a record of appeal.

Determination of the application

6. The applicant has explained that the delay in filing her appeal within 14 days after conviction and sentence was due to her inability to obtain the proceedings in time. I grant the prayer for leave to appeal out of time. The applicant's petition of appeal already filed is hereby deemed to be properly on record.
7. On the second prayer for bail pending appeal, this court notes that the applicant was convicted on her own plea of guilty which was clear and unequivocal. In her mitigation she informed the court that she has 2 children in secondary school and 1 in primary school, in Standard 8. She prayed for leniency and explained that was the reason why she possessed chang'aa for sale.
8. At the trial court, the Prosecuting Counsel informed the court that the applicant had 2 previous convictions and she admitted that it was so. The trial court noted that the applicant had not reformed.
9. The applicant has attached a medical report to her affidavit showing that she is diabetic, hypertensive and suffers from peptic ulcers for which she has been receiving treatment since the year 2014.
10. The grounds upon which an applicant may be released on bail pending appeal are well spelt out in the cases of **Mundia vs. Republic (1986) KLR 623**, **Ademba vs. Republic (1983) KLR** and **Somo vs. Republic (1972) EA 476**. **For an applicant to benefit from bail pending appeal, he must show that his appeal has overwhelming chances of success, that there are exceptional and unusual circumstances; and that the appeal is likely to be delayed such that the applicant may serve his sentence or a substantial part thereof by the time the hearing is reached among other considerations.**
11. In the case of **Dominic Karanja vs. Republic (1986) KLR**, the Court of Appeal considered conditions an applicant should satisfy before he can be granted orders for bail pending appeal. The court held that:-
 - i. ***The most important issue was that if the appeal had such overwhelming chances of success, there is no justification of depriving the applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances;***
 - ii. ***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 exceptional circumstances where there existed medical facilities for prisoners;***

iii. A solemn assertion by the 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.”

12. This court notes that an applicant who applies for bail pending appeal stands on the premise that he has already been found guilty of an offence and has been convicted accordingly. The principle of the applicant being regarded as innocent until proved guilty so as to be entitled to an automatic right to bail does not apply. The court has to take into consideration the factors enumerated in the authorities I have cited herein.

13. I note that the applicant is a repeat offender and the record of the Vihiga Principal Magistrate is very clear on that. The sentence of 12 months imprisonment was lenient as the maximum sentence for the offence she was charged with is imprisonment for a period of 5 years. The learned trial magistrate opted not to impose a fine on the applicant. The issue of sentencing was within the learned magistrate’s discretion which she exercised judiciously.

14. I am of the considered view that the ailments that the applicant is suffering from can be managed within the confines of prison. Without pre-empting the appeal, I think the applicant might have an arguable appeal but not one with overwhelming chances of success. I decline to release her on bail pending appeal for the reasons stated herein.

15. Since the applicant was sentenced to serve 12 months imprisonment, she will take a priority hearing date at the High Court Criminal registry for the hearing of her appeal.

It is so ordered.

DELIVERED, DATED and SIGNED at KAKAMEGA on this 26TH day of MAY, 2016.

NJOKI MWANGI.

JUDGE.

In the presence of:-

..... **for the Applicant.**

..... **for the Respondent.**

.....**Court Assistant**