



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL NO. 113 OF 2015

JULIUS MEITAMEI SAIRO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant was charged in the Principal Magistrate's Court at Makindu with two main counts of stealing contrary to section 275 of the Penal Code. He was also charged with alternative offences to both counts of being in possession of stolen goods contrary to section 322 (1) and (2) of the Penal Code. The Applicant was convicted of the main counts by the trial court, and thereafter sentenced to 18 months imprisonment without the option of a fine for each count on 21st May 2015.

The Applicant subsequently filed an appeal against the judgment of the trial Court by way of a petition of appeal dated 7th July 2015 filed in Court on 17th July 2015. He also filed an application by way of a Notice of Motion dated 23rd July 2015 which was supported by an affidavit he swore on the same date, seeking orders that he be admitted to bail pending the hearing and determination of this appeal, on such terms and conditions as the court may deem fit to grant. The main grounds for his application were that he has meritorious appeal with overwhelming chances of success, and that determination of the appeal is likely to take a long time and he shall have served the whole or substantial part of his sentence. The Appellant deponed that he is ready and willing to abide by any terms and conditions which may be imposed by the court

The Applicant's learned counsel, Mutua Muthuva, also filed written submissions dated 14th March 2016, and his main argument is that on various dates of the trial the court did not indicate in what language the proceedings were conducted, and that part of the trial was conducted in English which the Appellant did not understand. He relied on the provisions of Article 50(2)(m) of the Constitution and section 198(1) of the Criminal Procedure Code on the right to a fair trial include the trial being conducted in a language the Appellant understands. Reliance was also placed on various court decisions including the **Moses Karagu Wambugu vs Republic**, **Nyeri Court of Appeal Criminal Appeal No 112 of 2003** and **Joseph Mutiso Mutisya vs Republic**, **Machakos High Court Criminal Appeal No 139 of 2009**.

The Prosecution opposed the application in a replying affidavit sworn on 9th February 2016 by Cliff. O. Machogu, a prosecution counsel in the Office of the Director of Public Prosecutions. The prosecution averred that the Applicant has not demonstrated that his appeal has high chances of success, and that his

assertion 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.

The learned prosecution counsel also filed submissions dated 16th September 2015, wherein he urged relying on the decisions in **Some vs Republic, (1972) E.A 476** and **Dominic Karanja vs Republic (1986) KLR 612** that the Applicant has not advanced any grounds to demonstrate his appeal has high chances of success, and has not advanced any exceptional circumstances to warrant the grant of bail pending appeal. Further, that at the time, the Appellant had only served 3 months of his jail term.

I have considered the pleadings and submissions by the parties. 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 noted that there are indeed dates when the language of the trial is not noted. As the Court record is the only evidence of the language used in a trial, this omission is material in light of the provisions of Article 50 of the Constitution and section 198 of the Criminal Procedure Code.

The Court also notes that the Applicant was sentenced on 21st May 2015 to imprisonment for eighteen months for each count, and it is therefore likely that he might serve a substantial part of his prison term before the appeal is heard and determined.

Given the above circumstances, I am satisfied that this is a proper case in which to exercise this court's discretion in favour of the Applicant. I accordingly allow the application in the Notice of Motion dated 23rd July 2015 on the following terms:-

1. That pending the hearing and determination of the appeal herein, the Applicant be released on his own bond of Kshs.300,000/= (Kenya Shillings Three Hundred Thousand) with two (2) sureties of a like amount;
2. The sureties shall be approved by the Deputy Registrar of the Machakos High Court;
3. The Applicant will attend mentions before the Deputy Registrar of the High Court, Machakos once every month until his appeal is heard and determined.
4. The Applicant shall be required to attend court for the hearing of the appeal without fail.
5. In default of orders 1, 2, 3, and 4 hereinabove, the bond shall be cancelled immediately and sureties called to account.

There shall be no order as to costs.

It is so ordered.

DATED AT MACHAKOS THIS 26th DAY OF MAY 2016.

P. NYAMWEYA

JUDGE