



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL NO. 96 OF 2015

SAMUEL WAHOME MWANGI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant was charged in the Principal Magistrate's Court at Mavoko Criminal Case No. 36 of 2013 with the offence of vandalism of power apparatus contrary to section 64(4)(b) of the Energy Act 2012. He was convicted of the offence by the trial court, and fined Kshs 5,000,000/= or (ten) 10 years imprisonment in default on 17th June 2015.

The Applicant subsequently filed an appeal against the judgment of the trial Court by way of a petition of appeal dated 22nd June 2015 and filed in Court on 24th June 2015. He also filed an application by way of a Notice of Motion dated 22nd June 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. The main grounds for his application were that he was on bail in the lower Court, he will abide by any bond terms imposed by the Court and that his appeal has high chances of success. The Appellant deponed that he is not a flight risk as his wife is expecting their first child.

The Applicant's learned counsel, R.M Njiriani Advocates, filed written submissions dated 18th April 2016, and the main argument therein is that the trial Court convicted the Appellant on circumstantial evidence that failed to connect the Applicant to the offence. Further, that the Applicant has a right to be released on bond under Articles 49 and 51 of the Constitution, and sections 356 and 357 of the Criminal Procedure Code.

The Prosecution opposed the application in a replying affidavit sworn on 24th February 2016 by Shijenje Johnson, 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. It was also contended that the sentence of 10 years imprisonment and fine of Kshs 5,000,000/= is sufficient motivation for the Applicant to take flight if released on bond pending appeal

The learned prosecution counsel did not file submissions.

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 indeed there was no eyewitness who saw the Applicant commit the offence he was charged with, neither was the vandalized transformer he is accused of having vandalized and removed recovered from him. Given these circumstances, coupled with the fact that the sentence imposed on the Applicant is a minimum sentence under section 64(4)(b) of the Energy Act, 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 22nd June 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 one (1) surety of a like amount;
2. The surety 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 9TH DAY OF JUNE 2016.

P. NYAMWEYA

JUDGE