



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

MISCELLANEOUS CRIMINAL APPLICATION NO. 1 OF 2015

EMMANUEL ADEYA.....APPLICANT/APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

R U L I N G

1. Before me is an application for bail pending appeal expressed to be brought under Section 356 (1) and 357 (1) or the Criminal Procedure Code and supported by the affidavit of appellant/applicant Emmanuel Adeya. The key grounds on the face of the application are that:
 - i. **THAT** there exists special and unique circumstances in the Appeal to warrant the prayers sought.
 - ii. **THAT** the Learned Trial Magistrate exhibited unusual approach in convicting and sentencing the Applicant/Appellant is very evident in the Judgment as the Learned Trial Magistrate introduced his own evidence that the Three women who were passengers in the Applicant/Appellant's vehicle were carrying bags and not luggage in a sack when no such evidence had been tendered in Court by any of the Witnesses among others.
 - iii. **THAT** by the time the Appeal will be heard, chances are very high that the Applicant/Appellant shall have served his custodial sentence and or a substantial part of the said imprisonment.

The Appellant's affidavit replicates these grounds.

2. At the hearing of the application the appellant's counsel based his submissions on the authority of **Dominic Karanja –Vs- Republic [1986] KLR 612** that the appeal filed has high chances of success. He pointed out two key weaknesses in the prosecution case in the lower court. The first was that the vehicle in which the alleged drug was trafficked was not produced. The second was that two key witnesses were never called to testify and therefore an adverse inference ought to have been made against the prosecution. Counsel also submitted that the appellant is ailing.
3. The state did not oppose the application, conceding that the appeal has chances of success in light of the two evidential weaknesses cited by the appellant. The Court of Appeal held in **Dominic Karanja –Vs- Republic** that:

“The most important issue was that if the appeal had such overwhelming chances of success, there was no justification for denying the applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances.”

4. I have perused the proceedings and judgment of the lower court in light of the grounds of appeal, the supporting affidavit and submissions. It is true as conceded by the Director of Public Prosecutions that the vehicle which was ferrying the alleged drugs was not produced. The particulars of the vehicle were given as KAR 965F. However, in his defence the appellant admitted that the said vehicle belonged to him and that he was driving it at the time of arrest.

He stated that the vehicle was towed to Gilgil Police Station where it remained. The failure by police to produce the vehicle must therefore be examined in proper perspective and is not necessarily a fatal omission on the facts of the case.

5. I think the most critical challenge relates to the two female passengers of the appellant who never testified. Instead, the police tendered copies of passports and air tickets (Exhibits 5A, 5B and 6) as proof that the said passengers were en route to Saudi Arabia. Whether in the circumstances of this case an adverse inference ought to be made is in my view is not a straight forward matter at this juncture.

6. The Court of Appeal stated *inter alia* in **Bukenya and Others –Vs- Uganda [1972] EA 349** that:

“While the director (of prosecution) is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution.”

7. The Court of Appeal reiterated the principle in **Peter Ngure Mwangi –Vs- Republic [2014] eKLR** and stated further:

“In our view, the adverse inference can only be made where the evidence tendered by the prosecution is “barely adequate”.”

It can be seen therefore that the omission to call certain witnesses, does not automatically call for the making of an adverse inference. Looking at the total evidence tendered by the prosecution, it is difficult at this stage to conclude that it was “barely adequate.” I say no more on these matters which will no doubt be explored fully in the course of the appeal. Suffice to say that the case of **Dominic Karanja** prescribes a high threshold – overwhelming chances of success of the appeal. I am of the view that at this stage there is not demonstrated before the court an overwhelming chance of the appeal being successful.

8. As regards the alleged sickness of the appellant, this ground does not amount to exceptional or unusual circumstances. There are medical facilities available in the prison where he is serving his term. And there is no likelihood at all that the appellant will serve a substantial part of the sentence 3 year before the appeal is heard. Once the appeal is admitted if that has not already happened, this court will be able to hear the appeal in a matter of months.
9. It would seem that the appeal was already filed on 8/12/2014 as High Court Criminal Appeal 76 of 2014 (See Annexure **EA1**) and it is not clear to me why this application was filed separately.

Be that as it may let the appellant take the necessary steps in the prosecution of his pending appeal.

10. The application is dismissed.

Delivered and signed this 19th day of March, 2015 in the presence of:

State

Advocate for the Applicant/Appellant

Court Clerk

C. W. MEOLI

JUDGE