



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISCELLANEOUS CRIMINAL APPLICATION NO.97 OF 2015
IN THE MATTER OF CRIMINAL APPEAL NO.46 OF 2015

FARID KEYA WANGARAAPPLICANT

VERSUS

REPUBLICRESPONDENT

RULING

By Notice of Motion dated 20th March, 2015 the applicant prays that he be granted bail pending the hearing and determination of High Court Criminal Appeal No.46 of 2015.

The application is premised on the following grounds:-

- That the applicant is a family man with children, is their breadwinner and his continued imprisonment is detrimental to him and the family.
- That the applicant is not a flight risk. He was granted a bond of Kshs.200,000 by the trial court and he faithfully attended the trial.
- That it is applicant's constitutional right to be granted bail.
- That the applicant has an arguable appeal with a likelihood of success.
- That no prejudice will be occasioned to the prosecution if the orders sought are granted.

The application is further supported by the affidavit of the applicant sworn on 20th March, 2015. It reiterates the grounds on which the application is premised.

The application was canvassed before me on 16th April, 2015. Learned counsel Mr. Amadi appeared for the applicant whereas learned state counsel Mr. Mureithi represented the Respondent. Mr. Amadi raised the following issues in submission:-

First, the applicant suffers from high blood pressure and cannot be adequately treated in prison.

Two, prior to his imprisonment, the applicant was the sole breadwinner of his family.

Three, he was sentenced to two years imprisonment and is likely to have served the term by the time the appeal is heard.

Four, he is not a flight risk in that he never absconded the trial court proceedings at any time.

Five, the applicant has an arguable appeal. He was exonerated by the trial magistrate in the judgment leaving doubts as to why he was finally convicted.

Mr. Mureithi conceded to the application on ground that the appeal is likely to succeed. He submitted that page 5 lines 19 to 23 of the judgment the trial court created doubts as to who was responsible for the theft which doubt ought to have been cleared infavour of the applicant. Instead, the court convicted him.

He further submitted that the applicant is likely to have served substantial portion of the sentence by the time the appeal is heard.

An avalanche of decided case law gives guidelines on the principles to be considered in an application for bail pending appeal. Two factors are of paramount importance. One, whether the applicant has demonstrated any unusual and exceptional circumstances that would warrant the granting of bail pending appeal, and, two, whether the appeal has a likelihood of success.

Such principles were enunciated in the case of ADEMBA –VS- REPUBLIC (1983), KLR 442 and MUTUA –VS- R(1985) KLR, 497.

In the **ADEMBA** case, court held, inter alia, that:-

- 1. Bail pending appeal may only be granted if there are exceptional or unusual circumstances.**
- 2. 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.**

In the **Mutua** case, court held as follows:-

“1. The main problem was whether the appeal had overwhelming chances of success for if it did not, then this court would not grant bail pending the appeal by virtue of the Court of Appeal rules, rule 5(2) (a).

2. The test was whether there were exceptional or unusual circumstances, the most important being whether the appeal had overwhelming chances of being successful.

3. 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 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.

4. There was no overwhelming probability that the sentence would be reduced since the Appellate Court could not deal with the issue of sentence, and on the other grounds, it was not apparent as a matter of law that the Appellant would succeed.”

Further in DOMINIC KARANJA –VS- REPUBLIC (1986) KLR 612 the Judges said:-

“The previous good character of the applicant and the hardships, if any, facing his family were not exceptional or unusual factors.....”

In the present case, the fact that the applicant is sick, has a family and is its breadwinner and is likely to have completed sentence by the time the appeal is heard are not unusual and exceptional circumstances that the court may consider in his favoaur. It must be borne in mind as stated in the **Mutua** casethat an applicant is deemed to have been properly convicted and unless and until that conviction is quashed, he must serve his sentence. It is also factual that the Kenyan prisons are equipped with medical personnel and for the cases they cannot treat are referred to other bigger public hospitals. Furthermore, his personal problems are issues that ought to have been considered in mitigation before sentencing and not at this

point.

On the success of the appeal, it is a cardinal principle in criminal trials, that in casethe court is in doubt as to who committed the offence, that doubt must ultimately be resolved in favour of the accused. From the second paragraph on page 5 of the trial court judgment, a doubt was raised as to who among the Equity Bank employees helped the strangers into the ATM machine. Whereas other considerations must be taken into account in crystallizing a case against the appellant, the mere fact of the court observing that he may have participated in ushering in the strangers into the ATM could no, of itself, be a basis for his conviction. Unfortunately, this aspect appears to have guided the trial court in finding a conviction against him. That was an outright error, the court having created a doubt in its mind as to who was responsible for ushering in the strangers into the ATM.

For this reason, I find that, prima facie, the appellant has an arguable appeal.

In the result, I allow the application. I admit him to bail pending appeal. He shall execute a bond of Kshs.500,000/- with one surety of a similar amount. The surety shall be assessed by the Deputy Registrar of this court.

DATED and DELIVERED at NAIROBI this 23rd day of April, 2015.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:-

1. Mr. Amadi for applicant.
2. Mr. Mureithi for Respondent.