



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL APPEAL NO.53 OF 2013

AKM.....APPLICANT

VERSUS

REPUBLICRESPONDENT

RULING

By Notice of Motion dated 29th April, 2015, the applicant herein prays that she be granted bail pending the hearing and determination of the appeal.

The main grounds upon which the application is premised are that the appeal has overwhelming chances of success, that the respondent will not be prejudiced, that by nature of the sentence if the appeal succeeds the appellant will have served the custodial term or substantial part of it and that the appellant is not a flight risk.

The application is supported by the affidavit of AKM the applicant herein sworn on 29th April, 2015 reiterating the grounds on which the application is based. She also deposes that she is of poor health and that her further imprisonment is detrimental to her health. In this regard, she filed a supplementary affidavit sworn by herself on the 6th May 2015 by which she annexed a medical report from Social Medical Services League, M.P. Shah hospital. The report is signed by Dr. Timothy Anyuma a Pathologist which confirms that she suffers from Rheumatoid Arthritis.

Learned Counsel, Mr. Kamunda, on behalf of the applicant submitted that the learned trial magistrate erred in dismissing the applicant's defence in a statement without its due consideration, which defence cast doubts on the strength of the prosecution's case. He referred the court to page 15 of the proceedings which was part of the applicant's defence which indicated that someone else other than herself committed the offence. According to him, the trial court ought to have indicated why it did not believe her statement of defence. Unfortunately, due consideration was not given which the applicant hopes to successively canvass in the appeal.

Mr. Kamunda further submitted that the trial court in its judgment noted that it relied on circumstantial evidence which in the view of the applicant was too weak to link her to the offence.

He further submitted that the applicant having been sentenced to serve two years imprisonment, and taking into account the length of time that it takes for an appeal to be reached for hearing, she is likely to have served her full term of imprisonment before the appeal is heard. That would render the appeal nugatory.

He also urged the court to look at the demeanor of the applicant who was not a flight risk given that she

never absconded the trial court proceedings at any time. In this respect the court was referred to the case of **Republic –Vs- Danson Mgunya and Another Mombasa High Court Criminal Case No.26 of 2008** in which the accused were given bail on the court noting that they were not a flight risk.

Finally, Mr. Kamunda submitted that the applicant is of poor health and is currently undergoing treatment for breathing problems among other ailments. And on account of poor health she should be availed bail pending appeal.

Learned State Counsel Miss. Aluda on behalf of the respondent did not oppose the application. She conceded that indeed the appeal was arguable and had high chances of success. That the applicant was a victim of circumstances and was convicted on mere circumstantial evidence. She urged the court to objectively look at the medical reason advanced in support of the application.

Having considered the application and the respective arguments, it is trite law that an application for bail pending appeal may be granted only when the applicant demonstrates that the appeal has a high chance of success and that there exists unusual and exceptional circumstances warranting the granting of the bail. On the success of the appeal, I have taken note of the submissions by Learned Counsel Mr. Kamunda I concur with him entirely save to add that I do not wish to evaluate the trial court's evidence for the risk that I might determine the appeal in this application.

As regards the existence of unusual and exceptional circumstances, one factor so properly advanced is that the applicant may have served the sentence by the time the appeal is heard and determined. However, I note that the judgment was delivered on the 27th April, 2015 which is only less than a month ago. It may not be conclusive at this time to say that before two years elapse, the appeal would not be heard. This then casts doubt on the submission that the appellant may have served the entire sentence before her appeal is reached for hearing. Save that I have already found that the appeal is arguable I would not find this latter argument constituting a good ground for granting the application. In this regard, I refer myself to the Court of Appeal decision in the case of **Jiraj Shah –Vs- Republic (1986) K.L.R., 605** in which the court held that:-

“If it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of substantial point of law to be urged and that the sentence of substantial part of it will have been served by the time the appeal is heard, conditions for granting bail will exist.”

It then follows that the consideration that an applicant will have served the sentence or part of it can only be favourably considered if there exists other factors that convinces the court that the appeal would be successful. I have already found in this respect; reasons wherefore this issue may not entirely mitigate for the granting of bail pending appeal.

It is also my view that the ill health of an applicant does not, save for exceptional circumstances, constitute an exceptional and unusual circumstance warranting the granting of bail pending appeal. The rationale for this argument is that the applicant has been convicted by a properly constituted court and unless the conviction and sentence are lawfully set aside, he/she must continue to serve the sentence. Moreover, ill health constitutes a personal difficulty which courts have held is not an unusual and exceptional circumstance. See **Ademba –Vs- Republic (1983) K.L.R., 442.**

The court was referred to the case of **Republic –Vs- Danson Mgunya and Another (Supra)** in persuading it to grant the bail pending appeal. But this case is clearly distinguishable with the instant application in that in the Mgunya case the applicants were seeking bail pending trial. Under Article 49(1) (h) of the Constitution bail pending trial is a matter of constitutional right unless there are any compelling reasons. In contrast, bail pending appeal is a matter in the discretion of the court upon consideration of the principles hereabove stated. I would then not be persuaded by the Mgunya case to affirmatively consider this application.

In the end, this application is granted. The applicant shall pay a cash bail of Kshs.300,000/- or execute a

bond of Kshs.600,000/- with one surety of a similar amount. In the event that the bail is not paid, the surety shall be assessed by the Deputy Registrar of this court.

It is so ordered.

DATED and DELIVERED at NAIROBI this 14th day of MAY, 2015.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:-

Mr. Kimathi holding brief for Mr. Muli for applicant.

Ms. Ndumbi holding brief for Mr. Mureithi for respondent.