



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPLICATION NO.362 OF 2015

NJAU KARANJA.....APPLICANT

VESUS

REPUBLIC.....RESPONDENT

RULING

This is an application for bail pending appeal brought by way of an amended Notice of Motion dated 3rd November, 2015. The grounds upon which the application is premised are condensed into the following four grounds;

1. That given the time it will take to hear the appeal and the nature of the sentence, if successful, the appeal will be rendered nugatory since the Applicant may serve the sentence or a substantial portion of the sentence before the intended appeal is heard and determined;
2. That no prejudice will be occasioned to the prosecution;
3. That the offence for which the Applicant was convicted and sentenced is bailable under the laws of the country;
4. That the Applicant is of advanced age, frail and suffers from poor health and his health may be immensely affected to the worst if he continues to remain in prison.

The application is supported by the Applicant's affidavit sworn on 3rd November, 2015 in which he deposes that he shall abide by any conditions that shall be set by this Honourable Court if bail is granted. He also deposes that he has a fixed place of abode and that his intended appeal has a high chance of success.

The Applicant's submissions were dated 6th November, 2015. He submitted that he has already lodged his Petition of Appeal in this Court being Appeal No. 109 of 2014 and that there is a high likelihood of success of the appeal.

He cited several authorities in which the guiding principles granting bail pending appeal were highlighted. One was the case of **Somo Vs Republic [1972] E.A 476** where it was stated that the factors to be considered are that the Applicant must;

1. **Demonstrate the existence of overwhelming chances of success**
2. **Demonstrate unusual and exceptional circumstances prevailing to warrant the grant of bail pending appeal**
3. **Raise some critical issue of law or an issue as to the mode of application of evidence.**

The Applicant also referred to the cases of **R Vs Danson Mgunya and another [2010] KLR 219** and **Article 49** of the Constitution to support his contention that all offences are bailable. He also referred to **Section 123(1)** of the Criminal Procedure Code which provides that a person may be released on bail or bond while still in police custody and being charged in court and after he has been charged in court. He urged the court to grant the application in his favour.

The Respondent's submissions were dated 10th November, 2015. Counsel for the Respondent submitted that unlike an application for bail pending trial where the Applicant has a constitutional right to be deemed innocent until proven guilty under Article 49 on the Constitution, the application for bail pending appeal stands on the premise that the Applicant has already been found guilty for an offence. Counsel cited **Daniel Dominic Karanja's case (Criminal application No. 14 of 1986)** in which the conditions to be considered when granting bail pending appeal were set out. In that case, the court held that;

“the most important issue here is if the appeal has such overwhelming chances of success that there is no justification for depriving the Applicant of his liberty. The minor relevant consideration would be whether there are exceptional or unusual circumstances. The previous good character of the Applicant and hardship if any facing the wife or children of the Applicant are not exceptional or unusual factors...”

Counsel further submitted that the Applicant merely states that his appeal has high chances of success but has not demonstrated the same and further that there was evidence given by five prosecution witnesses which evidence was not controverted at all by the defence during the trial. Counsel for the Respondent submitted that advanced age and poor health are not unusual or exceptional circumstances to warrant the court to issue bail pending appeal. In conclusion, counsel for the Respondent submitted that the Applicant was sentenced to serve 10 years imprisonment on 8th August, 2014 thus he will not have served his sentence by the time the appeal is heard. He urged the court to dismiss the application.

The rival submissions from both parties have been considered. The Applicant argued that bail is a constitutional right. He referred the court to Article 49(1)(h) of the Constitution. The same provides as follows.

(1) An arrested person has a right-

(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.

The said Article operates where an accused person has not yet been convicted of an offence, and the rationale is to give him a benefit of doubt until it is proved beyond reasonable doubt that he is guilty. However, the present case, the moment the Applicant was found guilty and convicted of the offence under Section 234 of the Penal Code that right ceased to exist. It is now upon this court to ascertain whether or not to grant bail pending the determination of the Applicant's appeal. The case of **R v Danson Mgunya** is also applicable in instances where an Applicant is seeking bail pending trial.

In the case of **Jivraj Shah Vs Republic [1986] KLR 605**, the court of appeal held inter alia:

- 1. The principle consideration in an application for bail pending appeal is the existence of exceptional or unusual circumstances upon which the court can fairly conclude that it is in the interests of justice to grant bail.***
- 2. If it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on an account of some substantial point of law to be argued and the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail exist.***
- 3. The main criteria is that there is no difference between overwhelming chances of success and a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed and the proper approach is the consideration of the particular circumstances and weight and relevance of the points to be argued.***

In reference to the above mentioned case law, grounds 2, 3 and 4 on which this application is premised do not qualify as consideration that would warrant the granting of bail pending appeal. The arguments advanced therein would apply only when, on evaluation of the entire evidence, the appeal has a likelihood of succeeding. Furthermore, the Applicant is not likely to have served a substantial part of the sentence by the time the appeal is heard. He was convicted and sentenced to serve ten years imprisonment on 8/8/2014. He has so far served only one year and three months.

On the issue of whether there is a high chance that the appeal will succeed, I find that the evidence on record is so overwhelmingly against the Applicant. I am however disinclined to evaluate the entire evidence due to the risk of disposing of the appeal in this application. That is the preserve of the judge who will hear the appeal.

In the upshot, this application lacks merit and is therefore dismissed with no orders as to costs.

DATED and **DELIVERED** at **NAIROBI** this **25th** day of **November**, 2015.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Ongaro holding brief for Saende for the Applicant*
2. *M/s Atina for the Respondent*