



NO. 49/2013

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 57 OF 2012

WASHINGTON MUTHUI NDERITUACCUSED

VERSUS

REPUBLIC.....PROSECUTOR

(Being an Appeal from the decision of the Senior Principal Magistrate's Court Kajiado by Hon. P.A Olengo,PM on 3/5/2013 in the application for bail pending appeal in Criminal case No. 1587/2009)

RULING

1. This is an appeal from the decision of the lower court denying the appellant bail pending appeal. The appellant having been convicted by the subordinate court for the offence of obtaining money by false pretence contrary to section 313 of the Penal Code, applied to be released on bail. The court declined to grant him bail. Being aggrieved by the order he now appeals to this court pursuant to provisions of section 123 and 357 of the Criminal Procedure Code as read with Article 23 and 24 of the Constitution.
2. The application seeks for orders as follows:-

“i. That the decision by the trial court to disallow the appellant’s bail application be quashed and set aside and the applicant admitted to bail on such terms as the Hon. Court may be pleased to grant pending the hearing and final determination of his appeal.

2. That the decision by the trial court not to have the applicant present during the hearing of his application violates his rights and as such the proceedings and ruling thereof be declared a nullity.”

3. It is premised on grounds-

“i.) THATthe Appellant was convicted and sentenced to 1 ½ years’ imprisonment.

- ii. **THAT** the applicant filed an appeal on the conviction and sentence of the trial court.
- iii. **THAT** the trial court erred in law in concluding that a trial court cannot grant bail since it would in essence be saying that the appeal has overwhelming chances of success and as such castigating its own ruling.
- iv. **THAT** the trial court erred in law in declaring itself to have an interest in the application and still made a ruling on the same thereby offending the rules of natural justice of not being judge in a matter one has interest in.

- v. **THAT** the trial court misdirected and misapplied itself to the law since the drafters of the law in providing for an application for bail pending appeal to be filed at the trial court, knew pretty well that a trial court can and should actually be able to be objective or at worse give the benefit of the doubt as everyone can error
 - vi. **THAT** the trial court failed to appreciate the exceptional and unusual circumstances in the matter.
 - vii. **THAT** the trial court failed to appreciate that there is no justification for depriving the applicant liberty pending the hearing and determination of this appeal.
 - viii. **THAT** the trial court failed to appreciate the various ailments and diseases of the applicant though not being exceptional of unusual circumstances, are still factors to be considered especially bearing in mind the likelihood of the duration of the appeal and time before the actual appeal commences.
 - ix. **THAT** the appellant was not present in court at the hearing of his bail application which is a travesty of justice and as such a nullity especially since he had actually sworn the affidavit in support of his application.
 - x. **THAT** the application was not opposed yet the court *suo motto* opposed it.
3. The application is supported by an affidavit deposed by the applicant.
 4. In his submissions learned counsel for appellant **Mr. Okatch** argued that the trial court should have considered unusual circumstances that existed when determining the application made for bail pending appeal. He ought to have noted that the applicant suffered from diabetes, arthritis and hypertension.
 5. Further, he faulted the court for making a finding that granting bail would be tantamount to casting aspersions to its own ruling.
 6. He submitted further, that the court misdirected itself by deciding that the good conduct of the appellant was not a factor to be considered in granting bail, that the appeal would take longer than the sentence imposed. He called upon this court to consider the appellant's good character.
 7. Counsel also faulted the trial court for hearing the application in the absence of the appellant and the prosecution. He called upon this court to declare the proceedings and ruling thereof null and void.
 8. **Mr. Mwangi** learned State Counsel in response thereto opposed the application. He argued that for such an application to be allowed the appellant had to show that his case was arguable; there were unusual and exceptional circumstances requiring justice being done.
 9. He submitted that the appellant had been found culpable and convicted hence the presumption of innocence was not available to him; the issue of the appeal having a high chance of success had not been canvassed; ill-health could be dealt with in prison as there were medical facilities.
 10. Regarding the issue of the appellant having been absent when the bail application was being heard, he argued that the appellant had sworn an affidavit and was represented by legal counsel. Hence his absence was not prejudicial to him.
 11. He submitted further that a magistrate making an assertion did not amount to being a party to the proceedings as stated by appellant's counsel.
 12. Although he concurred with the appellant that having been sentenced to 1 ½ years in prison, by the time the appeal is heard and determined the appellant will have served a substantial term of the sentence, he urged the court to uphold the trial court's decision denying him bail.
 13. Bail may be granted by a subordinate court that has sentenced a person pending appeal (**see section 356(1) of the Criminal Procedure Code**). The power to grant bail is discretionary. It is not mandatory. It was upon the appellant to present facts that would have made the magistrate exercise his discretion.
 14. The trial magistrate **Hon. P.A Olengo** considered the application filed by the appellant herein. In his considered ruling he denied him bail. He has been faulted for having been party to proceedings because of the way he coached words in his ruling. In my view it as an analysis of his ruling. An application having not been opposed does not harm a judicial officer from analysing it and reaching a considered opinion. The trial magistrate could not be faulted on that ground.
 15. It has been argued that the trial magistrate heard the appellant's counsel in the absence of the appellant. In his view this was in breach of the appellant's constitutional right to be heard. It was argued by the learned State Counsel that the applicant was represented by counsel and he duly signed the affidavit in support of the application, therefore he was not prejudiced.

16. I have perused the record, both the bundle forming the application for bail and the substantive appeal. Only the ruling is included in the bundle. There is no record of proceedings that were taken by the trial magistrate when he heard the application for bail pending appeal. I therefore restrain myself from making the order sought since I do not have the information as to what transpired. However, I must point out that the law is clear. In some circumstances, the right to be present in court while an application is being canvassed can be waived. (*see Regina versus Jones [2002] UKHL 5*). In the premises I decline to declare the alleged proceedings null and void.
17. This therefore brings me to the issue whether the appellant should be admitted to bail pending appeal.
18. It has been stated that there were unusual and exceptional factors that called for the appellant's release on bail. The accused is said to be ailing. The Court of Appeal laid down principles that guide courts in considering applications of bail. It stated thus:-

“...the most important issue was that if the appeal had such overwhelming chances of success, there was no justification for depriving the applicant liberty, and the minor relevant consideration would be whether there were exceptional or unusual circumstances. The previous good character of the applicant and hardships, if any, facing his family, were not exceptional or unusual circumstances. Ill health per se would also not constitute an exceptional circumstance where there existed medical facilities. A solemn assertion by an applicant 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...”

19. There are medical facilities in prison therefore illness cannot be said to be an exceptional circumstance that would warrant the appellant being released on bail. Good conduct of the appellant can also not be a basis for release on bail.
20. In this case it is conceded by the State Counsel that the appellant having been sentenced to 1½ years in prison, by the time the appeal is heard and determined the appellant will have served a substantial part of the sentence. To exercise its discretion to release a person on bail pending appeal there must be an existence of prospects of success. There must be some evidence that the conviction will be overturned on appeal. Counsel for the appellant argued that the principle of high chances of success is a mere principle. Why would a court release a person convicted on bail if the person ought to serve sentence following conviction on merit?
21. I have perused the Petition of Appeal and the lower court's record. It is evident that the appeal is arguable. In the premises I do allow the appeal on bail and order that the appellant be released on a cash bail of 300,000/=.
22. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 14TH day of JUNE, 2013.

L.N. MUTENDE

JUDGE