



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO. 50 OF 2013

SAMUEL MACHARIA NJAGI.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

RULING

By a motion filed on 7th May, 2013 the applicant seeks to be admitted to bail pending the hearing and final determination of his appeal against conviction and sentence in Nyeri Criminal case number 1197 of 2011.

He further seeks that the sentence be suspended pending hearing and final determination of his appeal.

The applicant was tried and convicted on 26th March,2013 of the offence of preparing to commit a felony and sentenced to four years imprisonment.

He disputes the conviction and sentence and has filed in this court, a petition of appeal which he contends has an overwhelming chance of success and therefore if not admitted to bail, he will at the time of final determination of the appeal have served either whole or substantial portion of the sentence.

The applicant faults the trial court's finding on the following grounds:-

1. ***The learned trial Magistrate erred in fact and in law in failing to exhaustively analyze all the evidence on record and hence arrived at a wrong finding.***
2. ***The learned trial Magistrate erred in fact and law in failing to appreciate that the evidence of the witnesses lacked in material credibility as to be untruthful which tainted the trial.***
3. ***The learned trial Magistrate erred in law in accepting that PW4 conducted proper or any investigations at all to warrant him to charge the appellant with the charges he faced.***
4. ***The learned trial Magistrate erred in shifting the burden of proof to the appellant.***
5. ***The learned trial Magistrate erred in disbelieving the appellant's defence.***
6. ***The learned trial Magistrate erred in sentencing the appellant to 4 years imprisonment which sentence was manifestly excessive as to be unjust bearing in mind the circumstances of the case and his previous record.***

At the hearing of the application Mr. Kimunya who appeared for the applicant reiterated that the appeal

had an overwhelming chance of success and if his client is not admitted to bail he will at the time the appeal is heard and determined, served the whole or substantial part of the sentence. He submitted that the appeal faults the lower court's judgment especially on the investigations by PW4 which he contended were shoddy. According to him, it was not established beyond reasonable doubt that the appellant was at the scene of crime.

He urged that the appellant during his trial in the court below was out on bail and dutifully attended court. According to him, there is therefore no risk that the applicant would fail to attend court for the hearing of his appeal if admitted to bail once more. He urged that the offence does not involve personal violence and that the release of the applicant on bail would contribute towards decongesting the prisons.

Ms. Kitoto for the DPP opposed the application contending the appellant was arrested at the scene of the crime at 4.00 a.m. By PW2 and this was corroborated by other witnesses. She further stated that the appellant was arrested after he had tampered with the frame covering Telcom wires and was in the process of stealing. He was found with T-keys which were produced in court hence there was no doubt that the appellant was preparing to commit a felony.

Counsel further contended that the sentence meted out was illegal as the appellant ought to have been sentenced to a minimum of 10 years hence at the hearing of the appeal, the state would be seeking enhancement of sentence.

The sum total of Ms. Kitoto's submissions is that the appeal has no chance of success hence the appellant ought not to be admitted to bail.

The court has recently observed in the case of *Jeremiah Mwangi Ngatia -vs- Republic Criminal Appeal No. 110 of 2011* that the court in considering whether or not to grant bail pending appeal, ought to bear in mind that it involves the proposition that a person who has been found guilty and convicted by a court of competent jurisdiction and whose sentence of imprisonment has not been set aside, must nevertheless be let loose on the community instead of staying in prison to serve sentence which is prima facie deserved.

The appellant/applicant is prima facie a convict and his constitutional freedoms and rights are thus significantly circumscribed by his conviction. He no longer enjoys the absolute presumption of innocence available to persons facing trial at the first instance. In admitting such a person to bail the court ought to, in addition to principles governing admission to bail pending appeal, bear in mind the possible dilemma of resending such a person to prison in event that his or her appeal fails.

The principles for admission to bail pending appeal in Kenya have for over 40 years been clustered around the decision in *Somo -vs- Republic [1972] E.A 476*. According to this case the applicant must demonstrate the existence of overwhelming chances of success. The applicant ought to be in a position to persuade the court that his or her appeal is so strong, so meritorious, that at the end, the probabilities will favour acquittal. To discharge this burden, the applicant will need to raise some critical issue of law or an issue as to the mode of application of evidence.

The principles laid down in *Somo's* case are no doubt still sound in law however it cannot possibly be said to be the last and final testament on the principles governing the consideration of an application for bail pending appeal. Law as we all know is an evolving discipline. New circumstances and issues emerge which may call for different breed and sets of considerations. It is not surprising therefore that the Court under articles 159 and 259 of the Constitution is clothed with power while interpreting the constitution, to do so in a manner that advances the rule of law, and fundamental freedoms in the Bill of Rights and permits the development of the law. A determination on bail pending appeal is a fundamental right under the Bill of Rights as much as pre-trial bail. The only difference is that the fundamental freedom of an applicant in bail pending appeal is circumscribed to the extent that he or she remains prima facie a convict until the appeal is heard and turns out to be successful. The benefits that accrue from the interpretation of the constitution however extends to such applicant subject to qualifications hereinbefore stated.

In the Botswana's case of *Laing -vs- State 1989 BLR 54 (HC)* the considerations for bail pending appeal were stated as:-

1. ***If there is likelihood or reasonable prospect of the appeal succeeding;***
2. ***If there are exceptional or unusual grounds for application;***
3. ***If having regard to the sentence there is going to be considerable delay either in preparing the record of appeal or because of undue delay resulting in the appellant serving the whole or substantial portion of the sentence;***
4. ***If it was a case of the nature that it would require the applicant free to confer with his counsel in the preparation of the appeal.***

In Uganda, the Supreme Court of that country in the case of *Arvind Patel -vs- Uganda S.C Cr. Appeal No. 1 of 2003* has set them out as:-

1. ***Whether the applicant is or not a first offender;***
2. ***Whether the offence of which the applicant is convicted involved personal violence;***
3. ***The appeal must not be frivolous and has reasonable chance of success;***
4. ***The possibility of substantial delay in the determination of appeal and;***
5. ***Whether the applicant complied with bail conditions granted before the applicant's conviction during the pendency of the appeal.***

From the two authorities, it is discernible that the prospect of success of an appeal still remain of paramount consideration just like in *Somo's case*. However as stated by the Supreme Court of Uganda in *Arvind Patel's case* all the listed considerations need not be present before an applicant can be admitted to bail. A combination of two or more could be sufficient .

Mr. Kimunya urged before me that in addition to the high prospects of success of the appeal, this court need to take into account like was done the Supreme Court of Uganda in *Arvind Patel's case*, the facts that the offence for which the applicant was convicted did not involve personal violence and further that in exercising my discretion in releasing the applicant on bail pending his appeal, I will be contributing descongesting of prisons. The submissions by counsel in that regard are no doubt innovative and forward looking in so far as development of jurisprudence on bail pending appeal is concerned however admitting a convict to bail pending appeal simply because the offence concerned does not involve personal violence or that in doing so the court would be contributing towards decongesting prisons is not in tandem with the principles of our criminal justice system and would set a dangerous precedent.

The applicant intends to attack his conviction on the grounds of the quality of investigations and the circumstances under which he was arrested. He further faults the trial Magistrate for failing to believe his evidence.

The court has reviewed the grounds of appeal as well as the evidence and the findings of the trial Magistrate and is of the opinion that the appeal has some reasonable prospects of success and coupled with the fact that the offence for which the accused was convicted did not involve any personal violence admitting him to bail under the circumstances does not pose any risk to society or to himself.

The applicant at the trial stage was admitted to bail in the sum of Kshs.50,000 with a surety of a similar amount. As stated earlier in this ruling the applicant is no longer a free person but a convict. He conviction is prima facie valid until set aside. The bail terms therefore ought to be more stringent than at the trial stage to ensure his presence during the pendency and disposal of his appeal.

The court in the circumstances admits the applicant to bail in the sum of Kshs.150,000 with surety of similar amount to be executed before the Deputy Registrar of this court. The applicant is further directed to report to the said Registrar once every 30 days upon his release until the hearing and determination of this appeal or further orders of this court.

Dated and delivered at Nyeri this 26th day of July, 2013.

J. N. ABUODHA

JUDGE

Delivered in open Court in the presence of Kimunya Advocate for the Appellant and Njue for the Republic.