



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A
CRIMINAL APPEAL NO. 264 OF 2013

FRANCIS NGOBU MURATHE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The appellant has filed a Notice of Motion dated 18th March, 2013 seeking to be admitted on bail pending the hearing and determination of his appeal. He was convicted and sentenced to a fine of Kshs. 300,000/= and in default thereof to serve three years in prison.

It is not clear from the application the offence for which the accused person was charged; what is clear from the proceedings in the subordinate court is that whatever the charge was, the appellant was convicted on his own plea of guilty.

Counsel for the appellant argued that the appeal against the conviction and sentence has high chances of success and the appellant is ready to comply with any terms or conditions attached to his bond should he be released on bail. According to counsel, bail is a constitutional right available to the appellant and that he is entitled to it as long as there is no danger of him absconding.

The state has opposed the application and urged the court to hold that the appellant can only be admitted to bail at the discretion of the court. He urged that the appellant has neither demonstrated that his appeal has any chances of success or that there are any special circumstances that would warrant the appellant being admitted to bail. The state also argued that, contrary to the appellant's counsel's contention, the plea was unequivocal and there is nothing on the record to suggest otherwise.

In an application such as this the most important consideration is whether the appeal has overwhelming chances of success and should it be so deemed, there would be no justification for depriving the applicant his freedom. A passage from the judgment of Trevelyan J (as he then was) in the case of **Somo versus Republic (1972) EA 476** is useful on this point. The learned judge said at page 480 of his judgment that;

“But generally speaking, whatever grounds may properly be taken into account in favour of the grant of the application...the most important of them is that the appeal will succeed. There is little, if any, point granting the application if the appeal is not thought to have an overwhelming chance of being successful...I have used the word “overwhelming” deliberately and for what I believe to be good reason. It seems that when these applications are considered it must never be forgotten that

the presumption is that when the applicant was convicted, he was properly convicted. That is why, where he is undergoing a custodial sentence, he must demonstrate, if he wishes to anticipate the result of his appeal and secure his liberty forthwith, that there are exceptional or unusual circumstances in the case. That is why, when he relies on the ground that his appeal will prove successful, he must show that there is an overwhelming probability that it will succeed.”

The appellant omitted a copy of the information from his application and therefore the court is unable to appreciate the particular charge against him. All I can gather from the facts that were read out to the court by the prosecution upon entry of the plea of guilty is that the appellant seems to have been charged with an election offence related to bribery of voters.

The appellant’s counsel has urged that the plea was not unequivocal and that the appellant denied or controverted the facts. This argument appears to me to be inconsistent with what appears in the record from the subordinate court and I am not convinced at this stage that it is a ground upon which an appeal would be considered to have the potential to succeed; I am unable to see how the appellant’s appeal has overwhelming chances of success based on this argument.

Counsel argued that bail pending appeal is a right to which the appellant is entitled. Again I am unable to agree with the counsel’s submissions on this point. The eligibility to be admitted to bail pending the hearing of an appeal must be distinguished from the right to bail pending trial. The right to bail at the trial phase is guaranteed unless the prosecution demonstrates that there are compelling reasons for not granting bail. While the burden is on the prosecution to persuade the court that an accused person should not be admitted to bail pending trial the situation is different once an accused has been convicted and attained, as in the present application, the status of an appellant. As an appellant the burden is upon him to persuade the court that considering the probability of success of his appeal, he should be admitted to bail pending appeal. The reason is as stated in the case of **Somo versus Republic (supra)** in the passage I have quoted herein above where Trevelyan, J (as he then was) said;

“It seems that when these applications are considered it must never be forgotten that the presumption is that when the applicant was convicted, he was properly convicted. That is why, where he is undergoing a custodial sentence, he must demonstrate, if he wishes to anticipate the result of his appeal and secure his liberty forthwith, that there are exceptional or unusual circumstances in the case.”

The appellant has, regrettably not managed to rebut, at least at this stage of the proceedings, the presumption that the learned judge referred to that he was properly convicted. Without such rebuttal, without any hint that the appeal has overwhelming chances of success and without any demonstration of any exceptional or unusual circumstances I am inclined to reject the appellant’s motion dated 18th March, 2013. It is thus dismissed.

Dated, signed and delivered in open court at Murang’a this 22nd day of November, 2013.

Ngaah Jairus

JUDGE