



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL APPEAL NO. 62 OF 2013

LESIIT, J

MURUSI LMENINGACH LERUKAPPLICANT

V E R S U S

REPUBLIC.....RESPONDENT

RULING

1. The applicant was convicted of one count of possession of 15 rounds of ammunition without a firearms certificate contrary to section 4(2) (a) as read with 54(3) of the Firearms Act. He was sentenced to 5 years imprisonment.
2. The Applicant has filed an appeal against the conviction and sentence. He then filed an application seeking bail pending this appeal.
3. The grounds for the application is cited on the face of the Notice of Motion dated 29th July, 2013.
 - i. **That the trial magistrate erred in law and fact in convicting the Applicant in a charge where the essential ingredients of the offence had not been proved beyond reasonable doubt.**
 - ii. **That the trial magistrate erred in law and fact in the manner he treated the evidence tendered by the prosecution which was insufficient and thus arriving at a wrong finding.**
 - iii. **That the defence tendered by the Applicant was weighty and credible.**
 - iv. **That the sentence was excessive.**
4. There are other grounds on the filed supporting affidavit dated same day. The only additional ground in the affidavit which is not cited on the face of the motion is the issue of the sentence being harsh and excessive and fact the Applicant was not given an option of fine.
5. There was a change of advocate for the Applicant in which Ms. Nelima took over the conduct of the case from Mr. Mwanzia. Ms. Nelima brought in a certificate of urgency arguing a new reason why the Motion should be heard under certificate. She also attached certain copies of documents. They are not properly annexed as they were not formally filed neither are they exhibits.
6. I have considered submissions by both Ms. Nelima for the Applicant/Applicant and Mr. Mungai for the State. The Application has been opposed by the State.
7. The application before court is for bail pending appeal. The principles applicable in such an application are well settled and I will quote some cases to demonstrate these.

In JIVRAJ SHAH -VS- REPUBLIC [1986] KLR 605 the court of Appeal held, inter alia:

1. **The principal consideration in an application for bail pending appeal is, the existence of exceptional or unusual circumstances upon which the court of Appeal 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 urged and the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail will exist.”*

At this stage the burden lies with the Applicant to establish that the appeal has high chances of success and that the Applicant is likely to serve a substantial part of his sentence before his appeal is heard. For this proposition I am guided by the following Cases of Somo vs. Republic 1972 EA 476 where court held.

- iii. **the most important ground is that the appeal has an overwhelming chance of being successful; in that case there is no justification for depriving the application of his freedom;**

In Chimambai versus Republic 1971 EA 343 where court held:

- i. **anticipated delay in the hearing of the appeal together with other factors constitute good grounds for granting bail pending appeal (R. v. Akbarali Juma Kanji)**

In Dominic Karanja v. Republic [1986] KLR 612 the court of Appeal considered conditions to be met in an application for bail pending appeal should satisfy before the Appeal can be granted. The court held:

- a. **The most important issue was that if the appeal had such overwhelming chances of success, there is no justification for depriving the Applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances.**
- b. **The previous good character of the applicant and the hardships, if any, facing his family were not exceptional or unusual factors. Ill health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners.**
- c. **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.**
- d. **Upon considering the relevant material in this case, there was no overwhelming chance of the appeal being successful.**

Unlike an application for bail pending trial where the applicant has a constitutional right to be considered innocent until proved guilty (Article 49 of the Constitution) an applicant for bail pending appeal stands on the premise that he has already been found guilty of the offence. In an application for bail pending appeal the principle consideration is whether the appeal has a likelihood of success (Ademba vs Republic 1983 KLR PG 442 and Somovrs Republic 1972 EA 476). The other considerations are whether there exist exceptional circumstances that would justify the applicant being granted bail pending his appeal. The other grounds upon which bail may be granted is where there is an anticipated delay in the hearing of appeal which ground should be considered together with other factors which constitute good grounds for granting bail pending appeal (see Chimambhai 1971 EA 343)

8. **The Applicant has been found guilty by a properly constituted court. The burden now lies on him to establish that his appeal is not frivolous but has high chances of success. That ground should be established for the simple reason that no one should be confirmed if his appeal has an**

- overwhelming chance of success.
9. Ms Nelima has urged that the appeal has high chances of success. The reason why counsel holds that view was not demonstrated to court in the counsels submissions. Further the filed affidavit in support of the application has not demonstrated it either.

Mr. Moses Mungai argued that intended appeal should have an overwhelming chance of success in order for the application to be granted.

10. I have perused the record of the lower court. I cannot say from this record that Applicants appeal has an overwhelming chance of success.
11. Counsel for Applicant urged that Applicant had bail at the lower court and that chance of him absconding were not there.
12. As stated earlier, the Applicant has been convicted of an offence. The right to be considered innocent until he is proved guilty no longer applies to him. The fact therefore that he had a bond during the trial before the lower court cannot be of any relevance to this application.
13. Ms. Nelima urged that Applicant had chronic ulcers and relied on the documents I earlier noted were not properly filed or attached as exhibits. That notwithstanding I have looked at them, though with difficulty as they are barely legible.
14. First of all the annexed documents are treatment notes of November 2013 and receipts for drug purchase. The documents do not support Ms. Nelima's submissions that the Applicant has any chronic condition. He has been in prison serving sentence since July 2013. There is no evidence he has been treated for the same condition before November 2013.
15. Second there is nothing to show that the Applicant cannot receive adequate medical treatment while in prison. It is common knowledge that persons do have sick bays and fully run medical clinics where doctors handle all medical issues of prisoners. In case of need for further treatment prisoners are often taken to Government General Hospital for treatment. The Applicant has not demonstrated that the facilities currently available in prison are inadequate to handle his case. The Applicant through his counsel urges that he is likely to serve his sentence before the appeal is heard. I am privy to the knowledge that dates for hearing of appeals are available. There is no likelihood that Applicant may serve his sentence before his appeal is heard.
16. As to the sentence being harsh a person convicted of an offence under section 4(2)(a) of the Firearms Act is dealt with in the manner set out under section 4(3)(a) of same Act. It shows that once convicted the person is liable to be sentenced to for a term not less than five years but not exceeding ten years.
17. I find no merit in this application and the same is dismissed accordingly.

DATED SIGNED AND DELIVERED AT MERU THIS 10TH DAY OF DECEMBER, 2013.

J. LESIIT

JUDGE