



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Criminal Application 367 of 2012

ERICK OJWANG OYIEYO.....1ST APPLICANT

BOAZ OMONDI BOYI 2ND APPLICANT

VERSUS

REPUBLICRESPONDENT

RULING

1. **Eric Ojwang Oyieyo** and **Boaz Omondi Boyi** the applicants herein, filed an application dated 12th July 2012 by way of Notice of Motion under **Section 379(4) Criminal Procedure Code** and **Section 6 of the Appellate Jurisdiction Act Cap 9**. In the said application the applicants seek to be admitted to bail pending appeal **No. 108 of 2012**, which they have already filed in the Court of Appeal.
2. Mr. Mochere learned counsel for the applicants submitted that the applicants were out on bail in the High Court and did not abscond. He urged that if the court grants them bail, they will be sure to attend court whenever required, and that they were ready to abide by whatever conditions the court would grant.
3. The learned state counsel Mr. Mulati opposed the application on behalf of the state. Mr. Mulati urged that the applicants were convicted in the trial court and sentenced to two years imprisonment. They appealed to the High court and the appeal was dismissed. He also urged that the learned counsel for the applicants had failed to advance any reasons why bail should be granted to them.
4. The principle consideration in an application for bail pending appeal as stated by the Court of Appeal in the case of **Jivraj Shah vs. Republic [1986] LLR 605**, was *inter alia*, that bail pending appeal would be considered where there were existing exceptional or unusual circumstances upon which the Court of Appeal could fairly conclude that it was in the interest of justice to grant bail. Secondly, it may be granted where it appears, *prima facie* from the totality of the circumstances that the appeal is likely to be successful on account of some substantial point of law to be urged and that the sentence or substantial part of it will have been served by the time the appeal is heard. In that instance conditions for granting bail will exist.
5. I have considered the submissions of both counsels in view of the holding in the case above and it is evident that the conviction of the two applicants by the trial court was upheld by the High Court in

High Court Criminal Appeal No. 353 & 354 of 2010.

6. Whilst vide **Section 379** of the **Criminal Procedure Code**, the High Court has the power to grant bail to the applicants, the learned counsel for the applicants has not advanced any reasons why bail should be granted to them. He has not demonstrated that the appeal in the Court of Appeal has overwhelming chances of success, nor has he demonstrated the existence of any exceptional or unusual circumstances warranting the exercise of the court's discretion in favour of the applicants.

7. I find no existence of exceptional or unusual circumstances upon which I may conclude that it is in the interest of justice to grant the orders sought, and it would be absurd for me to make a finding that the 2nd appeal has overwhelming chances of successes in light of the verdict of the High Court dismissing the 1st appeal on grounds that it lacked merit.

I am also of the view that the High Court was rendered functus officio once, the appellant moved to the Court of Appeal, following the verdict in the 1st appeal.

For the foregoing reason I dismiss the appeal.

SIGNED DATED and **DELIVERED** in open court this **21st day of November 2012.**

L. A. ACHODE
JUDGE