REPUBLIC OF KENYA

High Court at Bungoma

Criminal Case 194 of 2012

BENEDICTO WANYONYI WAFULA…. ……..APPLICANT

versus

REPUBLIC …….RESPONDENT

RULING

INTRODUCTION

The Application

[1] The application before meis made by way of Notice of Motion under Section 357 of the Criminal Procedure Code which is dated 26th, October, 2012 and supported by the affidavit of the Applicant. The significant prayer in the applications is;

That the Appellant be released on bond pending hearing and determination of the appeal

An appeal has already been filed which is the foot on which the application stands.

GROUNDS IN SUPPORT OF THE APPLICATION

[3] That the offence for which the Appellant was convicted is bailable.

[4] That the Appellant may serve the jail term thus rendering the appeal an academic exercise.

[5] That the appeal has arguable grounds with high chances of success.

[6] That the Applicant duly complied with bond terms in the trial court.

[7] That the Applicant was wrongly convicted and should be released on bond.

[8] That the appellant is the sole bread earner and his family depends on him.

[9] For those reasons, he implores the court to exercise its discretion and grant him bail pending appeal.

PROSECUTION OPPOSES THE APPLICATION

[9] Mr. Kibelion filed Grounds of Opposition dated 5.11.2012 to wit:-

1. That the application is defective, inept, ambiguous and amounts to abuse of the process of the court.

2. That the application does not meet the threshold for grant of orders sought

3. That the orders sought are not for granting under the surrounding circumstances

[11] He amplified the grounds; that the principal condition is that the appeal must have overwhelming chances of success. There must be clear evidence of an error on the face of the record which should be discernable without looking at the merits. But nothing has been shown towards that end.

[12] Form record, the trial court in its lengthy judgment carefully considered the evidence by the prosecution and the defence witnesses, and on proper analysis arrived at a proper conclusion.

[13] That there is no possibility of success of the appeal herein

[14] That there is also no exceptional circumstances to warrant grant of bail pending appeal. The Applicant has only alluded in paragraph 4 of the Supporting Affidavit, to the shortness of the jail term, which in itself is not a ground for granting bail pending appeal. This is a well settled principle.

[15] It is also notable from his affidavit in paragraph 2 that he had complied with bond terms granted by the subordinate court and this is not a ground for bail pending appeal.

[16] That even though the offence that gave rise to the appeal is bail able there is a conviction in place and thus grant of orders of bail is not a matter of right but discretionary remedy upon satisfaction of the above conditions.

[17] That none of the above stated conditions had been satisfied and so the court dismissed the application for bail.

COURT RENDERS ITSELF THUS

Bail Pending Appeal; Discretionary Remedy

[18] Bail pending appeal is not grantable as of right, but is grantable at the discretion of the court, upon defined principles and proof of set conditions.

The Issue

[19] Whether the Applicant has satisfied the threshold provided by law for the granting of bail pending appeal under section 357 of the Criminal Procedure Code?

The Threshold

[20] The Court of Appeal, in the case of **DOMINIC KARANJA v REPUBLIC [1986] KLR 612,** set out the conditions that must be satisfied if the court should exercise its discretion and grant bail pending appeal when it held that:-

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

[21] The exercise of determining whether an appeal has overwhelming chances of success was circumscribed in the case of **BGM HC MISC CR APPEAL NO. 163 OF 2012** that;

… in determining whether the appeal has overwhelming chances of success, the court is not determining the appeal or confirming the success or otherwise of the appeal, but it is simply saying that, from the material before the court for purposes of the application for bail only, there are high or overwhelming chances of the appeal to be successful.

[22] Accordingly, at this stage, I should not comment on the particular issues in dispute in the main appeal in order to avoid; determining the appeal on the limited arguments offered for purposes of bail pending appeal; or taking a stand on an issue without full scale arguments at the hearing of the appeal. See **BGM HCCR APPEAL NO 185 OF 2012 JORAM NJOROGE NG'ANG'A v REPUBLIC.**

[23] After considering all the arguments herein by both parties, and on meticulous perusal of the proceedings of the trial court together with the judgment thereof, I am satisfied there is no overwhelming chances that the appeal will be successful.

[22] All the other minor arguments herein are accordingly answered in the *DOMINIC CASE* above, and holdings (b) and (c) apply mutatis mutandis. Hardships faced by families of the Applicants or previous good character of the Applicants or solemn assertion that the Applicants faithfully attended court during their trial, are not exceptional circumstances.

[23] In an application for bail pending appeal, I find the argument that the offence the Appellant was convicted on is bail able, to be misplaced, for all offences including capital offences are now bail able. See the case of **BGM HC CRC NO 55 OF 2009 JOKTAN MAYENDE & 3 OTHERS** that:-

…the constitutional order ushered by the Constitution of Kenya, 2010,…pronounced that all offences are bailable completely departing from the earlier position where capital offences did not qualify for bail,…

[24] By dint of Article 49(1) (h) of the Constitution of Kenya, 2010, the necessity to argue that an offence is bail able has been rendered unnecessary. What should however be properly understood is that, whereas in the initial trial, the prosecution is the one to prove *compelling reasons* why the accused should not be released on bail, in an application under section 357 of the CPC it is the appellant who should prove why he should be released on bail pending appeal. This approach of the law is underpinned by the fact that the Appellant is presumed to have been properly convicted and is not in the same standing as a person facing initial trial. On conviction, the presumption of innocence is unraveled, and the burden of proof, though not beyond reasonable doubt, is on the Appellant to prove his appeal and any other intermediate relief such as bail pending appeal.

I DECIDE

[25] As there are no overwhelming chances of the appeal being successful, I decline to exercise my discretion in favor of the Applicant. Bail pending appeal is denied. I order that; all requisite steps to be fast tracked; and the appeal to be heard expeditiously.

Dated, signed and delivered in open court this 19th day of December 2012

F. GIKONYO
JUDGE
19.12.12
In the presence of;

Evans Khisa- court clerk

Kibelion for DPP

Applicant in person-present

Ruling read and delivered in open court.

F. GIKONYO
JUDGE
19.12.12