



REPUBLIC OF KENYA

High Court at Bungoma

Criminal Case 187 & 172A of 2012

JACOB NDUNG'U MUTHEKI.....APPLICANT

versus

REPUBLICRESPONDENT

CONSOLIDATED RULING

INTRODUCTION

Two Applications Consolidated

[1] On 21/11/2012, the Prosecution and the defence counsels agreed that the application dated 30/10/2012 and 25/10/2012 in **BGM HIGH COURT CRIMINAL APPEAL NO 187 OF 2012 & BGM HIGH COURT CRIMINAL APPEAL NO 172A OF 2012** respectively, be consolidated, and a single ruling be delivered by the court. Both counsels also agreed that arguments made in the former case to be deemed as arguments in the latter case. The reason for the consolidation is because the issues for determination by the court and arguments proffered on those issues are similar in both cases, and could be handled together without any legal or practical difficulties. The court shared the view of the counsels hence this consolidated ruling.

Nature of the Applications

[2] The application in **BGM HIGH COURT CRIMINAL APPEAL NO 172A OF 2012** is made by way of Notice of Motion while that in **BGM HIGH COURT CRIMINAL APPEAL NO 187 OF 2012** is made by way of Chambers summons. Both applications are however made under section 357 of the Criminal Procedure Code, and each is supported by the affidavit of the respective Applicant. The significant prayer in both applications is;

That the applicant/appellant be granted bail pending the hearing of the appeal

Each applicant has filed an appeal which provides the foot on which their respective application stands.

GROUND OF THE APPLICATION

[3] According to Mr. Situma who acts for both Applicants, the conditions set out in law for the grant of bail pending appeal have been met.

[4] First, the subject matter of the charge was a transformer. The prosecution produced some components allegedly vandalized from a transformer, but did not produce the shell transformer from which those components were allegedly vandalized. The trial court, Mr. Situma argues, also observed this failure but

went ahead and convicted the Applicants.

[5] Secondly, in the absence of the shell transformer, it would be impossible to relate the recovered components to or even say that they are parts of a transformer belonging to Kenya Power and Lighting Company (hereafter KPLC). Indeed, Mr. Situma argued that PW2, PW3 and PW6 on cross-examination confirmed that there were no special marks on the recovered items which showed that they belonged to KPLC.

[6] Mr. Situma minutely examined the evidence of PW2, PW3 and PW6 to support his arguments.

[7] The defence counsel urged that the above matters make the foundation of the charges weak, thus the appeals herein have merit.

[8] There are other minor grounds which Mr. Situma argued, that Applicants suffer ill-health. He told the court that the Applicants were on medication before they were arrested and their continued incarceration has interrupted programmed treatment they were receiving, and this is detrimental to their health. He also talked of advanced age of one of the Applicants who he said was 53 years old. The affidavits in support also allude to some family problems and so the Applicants should be released to fend for their families.

[9] For those reasons, he implores the court to exercise its discretion in favour of the Applicants and grant them bail pending appeal.

PROSECUTION CONCEDES

[10] Mrs. Leting for the Prosecution concedes to the applications herein for good reasons.

[11] She has submitted that after perusing the grounds of appeal and the proceedings in the trial court, she is convinced that the appeals have chances of appeal.

[12] From the onset, she agrees with the applicants that the transformer was never produced yet it was the main issue in the case.

[13] She further submitted, the items that were found in possession of the Applicants did not have any special marks that identify them as the property of KPLC.

[14] To her, the sentence imposed of 3 years on each of the two counts, to run consecutively, had no basis since the Applicants are first offenders.

[15] For those reasons, she is constrained to concede to the applications herein.

COURT RENDERS ITSELF THUS

Bail Pending Appeal; Discretionary Remedy

[16] Bail pending appeal is grantable at the discretion of the court, upon defined principles. It is not a matter of right or one which the parties can obtain through consent, concessions or compromises. The parties only have the role of laying facts before the court which may or may not excite the exercise of the discretion of the court. This court will therefore make its decision but taking into account what the prosecution and the defence have submitted.

The Issue

[17] The question is; Have the Applicants satisfied the threshold provided by law for the granting of bail pending appeal under section 357 of the Criminal Procedure Code?

The Threshold

[18] 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. Holding No 1 of that case is most appropriate in the circumstances of this case 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....

[19] The way the court carries out 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.

[20] Accordingly, at this stage, I should not comment on the particular issues in dispute in the main appeal as Mr. Situma did when he minutely examined the evidence of PW2, PW3 and PW6, in order to avoid determining the appeal on the limited arguments offered for the purpose of bail pending appeal, and without fully considering each and every material issues of the appeal. By this design, the court also avoids taking a particular stand on an issue only to shift later when full scale arguments are presented on the plenary hearing of the appeal. See **BGM HCCR APPEAL NO 185 OF 2012 JORAM NJOROGI NG'ANG'A v REPUBLIC**.

[21] 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 that the appeals herein have overwhelming chances of success.

[22] But let me comment on the other minor grounds that the Applicants are relying on. The claim of ill-health does not in itself constitute exceptional circumstances on which bail pending appeal could be granted, especially where there are medical facilities within prison establishments in Kenya. The potency of this ground is therefore limited and proof must be provided which shows that the appellant is suffering from a condition that cannot be treated within the medical facilities for prisoners. It is such an onerous task, and it is not surprising the ground is seldom successful.

[23] For completeness of record, 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. All these arguments were dealt with in a subtle manner in **DOMINIC KARANJA v REPUBLIC [1986] KLR 612** and **BGM HC MISC CR APPEAL NO. 163 OF 2012**. See the relevant holdings below;

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.

[24] This approach of the law is based on the fact that the Applicant is presumed to have been properly convicted and is not in the same standing as a person facing initial trial. The conviction unravels the innocence of the person, and the burden of proof, though not beyond reasonable doubt, now shifts to the person convicted to prove his appeal or any other intermediate relief such as bail pending appeal.

I Decide

[25] On the basis of my finding that the appeals filed as **BGM HIGH COURT CRIMINAL APPEAL**

NO 187 OF 2012 & BGM HIGH COURT CRIMINAL APPEAL NO 172A OF 2012 have such overwhelming chances of success, it will not be justified to curtail the liberty of the Applicants. Accordingly, I grant each Applicant a bond in the sum of Kshs 500, 000 with one surety of the like amount until the appeal relative to each of them is heard and determined.

Dated, signed and delivered in open court this 6th day of December 2012

F. GIKONYO

JUDGE

6.12.12

In the presence of:

Alusa- court clerk

Kibelion for DPP

Situma for Applicants

Situma: Accused persons are not present as no production order was issued. But we can take the Ruling.

Kibelion: We can take the ruling.

Ruling read and delivered in open court.

F. GIKONYO

JUDGE

6.12.12