



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CORAM: F. AZANGALALA J.
CRIMINAL APPEAL NO. 182/2010

ANTONY MWANGI NGARE ::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::: APPELLANT

=VERSUS=

REPUBLIC ::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::: RESPONDENT

RULING

The applicant, **Anthony Mangi Ngare**, by his Notice of Motion dated 20th December, 2011 seeks one main order of the court namely, that he be released on bond/bail pending hearing and determination of his appeal. The application is indeed made in the appeal. The primary reason for the application is that the appeal has high chances of success. The applicant also seeks the said order because he takes care of his ailing and widowed mother who requires regular medication and attention and further that he has two (2) sons in high school and one (1) in university who solely depend on him for subsistence and school fees. The applicant has also supported the application by his affidavit which reiterates the above grounds.

When the application came up for hearing before me on 2nd June, 2011, Counsel for the applicant rehashed the same grounds and urged that the applicant be admitted to bond/bail.

Counsel for the state opposed the application because in his view, the appeal does not have chances of success and that the appeal can be disposed of with dispatch.

I have considered the application, the supporting affidavit and the submissions of counsel. Having done so, I take the following view of the matter. Bail pending appeal is at the discretion of the court which discretion is exercised on known principles. The primary consideration is whether the appeal has high chances of success. There are of course other considerations of less import such as whether there is a risk that if not granted, the sentence imposed will be served before the appeal is heard. Bail pending appeal has also been granted where there are exceptional circumstances. So, the discretion to grant bail pending appeal is not unfettered.

In this application, the primary complaint of the applicant in the appeal is that the Criminal jurisdiction of the trial court was used to settle a civil wrong. In the applicant’s view, that was wrong. But the facts presented before the trial court could have disclosed both a criminal and civil wrong. The mere fact that a criminal charge was preferred where a civil suit could also have been lodged would not of itself be sufficient to tip the scale in favour of granting bail pending appeal. In **Somo –vrs- Republic [1972] EA 476**, Trevelyan J. delivered himself as follows at page 450:

“It seems to me 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 learned judge continued as follows regarding delay in hearing the appeal:-

“Delay in hearing of an appeal unaccompanied by some other ground or grounds has never perhaps, been held to be enough. But in most of the cases which I have read, the delay was occasioned by the intervention of the long vacation and that is an annual affair. There must be some delay between conviction and sentence and the hearing of the appeal and that delay can only alone be an unusual or exceptional circumstance if it is unusual or exceptional itself.”

The principles in the **Somo** case have been applied by our courts from time to time. They are still applicable today. So despite the case being only of persuasive authority, I find no reason to depart from the same. The applicant has made a bare allegation that his appeal has high chances of success. The mere say so is not enough. He had to demonstrate that there is an overwhelming probability that the appeal will succeed. That, to my mind has not been demonstrated.

Regarding delay, there is every likelihood that the appeal may be disposed off with dispatch probably even before this session comes to a close.

In the end, there is no basis for allowing this application which is accordingly dismissed. To expedite disposal of this appeal, I hereby admit the same to hearing before a single Judge for 1 hour. The appellant should prepare and serve a record of appeal within the next 7 days.

Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 23RD DAY OF JUNE, 2011.

**F. AZANGALALA
JUDGE**

Read in the presence of:-

1. Antony Mwangi Ngare, the appellant in person and
2. Mr. Oluoch, Senior Deputy Prosecution Counsel for the State.

**F. AZANGALALA
JUDGE.
23/6/2011.**