REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Misc Crim Appli 702 of 2007

JOHN BOSCO SARIA..……...…….…….... APPLICANT

-VERSUS-

REPUBLIC……..…….……RESPONDENT

RULING

Coming up before the Court is the applicant's application by Chamber Summons dated 4th October, 2007 and brought under ss.350 and 357 of the Criminal Procedure Code (Cap. 75, Laws of Kenya) and "all other enabling provisions of the law". The substantive prayer in the application is that "this Honourable Court be pleased to admit the Appellant to bail with or without sureties pending the hearing and determination of the appeal filed herein". The appellant asked this Court to "be pleased to stay execution of the sentence or order [of the trial Court] appealed against until the hearing and determination of Criminal Appeal No. 490 of 2007 filed by the [applicant]".

The general grounds founding the application are, in summary, as follows. The applicant has a cogent appeal evidenced by the petition of appeal; the applicant runs the risk of serving through most of the seven-year jail sentence by the time the appeal is heard and disposed of, if bail is not granted; by the constitutional law, the offences with which the appellant is charged are bailable; the applicant, while enjoying bail terms during trial, had not absconded and had attended Court as required; the trial Court itself had directed that the instant application be made in the High Court; the applicant's co-accused had successfully applied for bond pending appeal, in ***Miscellaneous Criminal Application No. 635 of 2007***; the appellant is prepared to abide by any conditions and/or restrictions such as this Court might impose if bail is granted.

The applicant's advocate, ***Earle Ng'ani***, swore an affidavit in support of the application. He depones that the appellant had, on 25th July, 2007 been convicted of a bailable offence, namely, making a document without authority, and had, on 6th August, 2007 been sentenced to imprisonment for a term of seven years. The applicant then made an informal application for bail pending appeal, before the trial Magistrate; but the Court "declined to hear the application, directing that the same be made before the High Court". Since then, the appellant has filed his petition of appeal.

The deponent believes that the appeal has overwhelming chances of success: because conviction had been entered for the applicant's failure to offer an explanation; since the applicant was convicted on allegations made by the co-accused during investigations; due to the fact that the trial Court declined to interpret glaring inconsistencies in the prosecution's case in favour of the accused; for the reason that

conviction had been arrived at without any direct evidence against the applicant; owing to the fact that the appellant had not been accorded the right to make submissions after the close of the defence case, contrary to "the mandatory requirements of the Criminal Procedure Code". It is deponed that the appellant is ailing and needs constant medical attention, and that he will have been subjected to much suffering if the orders sought are not granted.

Learned counsel, ***Mr. Ng'ani*** highlighted certain points which he believed, rendered the instant application one of special merit. He noted, for instance, that after the applicant herein, during the trial, had opted to remain silent, the trial Magistrate had proceeded straightway to give judgment, and no submissions were made on behalf of the applicant.

Secondly, the two accused persons in the trial had faced seven counts of offences and, when they were sentenced to serve prison terms, all the sentences for the specific counts of the charge, were made to run consecutively; and counsel was going to challenge such an approach to sentencing on appeal.

Learned counsel submitted that the instant application had special merits, as the applicant was ailing, his illness taking the form of asthma and peptic ulcers.

Counsel drew to the Court's attention the Court of Appeal decision in ***Jivraj Shah v. Republic*** [1986] KLR 605 in which, in the material passage, it had thus been held (pp.606-607):

"**There is not a great deal of local authority on this matter [i.e., grant of bail pending appeal] and for our part such as we have seen and heard tends to support the view that the principal consideration is if there exist exceptional or unusual circumstances upon which this court can fairly conclude that it is in the interest of justice to grant bail. If 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 a substantial part of it will have been served by the time the appeal is heard, conditions for granting bail will exist. The decision in *Somo v. Republic* [1972] E.A. 476 which was referred to by this court with approval in Criminal Application No. Nai 14 of 1986, *Daniel Dominic Karanja v. Republic* where the main criteria was stated to be the existence of overwhelming chances of success does not differ from a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed. The proper approach is the consideration of the particular circumstances and the weight and relevance of the points to be argued".**

From the foregoing passage in the ***Jivraj Shah*** case, learned counsel held out the *interests of justice* as a primary consideration on whether to grant prayers such as those in the instant application; and he urged that the interests of justice would dictate a granting of the prayers in question.

Learned State Counsel, ***Mrs. Kagiri*** contested the application, and urged that a perusal of the trial Court proceedings would not show an overwhelming chance of success in the applicant's appeal. She submitted that strong circumstantial evidence had been adduced, which easily made a case in support of conviction. The trial Magistrate, while warning herself of the risks attendant on a reliance purely on circumstantial evidence, had held that such evidence, being adduced before the Court, was incompatible with the innocence of the appellant herein. Even as the prosecution had adduced evidence showing guilt on the applicant's part, the applicant had remained silent, and in the end the prosecution evidence had stood unshaken. ***Mrs. Kagiri*** urged that the applicant would have "an uphill task demonstrating that the conviction was unsafe and insecure''.

Learned counsel submitted that there existed no unique or exceptional circumstances to warrant grant of bail pending appeal, in the instant case. Counsel submitted that ill-health on the part of the applicant, did not constitute an exceptional circumstance justifying grant of bail pending appeal; for the State had made no objection to a prisoner being accorded appropriate medical attention, in case of need.

Learned counsel did not consider the fact that the several sentences were ordered to operate consecutively (and not concurrently), to be a ground justifying grant of bail pending appeal; for the same

was not an unusual circumstance, and would be subject to normal contest during the appeal.

Even the point that the applicant had not been given a chance to defend after he opted for silence, counsel urged, was just a normal question in the appeal, and gave no special circumstance.

Learned counsel submitted that the fact the applicant had not absconded during the trial period, was an irrelevant point in the instant application. She urged that the appellant should wait for the hearing of the appeal, during which he could canvass his various contentions, and the application should be dismissed.

The main consideration of principle to determine whether to grant bail pending appeal is clearly stated in ***Somo v. Republic*** [1972] E.A. 476. It is that a trial which, to all outward appearances, has been properly conducted, results in valid determination of the standing of the accused in the criminal proceedings, and, where such a trial ends in a committal of the accused to jail, it may be considered the right position in law, unless and until the judgment is set aside on appeal. Therefore, the applicant ought to be in a position to persuade the Court that his appeal is so strong, so meritorious, that at the end, the probabilities will favour acquittal. The applicant, to discharge that burden, will need to raise some critical issue of law, or an issue as to the mode of application of the evidence. Although it is recognized that a particular case may have special circumstances that could weigh in the Court's mind, the basic consideration remains: whether or not the appeal stands clear chances of success.

After carefully considering the facts of this particular case, considering the prayers and the evidence in support, and listening to the submissions of counsel, I have come to the conclusion that there is nothing to predispose the applicant's appeal to a successful outcome, so far as can be seen at this stage. I have also not found any special circumstances such as would, on their strength, incline this Court to grant the applicant's prayers.

Consequently, I must dismiss the applicant's application.

It is so ordered.

DATED and **DELIVERED** at Nairobi this 12th day of March, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Applicant: Mr. Ngani

For the Respondent: Mrs. Kagiri