



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

Misc. Crim. Appli. 650 of 2007

PETER NJOROGE NJUGUNA APPLICANT

AND

REPUBLIC..... RESPONDENT

(Intended Appeal from conviction(s) and sentence(s) of the S.R. Magistrate's Court at Kikuyu in Criminal Case No. 888 of 2007)

RULING

Before me is a Chamber Summons dated 13th December 2007 filed by Otieno Arum & Company advocates on behalf of the applicant PETER NJOROGE NJUGUNA. It was filed under section 356 and 357 of the Criminal Procedure Code (cap 75). It was brought under certificate of urgency. It seeks for orders that the appellant be granted bail pending the hearing and determination of the appeal. Though in paragraph 7 of the supporting affidavit sworn on 13th September, 2007 by KENNEDY OTIENO ARUM there is mention of an appeal having been filed, there is no indication of the appeal number, nor is there a copy of the petition of appeal annexed. Copy of the charge sheet as well as the proceedings and judgment of the subordinate court were however annexed.

At the hearing of the application, Mr Arum for the applicant submitted that the appeal filed had overwhelming chances of success. Counsel contended that the applicant was arrested on 20th July 2006 and taken to court on 31st July 2006, contrary to the provisions of section 72(3) of the Constitution which required him to be arraigned in court within 24 hours of arrest. Counsel also submitted that section 77(1) (ii) of the Constitution was flouted, as the charge was not read and explained to the appellant in a language that he understood. In addition, the applicant had asked for the trial to proceed from where it had stopped, but a succeeding magistrate ordered the trial to commence de-novo without giving the appellant time to be represented by counsel. Further, there were discrepancies in the evidence which meant that the prosecution had failed to prove the case beyond any reasonable doubt. Counsel argued that the applicant was on bail during the trial at the subordinate court. He would therefore not abscond, if granted bail pending appeal. Counsel sought to rely on the case of REPUBLIC vs JAMES NJUGUNA NYAGA - Nairobi HC Cr Case No. 40 of 2007 and the case of GERALD MACHARIA GITHUKU vs REPUBLIC - Nairobi Criminal Appeal No.119 of 2004 (CA).

The learned State Counsel, Ms Gateru, opposed the application. Counsel submitted that there was strong evidence to support the conviction. Counsel submitted that the applicant had not demonstrated overwhelming chances of success of the appeal. Counsel contended that the issue of delay in charging

the appellant was not raised at the hearing of the case. In any event, the Constitution provided that an accused can be charged within a reasonable time. Counsel also submitted that the decision to order a de novo trial was based on the fact that the offence was serious. Counsel also submitted that the appellant was sentenced to serve 7 years imprisonment therefore his appeal would be heard and determined before expiry of substantial part of the sentence.

This is an application for bail pending appeal. The considerations to be taken by a court in determining such an application were clearly stated in the case of - DOMINIC KARANJA vs REPUBLIC [1986] KLR 612, where the Court of Appeal held, inter alia, that -

“1 The most important issue was that if the appeal had such overwhelming chances of success, there was no justification for depriving the applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances.”

This application will not succeed. In my view, one of the important documents to be exhibited in court in such an application, is the document showing that indeed an appeal has been filed. In our present case there is no indication of an appeal number, or even an indication that an appeal has been filed. There is no copy of petition of appeal filed. In that event, I cannot be certain whether the bail, if granted, will be bail pending an appeal, as no appeal appears to be pending. On that ground alone, the application will not succeed.

Secondly, from the record of the proceedings, in my view, if an appeal is filed, it will be an arguable appeal. I do not see anything overwhelming about the success of the intended appeal. I will therefore dismiss this application.

Consequently, and for the above reasons I dismiss the application.

Dated and delivered at Nairobi this 23rd April 2008.

George Dulu

Judge

In the presence of –

Mr Arum for applicant

Ms Gateru for State – absent.

Mwangi c/c