REPUBLIC OF KENYA

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

Misc Crim Appli 88 of 2008

DAVID MUNYIRI KIMURE………....…………………….APPLICANT

-VERSUS-

REPUBLIC…………………………………………….RESPONDENT

RULING

The applicant, who is stated to have appealed from a conviction entered in Traffic Case No.2400 of 2006 at Kibera Law Courts, has moved this Court by Notice of Motion dated 6th February, 2008. The application carries one substantive prayer:

"THAT the applicant be admitted to bail on such conditions as the Honourable Court may determine, pending the hearing and determination of the appeal, or, in the alternative, the sentence [imposed against] the applicant be suspended pending the hearing [of the appeal]."

As a ground in support of the application, it is stated that the applicant has an arguable appeal with high chances of success. It is also stated that the applicant is ready to comply with any condition upon which bail may be granted.

The applicant has sworn a supporting affidavit in which he depones as follows. The applicant had, on 7th August, 2007 been charged in Traffic Case No. 2400 of 2006 at the Kibera Courts, with the offence of causing death by dangerous driving contrary to s.46 of the Traffic Act; he was convicted and sentenced to an imprisonment-term of three years; the applicant was supplied with the trial Court's proceedings on 5th February, 2007; he believes to be true the advice of his counsel, that his petition of appeal shows a "*prima facie* arguable appeal with high chances of success"; the applicant is "ready to comply with any terms and conditions that the Court will impose", in relation to an order granting the prayer for bail.

In the oral submissions, learned counsel ***Mr. Ojienda*** represented that the trial Magistrate had erred in entering a conviction, and that, on this account, the Court should exercise a discretion and make orders in favour of the applicant. He urged that the prosecution had failed to discharge the burden of proof resting upon it, beyond reasonable doubt; that essential probative documents had not been produced in Court; that neither direct nor circumstantial evidence had been adduced which could justify a conviction. It was urged that the crucial evidence which the trial Court had relied on was that of PW1 and PW4, witnesses who were not at the *locus in quo* at the material time and had not observed the events.

Counsel also submitted that the three-year term of imprisonment imposed by the trial Court had been harsh and excessive.

The issues related to both conviction and sentence, counsel urged, did form a credible basis for an arguable appeal.

But learned counsel for the respondent, ***Ms. Gateru*** urged that nothing in the trial Court's record disclosed overwhelming chances of success to the applicant's appeal. She urged that there was reliable evidence, as the basis of the conviction and sentence being contested. She submitted that the evidence showed that the applicant had driven a Nissan motor vehicle at a dangerous speed, and caused the death of a pedestrian. Counsel urged that the sentence imposed by the trial Court was by no means harsh or excessive, as a prison term of three years was dispensed, out of a possible maximum of 10 years. ***Ms. Gateru*** submitted that since the applicant had not yet served a substantial part of the sentence (the date of sentence is 10th December, 2007), the duration of appeal-hearing was unlikely to wreak prejudice to the appellant, and hence no case had been made for the grant of bail pending the hearing and determination of the appeal.

A careful consideration of the manner in which counsel treated the evidence relied upon by the trial Court does not, in my opinion, disclose a decisive scenario which, *prima facie,* predisposes the appeal towards an outcome of success. This is another way of saying that "overwhelming chances of success" have not been demonstrated. Although learned counsel ***Mr. Ojienda*** underscored *error* on the part of the trial Court, as predisposing the appeal towards success, the specific nature of that error, which is supposed to turn on *evidence,* has not been disclosed.

This application must be determined according to law; and the relevant law is now well-embedded in judicial decisions. I have not heard it seriously contested that "overwhelming chances of success" in a pending appeal, is the correct foundation in principle for granting prayers for bail pending appeal; the principle was carefully set out in a persuasive authority: ***Somo v. Republic*** [1972] E.A. 476 (***Trevelyan, J***.); and this Court has restated the same in ***Anvesh Keshavlal Shah v. Republic***, Nairobi H.C. Misc. Crim. Application No.675 of 2007:

"**Relying on the safeguards of the trial process to produce a fair verdict, the High Court must take a *prima facie* position, that the applicant's serving of sentence at the moment, is in accordance with the law, unless some irregular feature of the trial process is shown which could predispose the appeal to likely success. Unless such unusual feature in the judgment is shown, then it remains the duty of this Court to uphold the integrity of the trial process itself, and to see to the due observance of the decisions judicially taken."**

The foregoing principle, in the light of my review of the application and the submissions, leads me to the finding that it is *not* a proper case for the grant of bail pending the hearing and determination of the applicant's appeal. Consequently, the application is hereby dismissed.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 26th day of May, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Applicant: Mr. Ojienda

For the Respondent: Ms. Gateru