



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MISCELLANEOUS CRIMINAL APPLICATION NO. 162 OF 2008

JOSEPH AMAI ETYANG.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

The applicant's application by Chamber Summons, dated 19th March, 2008 and filed on 26th March, 2008 was brought under s.357(i) of the Criminal Procedure Code (Cap.75, Laws of Kenya). The applicant was seeking admission to bail pending the determination of his appeal which has been lodged as *H.Ct.Cr.App. No. 48 of 2008*.

In the general grounds founding the application, it is stated that the applicant, a first offender who was in custody for three years during which the trial lasted, is unlikely to abscond the process of justice. It is stated that the appellant's appeal has overwhelming chances of success. It is also stated that the applicant is sickly and requires specialised treatment and home care. It is stated too that the applicant is willing to abide by any bail terms such as may be set by the Court.

The evidence to support the several grounds is set out firstly in the applicant's affidavit sworn on 19th March, 2008, and in a further affidavit dated and filed on 9th May, 2008.

In his depositions, the appellant says he was arrested on 23rd March, 2007, and subsequently arraigned in Court for several offences, in *Criminal Case No. 2569 of 2003*, at the Kibera Law Courts. He was subsequently granted a cash bail of Kshs.300,000/= with two sureties of the same amount, but he was unable to raise the said amount – and so he remained in custody throughout the period of trial which lasted three-years-and-a-half. On 30th October, 2007 the applicant was found guilty, convicted and sentenced to two years' imprisonment for each of the offences – the sentences to run concurrently.

The applicant prays that since he has now been in custody for 3 ½ years, it is “only fair and just that this Honourable Court do find that [he] has served [his] jail term.”

Learned counsel **Mr. Langi**, who appeared for the applicant, brought several authorities before the Court in support of his client's case.

In ***Shah v. Republic*** [1986] KLR 528, ***Simpson, C.J.*** took into account the applicant's state of health, in considering an application such as the instant one. The learned Chief Justice thus remarked:

“The question on whether or not the applicant committed theft in this case is complicated by the acquittal of the applicant on the 1st count. In the absence of more detailed argument I am not prepared to say that there is an overwhelming probability of success in this appeal...”

“I am however concerned about the health of the applicant. He is a case of uncontrolled diabetes mellitus and it appears from the certificate of Dr. Obel that neither the prison diet nor the hospital diet is suitable for his condition since he is a strict vegetarian. Only at home can he obtain a diet suitable for his condition.

“In these circumstances bail is granted on the same terms as in the lower court...”

The Court of Appeal decision, ***Ademba v. Republic*** [1983] KLR 442 which counsel invoked, states that: (i) bail pending appeal may only be granted if there are *exceptional or unusual circumstances*; (ii) the Court will take into account the *likelihood of success in the appeal*.

Counsel also invoked another Court of Appeal decision, ***Jivraj Shah v. Republic*** [1986] KLR 605 in which the criteria for granting bail pending appeal were considered (p.613):

“The most important issue here is if the appeal has such overwhelming chances of success that there is no justification for depriving the applicant of his liberty. The minor relevant consideration would be whether there are exceptional or unusual circumstances. The previous good character of the applicant and the hardship, if any, facing the wife and children of the applicant are not exceptional or unusual factors: Somo v. Republic [1972] E.A. 476. A solemn assertion by an applicant that he will not abscond if he is released is not sufficient ground, even with the support of sureties, for releasing a convicted person on bail pending appeal...We are not to be taken to mean that ill-health per se would constitute an exceptional or unusual circumstance in every case. There exist medical facilities for prisoners in the country.”

Learned counsel particularly relied on the principle in ***Shah v. Republic*** [1986] KLR 508, that *health* may be a relevant consideration in an application for bail pending appeal.

Counsel also relied on the applicant’s further affidavit, and urged that since the applicant had been sentenced to two years’ imprisonment in October, 2007, the appeal would be rendered nugatory, as he ran the risk of serving the whole sentence. Counsel urged that the applicant was unlikely to abscond, if granted bail pending appeal.

Learned respondent’s counsel, ***Mrs. Gakobo*** urged that the principal consideration in determining an application such as the instant one, was that there must be *overwhelming chances of success*, before the application is allowed. She submitted that the applicant had not demonstrated that such a position prevailed, in the instant case. Counsel submitted that, with several counts of theft of a motor vehicle, there were no clear signs that an appeal had overwhelming chances of success; for the applicant had been identified as the person who hired out the motor vehicles, which were then recovered after several days, and he had purported to be the owner of those motor vehicles.

As regards the place of ill-health in this application, counsel submitted that it could only be stated from the record that the applicant is undergoing treatment for Tuberculosis, but there was no evidence that this condition could not be managed in prison. Counsel restated the principle contained in the ***Jivraj Shah*** and ***Ademba*** cases, that sickness *per se* was not a ground for grant of bail pending appeal, and that the crucial consideration was whether the appeal had overwhelming chances of success.

Mrs. Gakobo urged that the Court need not take into account the fact that the trial process had taken a long time: because the applicant himself had contributed to delay by not presenting himself before the Court – between 3rd June, 2003 and 19th December, 2005; he only came to trial because of a successful arrest of him at Bungoma.

It is quite clear that the instant application cannot succeed unless it is shown that the appeal filed by the

applicant has *overwhelming chances of success*. It is also now quite clear that the fact the applicant is undergoing treatment for Tuberculosis, by itself, will not, in law, justify grant of bail pending appeal. I have carefully considered the grounds of the application, as well as the affidavit-evidence. I have also anxiously listened to counsel on both sides; and I did not perceive the *ring* of overwhelming chances of success for the appeal already lodged. No special evidentiary matters, or possible errors of law made in the trial Court, have been raised which give the prospect of overwhelming chances of success for the appeal.

I have to conclude, in those circumstances, that the applicant has not made a case for being granted bail pending appeal.

Accordingly, I dismiss the application of 19th March, 2008.

It is so ordered.

DATED and DELIVERED at Nairobi this 29th day of September, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Applicant: Mr. Langi

For the Respondent: Mrs. Gakobo