



IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)
Misc Crim Appli 80 of 2007

ARJINDER SINGH BHARMA.....APPLICANT

VERSUS

REPUBLICRESPONDENT

(CORAM: LESIIT, J.)

RULING

The Applicant seeks a bond pending the hearing and disposal of his appeal. The grounds for the application are that the Applicant had pleaded guilty to one charge of **OBTAINING BY FALSE PRETENCES** contrary to **Section 313** of the **Penal Code** and had been sentenced to the maximum sentence provided of three years imprisonment. That the Applicant had filed an appeal which had high chances of success, that if the Application is not granted, the Applicant may serve a substantive part of sentence rendering his appeal nugatory.

The Applicant further grounds his application on medical grounds in which he claims to be suffering from an incurable disease and for which he had been in and out of hospital.

Counsel for the Applicant submitted that the plea was equivocal. He also submitted that the Applicant's medical condition was an exceptional circumstance on which his application should succeed. **Miss Gateru** for the State opposed the application. Counsel submitted that the Applicant had pleaded guilty and that his plea was unequivocal and that in the circumstances there were no overwhelming chances that his appeal would succeed. Learned State Counsel submitted that in regard to the Applicant's medical condition, that it was not an exceptional circumstance at all. That there were medical facilities in prison to cater for the Applicant's condition.

Learned State Counsel also submitted that the Applicant had only served two months by the time the application was made and that the appeal was unlikely to be rendered nugatory.

Mr. Wachira for the Applicant submitted that the distinction between civil and criminal liability in the offence charged was "usually" very thin. Applicant's Advocate submitted that in the circumstances the Applicant will be arguing in his appeal that the facts did not support the charge. He relied on **MERALI vs. REPUBLIC 1972 EA 47.**

In the cited case, **Harris, J.** found that bond pending appeal could be granted to an Applicant who pleaded guilty to a charge provided the requisite tests were met. The learned judge set out four tests to be applied at page 49 of the cited case as follows: -

“... It is proper to weigh its merits in the light of the criteria proper to be applied generally to all applications for bail pending appeal. Some of these would seem to be: -

1. *the character of the applicant;*
2. *the possibility of a substantial delay in the hearing of the appeal;*
3. *whether the offence of which the applicant was convicted involved personal violence; and*
4. *that the appeal is not frivolous and has a reasonable possibility of success.”*

Mr. Wachira does not seem to rely on any of these tests except the last one which is that the appeal has a high chance of success. One other ground relied on was exceptional circumstances specified by **Mr. Wachira** as the Applicant's ill health.

There are latter cases than the ones cited by **Mr. Wachira** which give clear guidance of what constitutes exceptional or unusual circumstances and the principles to be considered when considering an application such as this one. In **ADEMBA vs. REPUBLIC 1983 KLR 442, POTTER, KNELLER & HANCOX JJA** held: -

- “1. *Bail pending appeal may only be granted if there are exceptional or unusual circumstances.*
2. *The likelihood of success in the appeal is a factor taken into consideration in granting bail pending appeal. Even though the appellant showed serious family and personal difficulties, in view of the unlikelihood of success in this appeal, the application could not succeed.”*

The learned Judges of Appeal were saying that even where exceptional or unusual circumstances existed, bail pending appeal would still not be granted if the appeal is unlikely to succeed. In yet another case, which puts the two grounds I have quoted in the proper perspective, **DOMINIC KARANJA VS. REPUBLIC 1986 KLR 612 NYARANGI, PLATT & GACHUHI JJA** held: -

- “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.*
2. *the previous good character of the applicant and the hardships, if any, facing his family were not exceptional or unusual factors. ill health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners.”*

Mr. Wachira submitted that his client was sick and therefore his medical condition constituted an exceptional circumstance. As the **Karanja case**, Supra, demonstrates, ill health *per se* is not an exceptional circumstance where there existed medical facilities to prisoners. The Applicant has annexed medical records from Kenyatta National Hospital dated after his incarceration which are living proof that medical facilities have been available to him while in custody and in the circumstances his medical condition does not qualify to be considered as an exceptional circumstance.

On appeal having a high chance of success, **Mr. Wachira** argued that there was a thin line between a criminal and civil liability in a charge of obtaining by false pretences contrary to **Section 313** of the **Penal Code**. Granted even if I was to accept the argument that there was a thin line between both liabilities under the offence charged, that line has to be weighed and considered by the appellate court. In an application such as this one, the court cannot engage in a minute examination of the facts and neither should it make a determination of the likely outcome of the appeal when heard. If on the facts and circumstances of the case the court is not satisfied that an overwhelming chance of success of the appeal exists the application should fail. Whether such a success exists can either be demonstrated by the Applicant himself, or the court may infer from the proceedings of the lower court before it.

I am not satisfied on the basis of grounds argued before me and my own evaluation of the facts of the case that the application is merited. The Application has no merit and is accordingly dismissed.

Dated at Nairobi this 14th day of March 2007.

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LESIIT, J.

JUDGE

Read, signed and delivered in presence of:

Applicant present

Mr. Wachira for the Applicant

Miss Gateru for State

Tabitha CC

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LESIIT, J.

JUDGE