



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Misc Crim Appli 86 of 2007

JAMES MENI KINYOI APPLICANT

VERSUS

REPUBLIC RESPONDENT

RULING

Before me is a Chamber Summons dated 30th January 2007 filed by E.K. Kanja & Company Advocates on behalf of the applicant/appellant JAMES MBAI KINYOI. The application was brought under section 356 and 357 of the Criminal Procedure Code and seeks for the following orders:-

1. THAT the applicant be admitted to bail/bond pending hearing and determination of his appeal.
2. THAT this Honourable court suspend and stay the execution of sentence entered on 15th September, 2006 in Criminal Case Number 7536 of 2005 by Honourable Mr Fundi, Resident Magistrate, while sitting in the Chief Magistrate's Court in Kibera, Nairobi, against the applicant herein, pending the hearing of the applicant's appeal.

The grounds of the application are that the applicant/appellant was out on bond during his trial in the subordinate; secondly, that unless the applicant is admitted to bail/bond pending appeal, he stands to suffer irreparable loss and damage by the time his appeal is finally heard and determined; thirdly, that the appeal has overwhelming chances of success. The application is also supported by the affidavit of EDWIN KIRUNJA NJAGI Advocate sworn on 30th January 2007.

When the application came up for hearing before me Mr Maina appeared for the applicant while Mr Makura State Counsel appeared for the State.

Learned counsel for the applicant Mr Maina submitted that the applicant was on bond during the trial before the subordinate court and never absconded. He should therefore be released on bail pending the hearing and determination of appeal. He further submitted that the offence was bailable. The applicant had already filed his petition of appeal. The appeal had overwhelming chances of success, especially in that the magistrate denied the applicant an opportunity to be heard and call his witnesses. There were also glaring irregularities and discrepancies. He also submitted that the applicant/appellant was willing to abide by any terms imposed by the court, if he was admitted to bail pending appeal.

The learned State Counsel Mr Makura opposed the application. He submitted that the appellant/applicant had failed to demonstrate that the appeal had overwhelming chances of success. The applicant had failed to show any unusual or exceptional circumstances. He contended that the evidence of the complainant was corroborated by the evidence of her mother and the doctor, as well as the teacher of the complainant. He also submitted that the applicant was afforded a fair trial. He urged me to dismiss the application.

I have considered the application and the submissions of both the learned counsel for the applicant and the learned State Counsel.

Let me state at the outset that the fact that an applicant was on bail during the trial is not enough basis for releasing him on bail or bond pending the hearing and determination of appeal.

Indeed, as learned counsel for the applicant has correctly argued, this is a bailable offence. It is not a capital offence that would, according to law, disentitle the applicant from his right to bail.

The applicant has already been convicted and sentenced. A sentence in a criminal case starts to run immediately it is pronounced. Bail or bond pending appeal may be granted by the trial court or the High court, only if there are unusual or exceptional circumstances. The likelihood of success of the appeal is also a factor to be taken into account – see **ADEMBA –vs- REPUBLIC** [1983] KLR 442.

The learned Counsel for the applicant has argued that the trial court denied the applicant an opportunity to be heard or call his witnesses. He did not refer me to the relevant pages in the proceedings which indicate that the applicant was denied an opportunity to give his defence or call witnesses.

I have perused the record of proceedings. On 21st August, 2006 Mr Njagi for the applicant applied for an adjournment on the ground that the applicant, who was the accused in the subordinate court, was unwell. The court granted a last adjournment and put the defence case for 28th August, 2006. On that 28th August, 2006, counsel for the applicant was initially absent from court. No explanation was given for his absence. The accused informed the court that his advocate was coming. By 9.45 am the counsel for the applicant did not appear in court. The applicant did not complain to the magistrate that he could not proceed without an advocate. He went ahead and gave his defence on oath and was cross-examined. Mr Njagi for the applicant seems to have appeared within the course of the defence case and re-examined the applicant, and closed the defence case. He did not indicate that there was any defence witness to be called. The accused also did not indicate that he wanted to call any defence witness.

From the record, I find the assertion by counsel for the applicant that the applicant was not allowed a chance to defend himself or call defence witnesses as fallacious. It is not supported by the record. It cannot be a basis for persuading me to grant bail to the applicant pending the hearing and determination of his appeal.

Counsel for the applicant has also submitted to me that there are glaring discrepancies and irregularities in the proceedings. He has not pointed to any particular discrepancies or irregularities. It was for him to show or demonstrate to me those glaring irregularities or discrepancies. He has failed to demonstrate the alleged glaring irregularities or discrepancies.

I am not by any chance saying that this appeal has no merits. In an application for bail pending appeal I have to look for unusual or exceptional circumstances. I find none. The applicant was sentenced to serve fifteen (15) years imprisonment on 15th September, 2006, which is about six (6) months now. I do not think that a substantial part of the sentence will be served before the appeal is heard and determined.

For the above reasons, the application for bail and suspension of sentence pending appeal cannot succeed. Consequently, I dismiss the same.

It is so ordered.

DATED and delivered at Nairobi this 12th day of March 2007.

Geroge Dulu

Judge

In the presence of –

No appearance for applicant

Mrs. Kagiri for state