



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.284 OF 2007

EPHANTUS NYAGA GACHIRI.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

The applicant was, on 27th October, 2006 found guilty of rape by Senior Resident Magistrate **L.W. Gicheha**. He was committed to jail for a term of ten years, and subsequently, on 20th March, 2007 he filed a petition of appeal. Now as the appeal abides hearing, the applicant comes before this Court by his Chamber Summons of 18th April, 2007 praying for bail/bond.

The applicant's grounds are, firstly, that he has already filed an appeal, being Criminal Appeal No. 145 of 2007, "which has overwhelming chances of success"; secondly, that the issues for determination in the appeal are straightforward, arguable and meritorious; and thirdly, that the applicant is likely to suffer irreparable damage, prejudice, psychological and emotional loss by being held continuously in custody during the pendency of the appeal.

The factual information to validate the foregoing contentions is contained in the affidavit sworn by the applicant's advocate, on 19th April, 2007.

Learned counsel for the applicant, **Mr. Muturi Njoroge**, urged on the basis of s.357(1) of the Criminal Procedure Code (Cap.75) that his client be admitted to bail pending appeal. He contended that the applicant's appeal had an overwhelming chance of success. He submitted that the trial Court had entered a conviction even though important witnesses to corroborate the complainant's case had not been called, so that the evidence tendered as a whole was inconclusive.

Learned counsel cited items 2, 3 and 4 in the grounds of appeal as most significantly demonstrating that the appeal had high chances of success. These grounds are as follows:

- (i) that, the trial Magistrate misguided herself by admitting hearsay evidence without warning herself on the effects such evidence would have on the whole of the judgement;
- (ii) that, the trial Magistrate failed to consider the fact that the testimonies of PW1 and PW4 were inconsistent and incredible;
- (iii) that, the trial Magistrate failed to consider the demeanour of crucial witnesses.

Learned State Counsel **Ms. Gakobo** opposed this application, and submitted that it carried no elements demonstrating that the appeal had overwhelming chances of success. She urged that the conviction had been entered on the basis of reliable evidence, especially that borne by the testimonies of PW1, PW2, PW3 and PW4. PW4 gave testimony on the suffering sustained by PW1, at the hands of the applicant, and on her initiatives to get the complainant to hospital for medical care. **Ms. Gakobo** contested the claim made for the applicant, that the complainant's employer should have been called as a witness, as a basis for arriving at a safe conviction; for the said employer had not been at the *locus in quo* at the time of commission of the offence charged.

Learned State Counsel submitted that there were no exceptional circumstances relating to the applicant, demonstrated in Court, such as should persuade the Court to grant bail pending appeal; and although counsel for the applicant had pleaded psychological and emotional stress suffered by the applicant while held in custody, no medical evidence of the same had been produced.

Ms. Gakobo urged that if remaining in custody during the pendency of the appeal merely subjected the applicant to inherent inconveniences that attend upon conviction and imprisonment, then this would not be a ground for granting bail pending appeal.

Ms. Gakobo submitted that remaining in custody pending the hearing of the appeal would not prejudice the applicant, since, in all probability, the appeal would have been heard and determined fairly early, within his current term of imprisonment. She urged, in the circumstances, that the application lacked merit, and should be dismissed.

In his reply, learned counsel **Mr. Njoroge** submitted that the simplest demonstration of the seriousness of the appeal, is that it should be *pending* – which it is, in the instant case. Other relevant considerations, counsel urged, are that there exist special circumstances to justify bail pending appeal; that the applicant may or may not abuse the terms of bail, if it is granted; and that the applicant has already served part of a lengthy jail term.

From the affidavit evidence placed before the Court, and from the grounds stated, as well as from the submissions of counsel on both sides, it is evident that the appeal will be a contentious one in which it cannot be said, *ex facie*, and contrary to the contention made for the applicant, that the issues favouring his position are “outright, express, arguable and meritorious.” It's another way of saying that overwhelming chances of success cannot immediately be perceived, as the mark of the appeal. The main yardstick that guides this Court in determining whether or not bail pending appeal is merited, is whether, on the face of the trial Court record, and of the application lodged, it can be said that the application has lots of apparent merits and, indeed, has overwhelming chances of success. I am in agreement with the learned State Counsel, in this matter, that the mere fact that hardships of confinement in custody inure to the applicant, would not be reason to grant bail pending appeal.

I have to state that I have not, in this matter, perceived any radical factor touching on the merits of the applicant's appeal, which would in fairness, dictate that the Court should grant bail pending appeal. Consequently I will make orders as follows:

- 1. Prayers (a) and (b) in the applicant's application by Chamber Summons, dated 18th April, 2007 are refused.**
- 2. The Registry shall list the applicant's appeal dated 19th March, 2007 for hearing on priority.**

DATED and DELIVERED at Nairobi this 13th day of June, 2007.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Tabitha Wanjiku

For the Applicant: Mr. M. Njoroge

For the Respondent: Ms. Gakobo