

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 66 of 2007

DANIEL NDUNGU KIBEAPPELLANT

Versus

REPUBLIC RESPONDENT

(Appeal from conviction and sentence of the Resident Magistrate’s Court at Othaya in Criminal Case No.689 of 2006 by Mutuku M.W. – RM)

R U L I N G

The applicant was convicted of the offence of handling stolen property contrary to *section 322 (2)* of the Penal Code. He was upon conviction sentenced to 3 years imprisonment. Being aggrieved by the conviction and sentence, the applicant has lodged the instant appeal. He now seeks to be admitted to bail pending the hearing and determination of his appeal.

In support of the application, the applicant who appeared in person submitted that the appeal had overwhelming chances of success. That if the application is not granted the appeal would be rendered nugatory. He further submitted that the charge before the trial court was not proved beyond reasonable doubt. For this proposition he fell back to the case of **Dhahabu Ibrahim V Republic (1983) KLR 608.** The applicant also submitted that he was HIV positive and the diet within the prison facilities cannot help matters. Finally he submitted that he was willing to abide by any terms and conditions that this court may impose in allowing the application.

Mr. Orinda, learned principal state counsel opposed the application on behalf of the state. Counsel submitted that the appeal had no overwhelming chances of success. That the evidence on record was compelling as against the applicant. The evidence of the complainant was consistent and was corroborated by PW4. That the court observed the demeanor of PW1 and was impressed. This finding according to counsel, cannot be overturned by the appellate court. Counsel further submitted that the sickness of the applicant was not a consideration in an application of this nature. That the sentence imposed was neither harsh nor manifestly excessive as to invite the intervention of the appellate court. Finally counsel submitted that the appeal could not be rendered nugatory as it is likely to be heard in the next 6 or so months so that, the applicant cannot claim that he would have served a substantial portion of the sentence.

In the case of **Dominic Karanja VS Republic (1986) KLR 612,** it was held that in matters of bail pending appeal

“.....The most important issue was that the appeal had such overwhelming chances of success, there was no justification for depriving the applicant of his liberty and the minor relevant consideration would be whether there were exceptional or unusual circumstances....”

It would appear therefore that for an applicant to succeed in an application of this nature, he has to demonstrate, one that the appeal has overwhelming chances of success and two, that there are other exceptional or unusual circumstances pertaining to the appeal and or the applicant.

I have perused the proceedings and the judgment of the trial court and considered all that against the

grounds of appeal, the affidavit in support the application, the applicant's submissions and the reply thereto by the learned state counsel. I am of the view that at this stage there is not before me an overwhelming chance of the appeal being successful. No doubt the evidence on record links the appellant to the crime. I will say no more on this lest I tie the hands of the judge who may preside over the appeal.

The applicant was sentenced only on 22nd March, 2007. The sentence imposed was 3 years. In the premises the fear that the applicant would have served his term by the time the appeals comes up for hearing is baseless as I am certain that the appeal shall be heard early next year. The appeal will thus not be rendered nugatory as claimed by the applicant.

Had the sentence imposed been short, it would perhaps have been a minor but relevant consideration coming close to an exceptional or unusual circumstances. As I have already indicated, the applicant is unlikely to have served his full term or a substantial portion thereof by the time the appeal comes up for hearing. There are no other exceptional or unusual circumstances regarding the applicant or the appeal that have been brought to my attention that could have swayed my hand towards granting the application, save for his HIV positive status. However, sickness perse as correctly argued by the learned principal state counsel is not a consideration in applications of this nature. I am aware that our prison facilities have health facilities that can adequately address the applicants concerns on his HIV status: I am aware that the Anti retrovirals are now easily available in the prison medical facilities.

The conclusion I have inevitably come to is that the issues raised by the applicant are not the kind of issues that may tilt my hand therefore in favour of granting the application. Accordingly this application lacks merit and is for dismissal. The application stands dismissed.

Dated and delivered this 26th day of November, 2007.

M.S.A. MAKHANDIA

JUDGE