REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Misc Crim Appli 456 of 2005

(From original conviction and sentence in Criminal Case number 1845 of 2003 of the Chief Magistrate's Court Kiambu, M. W. Wachira, SRM)

ANTHONY MUCHAI KIBUIKA …….....……APPLICANT

VERSUS

REPUBLIC …….....……...RESPONDENT

RULING

The applicant was charged with two counts of Robbery with Violence contrary to Section 296(2) of the Penal Code. Following a lengthy trial, he was convicted on the lesser charge of Robbery contrary to Section 296(1) of the Penal Code. Upon conviction he was sentenced to seven (7) years imprisonment on each count. The sentence was ordered to run concurrently.

The applicant was aggrieved by both the conviction and sentence and hence lodged an appeal to this court being Criminal Appeal Number 454 of 2005. By an application filed in Court on 30th August, 2005, the applicant now seeks to be released on bail pending the hearing of the appeal. The application is supported by an affidavit sworn by the applicant in which he basically depones that:

"… ***in view of the prolonged delay in the hearing of*** **my** ***appeal I feel that Justice denied and I now seek to be released on bond/bail pending the hearing of the appeal …"***

In his oral submissions in support of the application, the applicant stated that he was ailing from diabetes and ought therefore to be released so as to seek proper medical treatment.

The application was opposed. Mr. Makura submitted that the major consideration on applications of this nature is whether the appeal has overwhelming chances of success or whether there are exceptional circumstances. According to the Learned State Counsel, the appellant had not been able to demonstrate to the satisfaction of the court any of the above conditions. The learned State Counsel further submitted that the evidence adduced during the trial was consistent and corroborative. That the applicant was positively identified by the witnesses. That in her judgment the learned trial Magistrate reduced the charge to simple Robbery on the ground that it was not the applicant who threatened to shoot the complainant but his accomplices. This was a gross misdirection in law according to the learned State Counsel. The applicant and his accomplices had common intention. They committed the offence of robbery with Violence jointly. Consequently during the hearing of the appeal the State would be seeking that the sentence be enhanced to that of Robbery with Violence. On the applicant's sickness, the learned State counsel submitted that sickness perse was not a ground for granting bail pending appeal where the applicant can receive treatment whilst in prison.

In the case of ***DOMINIC KARANJA –VS- REPUBLIC (1986) KLR 612*****,** the Court of Appeal laid down the principles that guide courts in considering applications of this nature. The court delivered itself thus

"…***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 consideration would be whether there were exceptional or unusual circumstances. The previous good character of the applicant and hardships, if any, facing his family were not exceptional or unusual factors. Ill-health perse would also not constitute an exceptional circumstance where there existed medical facilities. A solemn assertion by an applicant that he will not abscond if released, even if it is supported by sureties, is not sufficient ground for releasing a convicted person on bail pending appeal…..***"

Having carefully considered the application, the affidavit in support thereof, the submissions made in support and in opposition to the application and having glanced through the proceedings and judgment of the Lower Court, I am not persuaded that the applicant's appeal has any overwhelming chances of success. As correctly pointed out by the learned State Counsel, the applicant was positively identified by P.W.1, P.W.2 and P.W.3. In particular P.W.1 and P.W.2 had spent a lot of time with him. He was not at all disguised. It was during the day. So that the issue of mistaken identity cannot arise. I need not say more less I tie the hands of the Judge who may eventually hear the appeal.

As for the applicant's sickness, that perse again is not a ground for granting the applicant bail pending appeal. I am aware that there are medical facilities within our Prisons. The Diabetic condition of the applicant can therefore be adequately managed within those facilities. If the facilities aforesaid were unable to contain the applicant's condition, he can always be referred to other Government Health facilities such as Kenyatta National Hospital for proper management of the condition.

In the upshot then, I hold that the applicant has not demonstrated that his appeal has overwhelming chances of success. Secondly, his diabetic condition is not unusual or exceptional circumstance as to warrant the applicant being admitted to bail pending appeal. The application is therefore dismissed.

Dated at Nairobi this 16th day of February, 2006

…….

MAKHANDIA

JUDGE