



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 29 of 2005

LAWRENCE NDUHIU KIGOTHO.....
.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

Lawrence Nduhiu Kigotho hereinafter referred to as the Applicant was tried and convicted by the Acting Principal Magistrate Karatina for the offence of stealing a motor-vehicle contrary to **Section 279 A** of the Penal Code. He was sentenced to serve 5 years imprisonment. Being dissatisfied He has appealed to this court against his conviction and sentence. He now applies to this court to be released on bail pending the hearing of his appeal.

Mr. Gathiga Mwangi who appeared for the applicant contends that his appeal has very high chances of success as his conviction was based on identification which was not adequate. It is also contended that the applicant is suffering from stomach ulcers and needs to be admitted to bail to enable him obtain appropriate medical attention. In this regard the case of **Shah v Republic [1986] KLR 528** was quoted.

Mr. Orinda who appeared for the state opposed the application for bail. He contended that the main issue for consideration is whether the appeal has chances of success. In this respect Mr. Orinda submitted that there was sufficient evidence in support of the applicant's conviction and therefore his appeal did not have good chances of success. Mr. Orinda sought to distinguish the case cited contending that the type of illness suffered was different and that the information given on the Applicant's illness was inadequate.

In the case of **Ademba v Republic KLR [1983] 442** the court of appeal held as follows: -

“Bail pending appeal may only be granted if there are exceptional or unusual circumstances. 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.”

This position was restated again by the court of appeal in the case of **Jivrah Shah v Republic [1986]KLR 605**, when the court held inter alia,

“The Principle consideration in an application for bail pending appeal is the existence of exceptional or unusual circumstances upon which the court of appeal can fairly conclude that it is in the interest

of justice to grant bail. If it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of some substantial point of law to be urged and that the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail will exist. The main criteria is that there is no difference between overwhelming chances of success and a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed and the proper approach is the consideration of the particular circumstances and weight and relevance of the points to be argued.”

In the case of *Shah v Republic [1986] 528* relied upon by the Applicant, the Hon. Simpson C.J. (as He then was) considered only the issue of the Applicant's illness. He refused to consider whether the appeal had overwhelming chances of success as He thought that might embarrass the court hearing the appeal. The decision does not however depart from the two earlier decisions which I have referred to in that the Hon. Simpson C. J. considered the illness of the applicant to be so serious as to form an exceptional circumstance.

In this case the applicant herein is alleged to be suffering from peptic ulcer disease. Although it is alleged He has been having the problem since 1994, no medical records were produced in support of this contention. Moreover the court has not been given any explanation as to why the applicant cannot be taken for treatment at Nyeri Provincial General Hospital or even referred to Kenyatta National Hospital. One gets the impression that the letter dated 2nd May 2005 signed by the Registered Clinical Officer in charge Nyeri Main Prison, was only prepared to assist the applicant in this application. In my view, there is no evidence that the Applicants alleged condition is life threatening or that He cannot get appropriate treatment.

As regards the applicant's appeal I have perused the proceedings and judgment of the lower court. While I concede that the appeal may be arguable, it cannot be said that the chances of success are so obvious.

I find that the applicant has not shown any exceptional or unusual circumstances to warrant his release on bail pending appeal. I therefore reject his application for bail pending appeal.

Dated, signed and delivered this 29th day of June 2006.

H. M. OKWENGU

JUDGE