



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

Criminal Appeal 16 of 2006

JOSEPH KAIBUNGA APPLICANT/APELLANT

AND

THE REPUBLIC RESPONDENT

(Being an application for bail pending appeal under section 357 of the Criminal procedure Code, Cap 75 of Laws of Kenya)

RULING OF THE COURT

The applicant's application is a Notice of Motion expressed to be brought under the provisions of section 357 of the Criminal Procedure Code (C.P.C.) in which he seeks an order releasing him on bail pending the hearing and determination of his appeal. The appeal was filed on 14.2.2006. The application is supported by three grounds on the face thereof, namely:-

- (a) That the appeal has overwhelming chances of success.
- (b) That the applicant will abide by the terms of bail, if the same is granted as he did in the lower court.
- (c) That unless bail is granted, the appeal will be rendered nugatory as the applicant will have served substantial part of the sentence by the time the appeal is heard.

The application is also supported by the sworn affidavit of DAVID MAITAI RIMITA, and advocate for the applicant. Mr. Rimita has deposed that the applicant has given him instructions to file the appeal on his behalf after he (appellant) was sentenced to serve 18 months' imprisonment by the Tigania Resident Magistrate on 8.2.2006 in Tigania Criminal Case No. 1422 of 2005. He has also deposed that on perusal of the lower court record, he is of the opinion that the pending appeal has high chances of success and further that if the order sought is not granted, the applicant is likely to serve the entire sentence before his appeal is heard and determined.

In brief, Mr. Rimita contended that during the appeal, the appellant will be attacking the qualifications of the person who compiled the medical report which he says ought to have been prepared by a medical doctor. Secondly, that the appellant will show that the trial court failed to consider the appellant's defence and further that the learned trial magistrate failed to note that the police were biased against the appellant by withholding evidence on the P3 form until the same came up during cross-examination of the clinical officer.

The application is opposed. On the issue of the clinical officer, Mr. Muteti learned counsel for

the respondent contended that the definition of a medical practitioner under S 77 (1) of the Evidence Act (Cap 80) as amended by Act No. 14 of 1991 includes a clinical officer, and that the medical report was properly before court and therefore the appellant's appeal has no chance whatsoever of succeeding on that ground. In addition, Mr. Muteti contended that the medial evidence in respect of injuries sustained by the applicant does not show on which part of the body the applicant was injured.

On special circumstances, namely that the applicant is likely to serve the whole of the sentence before his appeal is heard, Mr. Muteti contended that the applicant is the author of his own misfortune by failing to file this application immediately he was convicted. Mr. Muteti also contended that the fact that the applicant was on bail in the lower court is of no consequence at this stage because he is a convict who has lost the benefit of the presumption that he is innocent until proven guilty.

Going back to the provisions of law under which this application is brought, there is no doubt that section 357(1) of the Criminal Procedure Code gives this court wide discretion to order the release of any person who has entered an appeal to bail with or without sureties. The applicant herein filed his appeal on 14.2.2006. A copy thereof is exhibited with this application.

The main issue for determination in this application is whether the applicant has demonstrated to this court that he is entitled to the exercise of this court's discretion in his favour. Mr. Muteti for the respondent thinks that the applicant is not so entitled for the reason that the applicant's appeal has no such overwhelming chances of success as contended by Mr. Rimita on the applicant's behalf.

The principles upon which this court should act in applications of this nature were explicitly stated in the case of **DOMINIC KARANJA – V- REPUBLIC (1986) KLR 612** in which it was held that:-

1. 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 considerations would be whether there were exceptional or unusual circumstances.
2. The previous good character of the applicant and the hardships if any, facing his family were not exceptional or unusual factors. Ill health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners.
3. 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.

As to what constitutes exceptional circumstances was considered in the case of **SOMO –V- REPUBLIC (1972) EA 476** (a case of persuasive authority to this court) where it was held that circumstances such as” That the appellant is of good character, that the appeal has been admitted for hearing, that the offence did not involve personal violence are not exceptional or unusual circumstances. In both this **Somo case** and **LAMBA –VS – R. (1958) E.A. 337**, the court had thought that the most important issue to consider in applications of this nature is whether there are exceptional or unusual circumstances. The **DOMINIC KARANJA** case (supra) has changed that view so that the issue of whether or not there are exceptional or unusual circumstances is only of minor consideration.

The reason why the courts have been reluctant to grant bail pending appeal as a mater of course came out from the judgment of **HARRIS J** in the case of **CHIMABHAI – VS – REPUBLIC (No. 2) (1971) EA 343** where the learned judge stated that:-

“It is manifest that the case of an appellant under sentence of imprisonment seeking bail lacks one of the strongest elements normally available to an accused person seeking bail before trial,

namely that of the presumption of innocence, but nevertheless the law recognizes to an extent one time unknown, the possibility of the conviction being erroneous or the punishment excessive, a recognition which is implicit in the legislation creating a right of appeal in criminal cases."

In light of the foregoing, what is the applicant's position? I shall first deal with ground (b) in support of the application and that is that the applicant will abide by the terms of the bail, if the same is granted as he did in the lower court. This ground does not have any legs to stand on in view of the principles set out in the authorities that I have referred to above.

The other ground is that the appellant's appeal has overwhelming chances of success. I have perused the grounds of the Petition of Appeal and the submissions made to me by both counsels on the issue. In Mr. Rimita's view, this ground is premised mainly on the fact that the person who examined the complainant and thereafter proceeded to produce the P3 form was not a medical practitioner as defined by law. To this Mr. Muteti contented that the position as stated by Mr. Rimita is not correct. Without in any way getting into the merits of the appeal, I do not think that on the grounds set out in the Petition of Appeal it can be said that the applicant's appeal has such overwhelming chances of success that there is no justification for depriving the applicant of his liberty. For this reason, the application must fail.

The other minor consideration is whether the applicant's appeal shall be rendered nugatory unless he is released on bail for the reason that by the time his appeal is heard he will have served either the whole or a substantial part of the sentence. Taking all factors into account, it is more likely than not that by the time the appellant's appeal is heard, he may have served a substantial part of his sentence.

In the result, and for the reason that the appellant's appeal may not be heard within reasonable time the applicant's application for bail pending appeal is allowed on the following conditions:-

1. The applicant shall execute a personal bond of Kshs. 300,000/= (three hundred thousand)
2. The applicant shall in addition to (1) above procure two sureties of Kshs. 300,000/= each. The said sureties shall be approved by the Deputy Registrar in the normal manner.
3. The applicant shall report every Monday morning to the OCS Nchiru Police Station (or such other officer as the OCS may designate) until the hearing and final determination of Criminal Appeal No. 16 of 2006.

Orders accordingly.

Dated and delivered at Meru this 26th day of July, 2006.

RUTH N. SITATI

JUDGE