



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Crim Misc Appli 97 of 2006

JENNIFER GACHOGA APPLICANT

VERSUS

REPUBLIC RESPONDENT

(Being an application for bail pending appeal)

RULING OF THE COURT

On the 19.2.2006, the applicant filed his Notice of Motion application, expressed to be brought under section 357 of the Criminal Procedure (CPC), seeking to be released on bail pending appeal. The application is premised on the following grounds:-

1. That the appeal has overwhelming chances of success.
2. That the applicant will abide by the terms of bail, if same is granted.
3. That injustice will be occasioned if this application is not granted.
4. 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 and determined.

There are two sworn affidavits in support of the application, the first of which is sworn by Mr. Joseph Mwangi, advocate for the applicant. Mr. Mwangi has deposed that the applicant, who is a woman of good character was convicted and sentenced to 18 months imprisonment on 14th July 2006 in Meru Criminal Case No. 412 of 2004. That the applicant, being dissatisfied with the conviction and sentence has appealed and that the applicant's appeal has overwhelming chances of success. The Petition of Appeal comprising 8 grounds of appeal is annexed to the application. Among the grounds raised are that the judgment was against the weight of evidence and that the learned trial magistrate failed to consider the applicant's defence.

The second affidavit is sworn by the applicant herself. She deposes therein that she was sentenced to 18 months imprisonment after being convicted in Meru Cr. Case No. 412 of 2004. She had been charged with the offence of grievous harm contrary to section 234 of the Penal Code. She has also deposed that the appeal has overwhelming chances of success. She further deposes that she is a person of good character, having faithfully abided by the terms of bond granted to her by the lower court. Finally, the applicant has deposed that she is of frail health and lives on continuous medication. Annexed to her affidavit and marked "JGI" is a bundle of receipts for drugs and treatment from various health

institutions.

The application is opposed. The learned state counsel contends that all the available evidence points to the fact that the applicant was at the scene of crime and that she is the one who inflicted the injuries complained of against her mother-in-law. Mr. Oluoch also contends that the medical documents produced by the applicant in an effort to persuade the court to find that there are special circumstances to dictate the exercise of this court's discretion in her favour should be disregarded as these, have no direct bearing on the applicant's current state of health.

The question that is for the determination of the court at this stage is whether the applicant is entitled to the order sought? Before I answer that question, it is necessary to set out the applicable principles in applications of this nature. These principles were set out by the Court of Appeal in the case of **DOMINIC KARANJA –VS- REPUBLIC (1986) KLR 612**. The earlier case of **Somo –vs – R (1972) EA 476**, which was a High Court decision of persuasive authority to this court also dealt with what may amount to special circumstances that would necessitate the exercise of discretion in an applicant's favour. In yet the much earlier decision of **CHIMABHAI –VS – R. (1971) EA 343**, (also a decision of persuasive authority to this court), the learned judge (Harris J) 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 the **DOMINIC KARANJA** case (supra) the Court of Appeal restated the applicable principles in the following words found at page 612:-

“The most important issue here is if the appeal has such overwhelming chances of success that there is no justification for depriving the applicant of his liberty. The minor relevant considerations would be whether there are exceptional or unusual circumstances. The previous good character of the applicant and the hardship, if any, facing the wife or children of the applicant are not exceptional or unusual factors: See SOMO –VS- REPUBLIC (1972) EA 476. A solemn assertion by an applicant that he will not abscond if he is released is not sufficient ground, even with sureties, for releasing a convicted person on bail pending appeal.”

The upshot of the above ruling by the Court of Appeal is that in exercising its wide discretion under section 357(1) of the CPC, the court should not be carried away by the convicted person's assertions that he/she will abide by the terms of the bail/bond if the same is granted nor should the court be unduly influenced by the convicted person's plea to be released on the ground that the family is suffering as a result of the imprisonment.

In the present case, the applicant contends that she will abide by the terms of bail if the same is granted, but as stated by their lordships in the **DOMINIC KARANJA** case (above), this contention by the appellant is of no consequence in determining whether or not the application before me should succeed. The applicant also contends that she is a person of good character, but again, a convict's good character is of no consequence in considering applications of this nature.

Taking all the above principles into account, and also considering the contending submissions by counsel for both the applicant and the respondent, I am not persuaded that the applicant has demonstrated to this court that his appeal has such overwhelming chances of success that there is no point of continuing to hold her behind bars. I have read through the grounds of the Petition of Appeal and have also read through the judgment by the learned trial magistrate and find that it is not obvious on the face of the Petition of Appeal that the appeal has overwhelming chances of success. On this ground, the application fails.

I have also addressed my mind to the minor point put forward by counsel for the applicant to the effect

that if this application is not allowed, the applicant is likely to serve all or a substantial part of the sentence before her appeal is heard. In the peculiar circumstances of the situation obtaining at the Meru High Court with regard to the diary for criminal appeals, it is possible that by the time the appeal is heard, the applicant will have served a substantial part of the 18 months' imprisonment. For this reason and this reason only, do I allow this application.

In the result, 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/= with one surety of a like amount. The surety to be approved by the DR in the normal manner.
2. The applicant shall appear for the mention of her case once every month until the appeal is heard and determined.
3. Mention on 19.9.2006.

Orders accordingly.

Dated and delivered at Meru this 1st day of August 2006.

RUTH N. SITATI

J U D G E