



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CRIMINAL APPEAL 36 OF 2004

ELVIS KIMANI MUTURI.....APPELLANT/APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an Application for bail pending Appeal from the Conviction and Sentence of V.

W. Wandera Esq., Senior Principal Magistrate in Eldoret Chief Magistrate's Court

Criminal Case No.1966 of 2001 read on 28th September 2004)

REPUBLIC PROSECUTOR

-VERSUS-

ELVIS KIMANI MUTURIACCUSED

JUDGEMENT

The applicant was charged in the lower court with two offences. The first count was for stealing from the person contrary to section 279 (a) of the Penal Code (Cap.63), while the second count was for theft contrary to section 275 of the Penal Code (Cap.63). He was convicted of the offence of stealing from a person, and acquitted of the offence of stealing contrary to section 275 of the Penal Code. He was sentenced to serve 2 years imprisonment. He was sentenced on 28th September 2003 but filed his appeal on 3rd November 2004, after having been granted leave to appeal out of time on 8th June 2004.

He then filed this application for bail pending appeal dated 10th June 2004. The application was brought under section 357(1) of the Criminal Procedure Code (Cap.75). The grounds of the application are as follows:

- 1) The appeal has overwhelming chances of success.
- 2) There are exceptional or unusual circumstances.
- 3) No justification exists for depriving the applicant of his right to liberty pending the determination of the appeal.

The application is also supported by an affidavit sworn by the applicant Elvis Kimani Muturi.

At the hearing of the application Mr. Kigamwa for the applicant submitted that the appeal has overwhelming chances of success. He sought to rely on ground (1) of the petition of appeal. He stated that the offence of stealing from the person was not proved beyond any reasonable doubt as there was no evidence that the complainant tendered Kshs.500/= to the appellant. He also submitted that a prospective witness Peris Muthui was not called to testify. He submitted that there was no evidence that the money had moved. Also that it is not possible to keep money in the mouth for 2 hours. He submitted that the defence tendered before the trial magistrate was credible and that, before the appeal is heard and determined, the appellant will have served the sentence.

Learned State Counsel Ms. Oundo opposed the application. She submitted that no overwhelming chances of success of the appeal had been shown. Also that no exceptional circumstances had been shown to the court to warrant granting of bail pending appeal.

In an application for bail pending appeal, the most important consideration by the court is whether there are overwhelming chances of success in the appeal. In this regard I am fortified by the decision of Tanui.J. in the case of Mundia –versus- Republic 1986 KLR 623. The issue of the possibility of the sentence being fully served before the appeal is determined is a matter to be taken into account, but the major consideration is whether the appeal has overwhelming chances of success

In our particular case, the applicant was sentenced to serve two years imprisonment. He took almost a year before filing an application for leave to file an appeal out of time. That leave was granted on 8th June 2004. That accounts for most of the delay in having the appeal heard and determined. The delay was not beyond the applicant's powers. Therefore the fact that he might serve sentence before the appeal is determined, in my view, does not operate to his favour, as the delay in filing appeal was caused by him as he filed his appeal on 3rd November 2004 more than a year after he was sentenced on 28th September 2003.

As to whether the appeal has overwhelming chances of success, I have considered the record of proceedings, the petition of appeal as well as submissions of counsel for the applicant in this application. In my view, the only issue on appeal that could convince me of overwhelming probability of success in the appeal, is ground 3 of the appeal. The ground alleges that the prosecution was conducted by an unqualified prosecutor. However, having perused the proceedings in the lower court, I find that PC Mwangi and PC Simiyu only appeared on mention dates, and did not participate in the prosecution of the case. No actual proceedings in the trial took place during that attendance. I am therefore not persuaded that this appeal has overwhelming chances of success. It is merely an arguable appeal.

For the above reasons I am not satisfied that there are factors, which justify the granting of bail pending appeal, and consequently the application is declined.

Delivered and Dated at Eldoret this 17th Day of February 2005

George Dulu

Ag. Judge