



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISCELLANEOUS CRIMINAL APPLICATION
NO.840 OF 2003

FRANCIS ASANYO MOBISA..... APPLICANT

VERSUS

REPUBLIC..... RESPONDENT

RULING

The applicant herein was on 25.09.03 convicted on count 1 of being in possession of a firearm without a firearm certificate, contrary to section 4 (2) (a) of the Firearms Act (Cap. 114) and on count 2 of being in possession of ammunition without a firearm certificate, contrary to section 4 (2) (b) of the same Act. He was sentenced 5 (five) years imprisonment under each count.

On 09.10.03 he filed High Court Criminal Appeal No.918 of 2003 against his conviction and sentence and on 30.10.03 filed the present application for bail pending appeal on the following grounds:-

1. That the applicant's appeal has been admitted to hearing and is therefore not frivolous and has a high probability of success. 2. That the granting of this application for bail pending appeal will not be detrimental to the interests of justice.

3. That there is likely to be a delay before the appeal can be heard, by which time the applicant would have served a substantial part of his sentence.

The applicant's application is supported by an affidavit sworn by his counsel, Mr. Pravin Bowry on 30.10.03. The affidavit states, inter alia, that the applicant's appeal has a high probability and likelihood of success; that there are serious matters of law and fact to be determined at the appeal and the appellant's case has an overwhelming chance of success; that the applicant's appeal is likely to take considerable time before being heard and finally determined as there are likely to be many pending appeals in the High Court Registry and that this would result in the applicant having served a substantial portion of the sentences imposed.

At the hearing of this application the applicant was represented by Mr. Bikundo. He basically echoed the grounds and sentiments alluded to above and added that there will be no detriment to the interests of justice if bail is granted.

Respondent's counsel cited the following cases: (1) **Chimnambhai vs Republic** (No.2) [1971] EA 343. The High Court (Harris, J.) held in that case, inter alia, that anticipated delay in the hearing of the appeal together with other factors **could** constitute good grounds for granting bail pending appeal. The Judge in Chimnambhai's case followed **Rex vs Akbarali Juma Kanji** (1946) 22 (1) KLR 17 in which the High Court (Harris, J.), inter alia, held that anticipated delay in the hearing of the appeal together with other factors could constitute good grounds for granting bail pending appeal. The next case cited by applicant's counsel was **Abdullahi vs Republic** [1971] EA 346 in which the High Court (Kneller, J.), inter alia, held that bail pending appeal may be granted in exceptional circumstances. Applicant's counsel also cited **Republic vs Hasham** [1971] EA 348 in which the High Court of Tanzania, inter alia held that the fact that an offence is serious does not outweigh the circumstances of the individual offender. Finally applicant's counsel cited **Motichand vs Republic** [1972] EA 399 in which the High Court (Muli, J.), inter alia, held that it is sufficient (for purposes of bail pending appeal) if the appellant demonstrates a probability of success on appeal rather than an overwhelming probability of success.

Other than Motichand's case, the decisions in the other cases cited by applicant's counsel are couched in permissive or optional terms.

In his submissions before me, learned applicant's counsel contended in line with Motichand's case, which was followed by the High Court (Oguk, J.) in High Court Criminal Appeal No.64 of 2002, **Manoj Ratilal Sangani vs Republic**, that that the test in considering whether or not to grant bail pending appeal is not overwhelming probability of success of the appeal but merely probability of success. I wish to point out that Motichand's case was decided by a single Judge in 1972. It is, with respect, a persuasive but not binding authority on me. The subject has also been considered in other decisions of the High Court. In **Somo vs Republic** [1972] EA 476, the High Court (Trevelyan, J.), inter alia, held that the most important ground is that the appeal has an overwhelming chance of being successful: in that that case there is no justification for depriving the applicant of his freedom.

The rationale is that after conviction there is a presumption that the conviction was proper, hence the need for a convict wishing to be granted bail in anticipation that his appeal will succeed to show that there is an overwhelming probability that his appeal will succeed. This is the view I hold and I note from **Dominic Karanja vs Republic** [1986] KLR 612 that the Court of Appeal thinks likewise. In Dominic Karanja's case the Court of Appeal, inter alia, held as follows:

“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.”

Learned counsel for the respondent, Mr. Monda opposed the applicant's application and expressed the view that the applicant had not demonstrated that his appeal stood overwhelming chances of success.

I have duly perused the lower court record and considered the submissions made by learned applicant's counsel. In my respectful view the applicant has **not** demonstrated that his appeal stands overwhelming chances of success.

The applicant's application for bail pending appeal is hereby dismissed. Order accordingly

Delivered at Nairobi this 19th day of February, 2004.

B.P. KUBO

JUDGE