



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPLICATION NO. 16 OF 2003
CONSOLIDATED WITH
CRIMINAL APPLICATION NO. 17 OF 2003**

**(From Original Conviction and Sentence in Criminal Case No. 893 of 2003 of the
Chief Magistrate's Court at Mombasa – A.N. NGUGI – RM).**

ANISA FARAJ.....1ST APPLICANT

2ND APPLICANT

-VERSUS

REPUBLIC..... RESPONDENT

RULING

The applicants made two separate applications i.e. miscellaneous Criminal applications numbers 16 and 17 of 2003 which were consolidated when they were presented for hearing before this court on 9.4.2003. The applicant in an application number 16 would be the 1st applicant and the applicant in No. 17 would be the 2nd applicant and the court directed that file No. 16 be used.

The application is by way of a notice of motion dated 7th April 2003 seeking for the applicant to be admitted to bond and or bail pending appeal. The application is based on the affidavits of Mr. Magolo advocate.

The main grounds of the application were that the applicants have filed their petitions of appeal and that the same had high chances of success. Secondly that the applicants are sick and need special diet and attention. Thirdly that even if conviction was to be sustained the appellate court may interfere with the sentence which the applicants may have served fully or substantially before the appeal is heard. Fourthly, that the appellants were on bond pending trial and had a chance to take care of young children under their car.

The application was opposed by Miss Kwena who appeared for the State on the ground that the appeal has no chances of success. Secondly that there are no extraordinary circumstances which warrant this court to admit the applicants to bond or bail.

In dealing with applications for bond or bail pending appeal this court will follow the principles which have been established in past decisions The principles were laid down in the case of **RAGHBIR SINGH LAMBA =VS= R [1958] E.A. 337** where

It was held:

- (i) The principle to be applied is that bail pending appeal should only be granted for

exceptional and unusual reasons.

(ii) Neither the complexity of the case nor the good character of the applicant nor the alleged hardship to his dependants justified the grant of bail but had the court been satisfied that there was an overwhelming probability that the appeal would succeed, the application would have been granted.

Another principle was also developed in the case of **CHIMAMBHAI =VS= R [NO.2] [1971] E.A. 343** where it was held 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 principles laid down by the above decisions were further restated and expounded in the case of **SOMO =VS= R. [1972] E.A. 476** In this later decision it was stated that the mere fact of delay in hearing an appeal is not of itself an exceptional circumstance but it may become an exceptional circumstance when coupled with other factors. Also that good character of the appellant may for example, together with the delay in hearing the appeal constitute an exceptional circumstance. It has also been stated that the single fact of there being two identical applications with one being allowed and the other being refused was of itself an unusual and exceptional circumstance. I will also add that the failing health of an appellant may also influence the decision of this court to grant an applicant bail pending appeal as an unusual circumstance. Secondly, the issue of hardship being visited on the dependants of the appellant particularly children will be considered as an unusual and exceptional circumstance to influence this court to grant bail pending appeal.

I have perused the application and the supporting affidavit plus the annexures. I am of the opinion that though the appeal has not been admitted, the same is not frivolous. The same is arguable. However I am not convinced that the appellant's ailments are that serious to enable this court categorise them as exceptional circumstances. I am also not persuaded in this case that the 1st applicant's children's hardship will be an unusual circumstance to warrant me grant bail pending appeal. No peculiar circumstances were laid before this court to convince this court to accept that line of submission.

The age of the 2nd applicant is not also a factor for me to consider as an unusual and exceptional circumstance.

In granting bail pending appeal, the principal danger against which the court must guard is of course, that the appellant may in the meantime either abscond or commit further offences. In this regard, the applicants were indeed on bail pending trial and no complaint was raised. Their good character combined with the terms of bail granted pending trial makes this court soften its stand. However the most important is that I will admit the applicants to bail pending appeal because their appeal is arguable and has overwhelming chance of being successful. I will therefore allow the application and order that each of the applicants be released on his or her own bond of KShs.250,000/= plus 1 Surety of like sum.

Dated and Delivered at Mombasa this 10th day of April 2003.

J.K. SERGON

J U D G E