Kabati v Republic (Criminal Appeal 62 of 2023)
[2024] KEHC 8829 (KLR) (24 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8829 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIBERA

CRIMINAL APPEAL 62 OF 2023

DR KAVEDZA, J

JULY 24, 2024

BETWEEN

SGT JOSEPH MUNGATHIA KABATI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The appellant was charged with the offence of committing a civil offence contrary section 133 (1)(b) of the *Kenya Defence Forces Act*, No. 25 of 2012, that is to say attempted murder contrary to section 220 (a) of the *Penal Code*. In the alternative, the appellant was charged with the offence of committing a civil offence contrary section 133 (1)(b) of the *Kenya Defence Forces Act*, No. 25 of 2012, that is to say causing grievous bodily harm contrary to section 231(a) of the *Penal Code*. After a full trial he was convicted and sentenced to serve ten (10) years imprisonment.

2. Being aggrieved, he filed a petition of appeal challenging his conviction and sentence. He also made an application seeking to be released on bail pending the hearing and determination of his appeal. The application is premised on the grounds that the appeal has overwhelming chances of success. The appellant will have served a substantial part of the sentence. He is not a flight risk. He undertakes to abide by the terms set by the court.

3. I have considered the application, the submissions of the parties, and a petition of appeal. The issue that arises for determination is whether the applicant has met the threshold for the grant of bail for pending appeal.

4. The provision of law that applies to bond/bail pending appeal is section 357 of the *Criminal Procedure Code* (Cap 75) Laws of Kenya which provides as follows:

   (1) After the entering of an appeal by a person entitled to appeal, the High Court, or the subordinate court which convicted or sentenced that person, may order that he be released on

bail with or without sureties, or, if that person is not released on bail, shall at his request order that the execution of the sentence or order appealed against shall be suspended pending the hearing of his appeal:

5. The principles for granting bond pending an appeal were reiterated in the case of *Jivraj Shah v Republic* [1986] KLR 605 which laid down the principles as follows:

> "(1) The principal consideration in an application for bond pending appeal is the existence of exceptional or unusual circumstances upon which the Court of Appeal can fairly conclude that it is in the interest of justice to grant bail.
>
> (2) If it appears *prima face* from the totality of the circumstances that the appeal is likely to be successful on account of some substantial point of law to be argued and that the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail exists.
>
> (3) The main criteria are that there is no difference between overwhelming chances of success and a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed and the proper approach is the consideration of the particular circumstances and weight and relevance of the points to be argued."

6. In the case of *Chimambhai v Republic* 1971 EA 343 J. Harris made another observation in such an application when he said;

> "The case of an appellant under sentence of imprisonment seeking bond lacks one of the strongest elements normally available to an accused person seeking bail before trial, namely, the presumption of innocence, but nevertheless the law of today frankly recognizes, to an extent at one time unknown, the possibility of the conviction being erroneous or the punishment excessive, a recognition which is implicit in the legislation creating the right of appeal in criminal cases....."

7. Under Article 49 of the *Constitution* of Kenya an accused person who is facing a criminal charge has a right to bond because he is presumed to be innocent till proven guilty, unlike a case where one is already convicted. I have carefully examined the grounds of appeal raised by the applicant. On the aspect of demonstration of exceptional or unusual circumstances, the court observes that the applicant has not demonstrated any unusual or exceptional circumstances to warrant the grant of bond pending appeal.

8. The appellant also argued that the appellant's appeal is likely to be determined after the sentence is served. The appellant was sentenced to a cumulative time of ten years imprisonment. The applicant's apprehension, as I understood it is that the appeal will take a long to be heard with the appellant having already spent a considerable amount of time in remand custody.

9. Having carefully considered the application and perused the record of appeal in its entirety, I have considered the that the applicant has been in remand custody since 2017, which is a considerable amount of time. As to whether the appellant's appeal will be successful or not, this court's view is that this is a matter that can only be determined after the appeal has been canvassed. However, I am not satisfied that the said grounds disclose the existence of an appeal with overwhelming chances of success. Whereas the appellant may succeed in arguing the said grounds at the hearing of the appeal, I am not satisfied that the chances of the appeal succeeding are overwhelming.

10. The most important fact that this court has taken into account is that the appeal may not be heard and determined to conclusion before the appellant has served a substantial part of her sentence. The modus operendi of this court, having taken judicial notice of the fact that judiciary secretaries are overwhelmed with typing bulky proceedings, is to call for untyped proceeding for purposes of handling applications for revision, miscellaneous applications and other interlocutory appeals. As I write this ruling, the complete record of the subordinate court is yet to be provided.

11. In the *Chimambai vs Republic* (*supra*) it was held that anticipated delay in the hearing of the appeal together with other factors may be grounds for grant of bail pending appeal.

12. For the above reasons, I am inclined to consider the applicant's application favourably. The court, in the circumstances, I hereby make the following orders:

    i. The applicant, Sgt Joseph Mungatia Kabati is granted a cash bail of Kshs. 100,000/= with one contact person.

    ii. The contact person shall avail a copy of his/her National Identity Card, a passport photo and a chief's letter indicating that he/she has known the applicant for a period of more than 12 months, all to be approved by the Deputy Registrar

    Orders accordingly.

RULING DATED AND DELIVERED VIRTUALLY THIS 24TH DAY OF JULY 2024

.....

D. KAVEDZA

JUDGE

In the presence of:

Munene for the Applicant/Appellant

Mong'are for the Respondent

Naomi Court Assistant