Mutwiri alias Japhet Koome v Republic (Criminal Appeal E091 of 2023)
[2024] KEHC 14225 (KLR) (14 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14225 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E091 OF 2023

AK NDUNG'U, J

NOVEMBER 14, 2024

BETWEEN

DENIS MUTWIRI ALIAS JAPHET KOOME ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. Vide an application dated 9th January 2024, the Appellant seeks to be admitted to bail pending hearing and determination of this appeal. The appellant is aggrieved by the conviction and sentence of 21 years imprisonment, hence the instant appeal. He states that the appeal has high chances of success and that he is likely to have served a substantial part of the sentence before the appeal is heard and determined. It is his case that he is not a flight risk.

2. The application is opposed. On record is the Replying affidavit dated 17.1.24.

3. The application was canvassed by way of written submissions.

4. I have had occasion to consider the application, the response thereto and learned submissions on record.

5. Section 357 (1) of the Criminal Procedure Code which provides for admission to bail or suspension of sentence pending appeal reads: -

    (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: Provided that, where an application for bail is made to the subordinate court and is refused by that court, no further application for bail shall lie to the High Court,

but a person so refused bail by a subordinate court may appeal against refusal to the High Court and, notwithstanding anything to the contrary in sections 352 and 359, the appeal shall not be summarily rejected and shall be heard, in accordance with such procedure as may be prescribed, before one judge of the High Court sitting in chambers.

6. The main consideration in application seeking bail pending appeal were best articulated in Simon Mwangi Kirika v Republic citing Jivraj Shah v Republic [1986] KLR 605 in which it was stated: -[3]Criminal App No. NAI 3 of 2006 (UR).[4]{1986} KLR 605 where the court stated;

   "i. The principal consideration in an application for bail pending appeal is the existence of exceptional or unusual circumstances upon which the Court of Appeal can fairly conclude that it is in the interests of justice to grant bail

   ii. If it appears prima facie 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.

   iii. The main criteria is 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.

7. Further guidance on the grant of bail pending appeal is found in the Bail and Bond Policy Guidelines provide at page 27, paragraph 4.30 that with respect bail pending appeal, the burden of proof is on the convicted person to demonstrate that there is an "overwhelming probability" that his or her appeal will succeed.

8. Different considerations do, of course, arise in granting bail after conviction from those relevant in the granting of bail pending trial. Decided cases are in agreement that before bail can be granted to an applicant for bail pending appeal there must always be a reasonable prospect of success of the appeal. However, even where there is a reasonable prospect of success, bail may be refused in serious cases notwithstanding that there is little danger of an applicant absconding. The proper approach should be towards allowing liberty to persons where that can be done without any danger to the administration of justice. To apply this test properly it is necessary to balance both the likelihood of the applicant absconding and the prospects of success. These two factors are inter-connected because the less likely the prospects of success, the more inducement there is on an applicant to abscond.

9. In the present appeal, the submissions made by the appellant are self- defeating in so long as demonstration of the strength of the appeal is concerned. The Appellant disowns the Petition of appeal filed stating that he would wish to file fresh grounds of appeal since his erstwhile counsel misled him.

10. It is not therefore possible to weigh with any degree of certainty the probability of the success of the "intended" appeal as the grounds to be relied upon are, as it were, not disclosed to the court yet in a petition. Curiously, the Appellant raises an issue that was not raised in the trial, to wit, that his advocate misled him not to defend himself despite knowing that he was not Denis Mutwiri Mwiti. This issue is not captured in his Petition of appeal already filed and it is not possible then to gauge the chances of success of that line of defence and it remains to be seen how the Appellant shall navigate the legal conundrum which may require an application for additional evidence on appeal.

11. No unusual or exceptional circumstances have been demonstrated to warrant the grant of bail pending appeal.

12. In any event, the proceedings in the lower court have since been prepared and with the concerted efforts of the Appellant, it is possible to dispose of this appeal in 3 months.

13. With the result that I find the application without merit and it is hereby dismissed.

14. Let the Appellant move with speed to prosecute the appeal.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 14TH NOVEMBER 2024

A.K. NDUNG'U

JUDGE