



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL EO30 OF 2021

JACKSON KOMU KYENGO.....APPLICANT

VERSUS

PROSECUTORRESPNDENT

RULING

1. The appellant herein was on 25th March, 2021 sentenced to six months imprisonment by Hon Christine Auka of Kwale Senior Resident Magistrate's court after having been convicted of the charge of malicious damage to property contrary to 339 (1) of the penal code. Particulars of the charge as framed by the prosecution was that, on 13th September, 2018 at around 16.00 hours at Miatsani village Kizibe Sub-location, Mwaluphamba Location, Matuga Sub county of Kwale County within Coast region willfully and unlawfully damaged wire fence the property of Michael Muthee Njunga valued at Ksh 100,000.

2. Aggrieved by the said conviction and sentence, he filed what is referred to as the memorandum of appeal dated 14th April, 2021 citing five grounds of appeal. Contemporaneously filed with the said memorandum of appeal is a notice of motion seeking leave to appeal out of time as well as bail pending appeal. The application is premised on grounds set out on the face of it and averments contained in an affidavit sworn by the appellant on 14th April, 2021.

3. Basically, the application is anchored on the grounds that; the applicant is very old aged 67 years; he is a blind man as evidenced from the doctor's report annexed thereof; the sentence is too short hence the possibility of serving the full term before the appeal is heard and determined; he was very cooperative and obedient to bond terms imposed during his trial, and that bail is a constitutional right.

4. During the hearing, the state indicated that they were not opposed to the court granting leave to appeal out of time. Consequently, the hearing proceeded on the aspect of release on bail pending the hearing and determination of the appeal. In his submission, Mr. Asige appearing for the applicant reiterated the averments contained in the grounds and affidavit in support of the application. Learned counsel submitted that the applicant is a sick man who is also blind. He contended that, in view of the current situation of Covid-19, he is having challenges in independently leading prison life without the support of anybody else. In counsel's view, this is an exceptional circumstance to warrant release of the applicant on bail pending appeal.

5. Further, counsel submitted that the applicant is a senior citizen aged 67 hence should not have been subjected to imprisonment term. Mr Asige went further to state that the applicant is serving a short imprisonment term which he is likely to serve in full before the appeal is heard and determined thus a possibility of rendering the appeal useless should it succeed.

6. Learned counsel urged the court to take into account that the applicant had faithfully attended court during his trial thus vindicating his plea that he is not a flight risk. It was further submitted that the applicant is a first offender and that his appeal has high chances of success considering that the criminal charges were irregularly preferred instead of the complainant pursuing a civil remedy.

7. M/s Karanja prosecution counsel opposed the application arguing that, the appeal does not have overwhelming chances of success; blindness and old age at 67 years are not reasonable grounds to warrant release on bond. Learned state counsel opined that the letter from the Doctor dated 12th April, 2021 was conveniently obtained to secure release of the applicant in this application. Regarding the allegation that the complainant's claim was of a civil nature, M/s Karanja asserted that the act of destroying a fence is criminal in nature not a civil act.

8. I have considered the application herein, affidavit in support and counsel's rival submissions. As stated earlier, the prayer for leave to appeal out of time is spent as the state was not opposed to it. Leave to file appeal out of time is hereby granted. The applicant to file and serve a petition of appeal within 14 days.

9. Having held as above, I am left with the key prayer of release of the applicant on bail pending appeal. The application herein has been brought under Article 49 (1) of the Constitution and Sections 349 and 357 of the Criminal procedure code.

10. Section 357 of the Criminal Procedure Code provides for admission to bail or suspension of sentence pending appeal. It states at Sub section (1) as follows;

“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 and determination of the appeal.”

11. Unlike bail pending trial where one is presumed innocent until proved guilty, bail pending appeal is more of a restricted right which is exercised at the discretion of the court. However, the right to fair hearing does not determine at the conviction stage. One is entitled where appropriate and not as a matter of course to an opportunity to exhaust his right of appeal without unnecessary hindrance. Therefore, an appellant should be enabled to achieve that right unless there are sufficient reasons necessitating the denial. See Gerald Macharia Githuka Vs Republic Criminal Appeal No 119/2004 where the court held that;

“the corner stone of the justice system is that no one will be punished without the benefit of due process including the right to exhaust the right to appeal. Incarceration before trial or pending the hearing of the appeal cuts against this principle...”

12. It is incumbent upon the applicant to prove the requisite conditions which have been adopted in several judicial precedents inter alia; proof that the appeal has overwhelming chances of success; that there are exceptional circumstances to warrant such release and, that the sentence imposed is too short to the extent that the applicant is likely to serve full term or substantial sentence by the time the appeal is heard and determined.

13. In the case of Jivraj Shah V Republic (1986) KLR and Simon Mwangi Kirika V Republic Cr Appeal No. 3/2006 Nairobi (UR2/2006) the principles for consideration before granting bail pending appeal were set out as follows;

i. Existence of exceptional or unusual circumstances

ii. If it appears from the totality of the circumstances that the appeal is likely to be successful on account of some substantial law.

iii. That the sentence or substantial part would have been served by the time the appeal is heard.

14. Similar position was held in the case of Rebecca Nabutola Vs Republic (2012) e KLR

15. There is no dispute that the applicant is serving a sentence of six months after he failed to meet the option of paying ksh100,000 as compensation to the complainant instead of serving a jail term. He was given 30 days to pay but when he failed, he was then sentenced to six months. He has since served one month thus leaving him with five months to go or serve full term.

16. In view of the short sentence and the overwhelming work in the criminal division implying that it will take quite a while before the appeal is heard and determined, the applicant would have served full sentence thus rendering the appeal nugatory. I am persuaded that that ground is convincing hence the applicant should not be denied the opportunity to exercise his right of appeal.

17. As regards the issue of whether the appeal has high chances of success, the court must be cautious not to delve into the merits of the appeal. I will safely say that, the appellant has an arguable appeal which should not be summarily be dismissed. Concerning exceptional circumstances, the appellant claimed that he is sick and blind. There was no evidence to show that he is sick and whether the alleged sickness cannot be adequately dealt with by the prison’s facilities.

18. However, on account of blindness and old age, I take judicial notice that with the Covid -19 now rampant in our prison facilities, it is almost impossible to get support from fellow inmates. It is obviously a challenge for him to independently survive in that kind of environment. In the circumstances, I am convinced that at his age and condition, it falls within the category of exceptional circumstances. However, that does not mean that if the appeal is dismissed he cannot go back to prison and face the same reality.

19. Besides the three main grounds referred to herein above, the court is further guided by other ancillary conditions like; the fact that the applicant is not a flight risk and that he has previously obeyed bail terms imposed pending trial. Having held as above, I am persuaded to find that the application herein is merited and the same is allowed with orders that;

a. The applicant be and is hereby admitted to bail pending appeal.

b. That the applicant shall deposit a cash bail of ksh 30,000

c. That upon release, he shall continue attending court proceedings until the appeal is heard and determined.

Dated, signed and delivered virtually at Mombasa this 6th day of May,2021

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J. N. ONYIEGO

JUDGE