



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**MISCELLANEOUS CRIMINAL APPLICATION NO. 3 OF 2020**

**SAMMY CHONE MWENDA .....APPLICANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**Coram: Hon. Justice R. Nyakundi**

**Mr. J. S. Kaburu for the Applicant**

**Ms. Sombo for the State**

**RULING**

**THIS IS AN APPLICATION** for bail pending appeal which I have allowed. The applicant was charged, tried, convicted and sentenced to a total of seven (7) years imprisonment for an offence of being in possession 16 rolls of cannabis sativa together with four (4) others. Having been dissatisfied with the judgement and sentence, he has lodged an appeal vide **HC Criminal Appeal No. 1 of 2020**.

The applicant sought bail pending appeal on the grounds that he was the 4<sup>th</sup> Accused in **Criminal Case No. 529 of 2018** and contends that he was joined with strangers as he walked on a footpath hence his charge and conviction was a serious mistake. He has also averred that he complied with the bail granted before his conviction and that he has always attended court whenever he was required to attend and which bail was set at Kshs.10.000/=. The Applicant believes that his appeal is not frivolous and it has overwhelming chances of success and that he was convicted and sentenced as a first offender.

Further grounds are that given the time it will take to hear and determine the appeal, and if successful the appeal will be rendered nugatory and the applicant would have suffered great injustice and that the applicant has a young family (a wife and a child).

The prosecution objected to the application through grounds of objection filed on the 18<sup>th</sup> of February, 2019. It is contended that the applicant has not demonstrated that the appeal has high chance of success, that he has not annexed any document to show that indeed he was offered an opportunity to study at Kenya Maritime School and that the right to cash bail granted to the applicant during trial is not applicable to a person who has already been convicted.

Further grounds that, the Respondent argues that it is only right to focus on the main appeal since it is already filed and pending and that the sentence imposed upon the applicant was within the ambit of the law and upon the discretion of the court.

**The Law**

The principles for granting bail pending an appeal were reiterated in the case of **Jivraj Shah v Republic (supra)** 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 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.”*

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.....”***

In **Dominic Karanja v Republic (1986) KLR 612**, the Court of Appeal stated in alia:

***“(a) The most important issue was that if the appeal had such overwhelming chances of success, there is no justification for depriving the applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances;***

***(b) The previous good character of the applicant and the hardships if any facing his family were not exceptional or unusual factors. Ill health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners;***

***(c) A solemn assertion by an applicant that he will not abscond if released, even if it is supported by sureties, is not sufficient ground for releasing a convicted person on bail pending appeal;***

***(d) .....***

In view of the above set out principles, it is clear that when a person is convicted and sentenced, the applicant’s right to be presumed innocent until the contrary no longer prevails particularly so in case of appeal against both sentence and conviction. Where there are no positive grounds for granting bail it is generally refused.

It is trite that the grant of bail pending appeal is a matter of discretion of the court guided by the aforementioned principles. Of course the discretion of the court must be exercised judiciously. In matters of bail pending appeal, the onus is incumbent upon the applicant to establish that the appeal has high chances of success or that there is a likelihood of him serving a substantial part of the sentence before the appeal is heard and determined. Normally, the greater the likelihood that he will abscond the higher the chances of denying him bail.

Other factors which must also be taken into account include the right to the individual freedom and security in Article 29, human dignity in Article 28 and rights to equality before the Law under Article 27.

I have carefully perused the grounds of appeal raised by the applicant. He argues that he was convicted without any sufficient evidence, the court misdirected itself by failing to consider that the contradiction in the prosecution case were not fatal, that the learned magistrate misdirected himself on the law pertaining to cases of joint possession, that the quantum of the cannabis sativa in this case does not warrant the length of the sentence imposed by the learned magistrate, that the counsel for the Appellant was not given a chance to submit during trial, hence the trial was in breach of Article 50 on due process and right to a fair hearing and that the sentence of seven years imprisonment without an option for fine was manifestly excessive in the circumstances among other grounds.

I have had the privilege of perusing the record of proceedings to determine whether the grounds of appeal raised by the appellant disclose an arguable appeal with high chances of success. I have also looked at the judgement of the learned magistrate. I have noted among other things that the applicant was not found in actual possession of the cannabis sativa hence the possibility of him having been mistakenly trumped up with other accused persons is high. It is my view that the appeal is arguable with high chances of success.

On the limb of whether there arise any exceptional circumstances to warrant the appellant to be granted bail pending appeal, the Applicant has not attempted to advance a contention on the same. Hence, has not proved any exceptional circumstances to warrant relief sought.

It is true that given the sentence handed out to the Appellant, a substantial part of that sentence will have been served by the time this appeal is heard and determined. This court has already admitted that the intended appeal by the appellant herein has high chances of success. In that respect, in the event that the said appeal succeeds, the appeal may be rendered nugatory.

Having also considered that the Applicant did not breach the bail conditions in the lower court. With his appeal having high chances of success, there would be little or no reason for him to abscond. The respondent herein has also not offered sufficient reasons to show that the applicant will abscond if granted bail. It is my finding that the application has satisfied the basic requirements and that it is merited. The application is hereby allowed.

***(a) The applicant is hereby released on a cash bail Kshs.20,000/= or surety bond of Kshs.20,000/= with one surety of identical amount.***

***(b) The Record of Appeal be filed and served upon the respondent within thirty (30) days from today’s date.***

***(c) Pursuant to Clause b above directions on the appeal be taken on 24<sup>th</sup> March 2020.***

***(d) The deprived liberty of the applicant takes effect pursuant to this order.***

It is so ordered.

**Dated, signed and delivered at Malindi this 20<sup>th</sup> day of February, 2020**

.....

**R. NYAKUNDI**

**JUDGE**

**In the presence of:**

1. Mr. J. S. Kaburu for the appellant
2. Ms. Sombo for the state