



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 8 OF 2020

TIMOTHY NDWIGA NYAGA..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

A. Introduction

1. Vide an application dated 25/06/2020 the applicant moved this court for orders that he be granted bail pending hearing determination of this appeal.
2. The grounds in support of the application were that he was tried, convicted and sentenced to serve five (5) years imprisonment on 9/12/2019 for the offence of causing grievous harm contrary to Section 234 of the Penal code. That being dissatisfied with the said conviction and sentence he filed the instant appeal which has overwhelming chances of success and he stood to suffer irreparable harm in the event the prayers sought were not granted. Further that he was the sole bread winner of his family and had children who depended on him and that he was out on bail during trial and always attended court and would continue to do so when released on bail pending appeal.
3. The Respondent opposed the said application vide a replying affidavit sworn by Ms. Mati and where it was deposed that the applicant was rightfully convicted as the evidence therein was consistent and further that it was not demonstrated that the appeal had high chances of success. Further that the sentence was proper to serve the retributive purpose.
4. At the hearing of the application, the parties elected to canvass the same by way of written submissions. Pursuant to these directions the parties filed their rival written submissions.

B. Issues for determination

5. From the analysis of the application, the response by the Respondent and the rival submissions filed therein, it is my opinion that the issue for determination by this court is whether the application herein is merited.

C. Application of the law and determination

6. Article 50(2)(q) of the Constitution of Kenya 2010 guarantees the right of every accused person, if convicted, to appeal to, or apply for review by, a higher court as prescribed by law. Pursuant to the provisions of **Section 357 (1) of the Criminal Procedure Code** an accused person may be released on bail pending appeal. The said section provides as thus: -

“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.”

7. **It is clear from the above provision that jurisdiction** to grant bail pending appeal is discretionary and the same must be exercised judicially bearing in mind that an applicant who has been convicted by a competent court and is serving sentence cannot be presumed innocent. The said conviction stands until set aside on appeal and thus it is not wise or to set the applicant at liberty either from the point of view of his welfare or of the state unless there is a real reason why the court should do so (See **Mutua –vs- R, [1988] KLR 497**).

8. Further it should be borne in mind that the right to bail pending appeal is not a guaranteed constitutional right and the same ought to be distinguished from bail pending trial (as provided under Article 49 of the Constitution) since once a trial court has made a determination and found an accused guilty of the offence, he is no longer considered innocent for his guilt has already been established.

9. In Jivraj Shah –vs- Republic [1986] KLR 605, the court laid down the principles which courts ought to consider **in exercise of the discretion to grant bail pending appeal** and the said principles are: -

- a) *Whether the appeal has overwhelming chances of success.*
- b) *Whether there are exceptional or unusual circumstances to warrant the court's exercise of its discretion.*
- c) *Whether there exists a high probability of **the sentence or substantial part of it, having been served by the time the appeal is heard***

10. **The burden of proof is always on the applicant to prove these factors/principles.**

11. On whether the appeal has overwhelming chances of success, the rationale for considering the chances of success was given in Somo vs. R (supra) where the court held thus: -

“There is little if any point in granting the application if the appeal is not thought to have an overwhelming chance of being successful, at least to the extent that the sentence will be interfered with so that the applicant will be granted his liberty by the appeal court. I have used the word “overwhelming” deliberately for what I believe to be good reason. It seems to me that when these applications are considered it must never be forgotten that the presumption is that when the applicant was convicted, he was properly convicted. That is why, where he is undergoing a custodial sentence, he must demonstrate, if he wishes to anticipate the result of his appeal and secure his liberty forthwith, that there are exceptional or unusual circumstances in the case. That is why, when he relies on the ground that his appeal will prove successful, he must show that there is overwhelming probability that it will succeed.”

12. As per the court’s dictum in Dominic Karanja v. Republic [1986] KLR 612, overwhelming chances of success should be the most important issue for consideration before granting of bail pending appeal.

13. In determining whether the appeal has overwhelming chances of success which is a requirement herein, the court must consider the petition of appeal *vis a vis* the evidence and the judgment of the trial court and make a conclusion as to whether the *prima facie* the prospects of success are either dim or high. If the court is satisfied that the appeal has overwhelming chances of success, there would be no justification in depriving the applicant of his freedom.

14. I have carefully examined the grounds of appeal raised by the applicant in his petition of appeal as well as the judgment and the proceedings of the trial court and it is my opinion that the same does not give the impression of far-fetched, inadequate or unreliable. Further the issue of the sentence being harsh and excessive will depend on the law and on the arguments presented during hearing of the appeal. In my considered view, the applicant has not satisfied the court as to the arguability of his appeal.

15. On whether there are exceptional or unusual circumstances to warrant the court's exercise of its discretion, the applicant deposed that he was the sole bread winner of his family and had children who depended on him. Further that he was out on bail during trial and always attended court and would continue to do so when released on bail pending appeal. In Dominic Karanja v. Republic (supra), the court held that: -

“The minor relevant considerations would be whether there are exceptional or unusual circumstances. The previous good character of the applicant and the hardship, if any, facing the wife and children of the applicant are not exceptional or unusual factors: see Somo v. Republic [1972] EA 476.

16. Further in Peter Hinga Ngatho versus Republic [2015] eKLR it was held that: -

the fact that the Applicant did not breach the bail conditions in the court below, is not an exceptional circumstance which can warrant a decision to admit an applicant to bail pending appeal.

17. It is my opinion therefore that the applicant did not satisfy the condition as to there being exceptional or unusual circumstances to warrant the court's exercise of its discretion.

18. The other issue is whether there exists a high probability of **the sentence or substantial part of it, having been served by the time the appeal is heard. This court at the moment is hearing appeals filed this calendar year which means that there is no backlog on appeals. It is hoped that this appeal once admitted will be given a hearing date and be disposed of without delay. This aspect of delay has not been established in my view.**

19. **It is my finding that the applicant has not established a case for granting bail pending appeal.**

20. **I find no merit in this appeal and I accordingly dismiss the application. The same was not proved and hence this court ought not to consider the same.**

21. **It is hereby so ordered.**

DELIVERED, DATED and SIGNED at EMBU this 15th day of October, 2020.

F. MUCHEMI

JUDGE

Ruling delivered through video link in the presence of Mr. Kathungu for the Appellant