



REPUBLIC OF KENYA

IN THE HIGHCOURT OF KENYA AT MILIMANI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 241 OF 2018

SIMON KIHORO MAINA.....APPELLANT/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

*(An application for bail pending appeal).*

**RULING**

1. The Applicant was charged and convicted for the offence of obtaining a sum of Kshs. 920,000.00 by false pretence contrary to Section 313 of the Penal Code. He was sentenced to serve three years imprisonment on 14<sup>th</sup> September, 2018 and has since filed an Appeal to this Court. In his application dated 4<sup>th</sup> December 2018, he now seeks to be admitted to bail pending appeal. He also prays that the court do grant any further order to ensure the expeditious disposal of the appeal. The said application is supported by a self-sworn affidavit of even date. Attached to the affidavit are handwritten diet plan notes and a treatment charge sheet to the effect that the Applicant was admitted at Mbagathi County Hospital and treated for diabetes and high blood pressure.

2. During the hearing of the application, the Applicant's counsel Mr. Kinyanjui submitted that the Applicant's appeal has overwhelming chances of success. To support that contention, he stated that the trial magistrate failed to consider the exhibits produced by the Appellant in proof of the fact that the Kiantutu Slum Upgrading Scheme from which the complainant was to buy ninety (90) plots indeed existed. He argued that the trial court failed to consider that the dealing did not amount to obtaining by false pretence. Counsel further argued that the Appellant is advanced in age and suffers from diabetes and high blood pressure which will only be worsened by the prison environment as he will not be able to access proper treatment and care. Further, counsel asserted that the Appellant had been out on bond throughout his trial without absconding court. This was proof that he will faithfully comply with the terms and conditions of the bail pending the hearing of his appeal if granted. Lastly, counsel submitted that since the Appellant was sentenced to three years imprisonment, he was likely to serve a substantial part of the sentence thereby rendering his appeal nugatory.

3. Ms. Atina for the State conceded to the application. She noted that the court is not admitting fresh appeals currently. Therefore, the Appellant is likely to serve a substantial part of his three years custodial sentence by the time the appeal is heard and determined.

4. Bail pending appeal, unlike bail pending trial, is not a constitutional right. This is in view of the fact that the Appellant is now a convict who has already been found guilty of the offence he was charged with before the trial court. He does not therefore have the benefit of presumption of innocence which is normally available to an accused person who is yet to face trial. In **Samuel Macharia Njagi –vs- Republic [2013] eKLR**, Abuodha, J rendered himself as follows:

***“The Appellant/Applicant is prima facie a convict and his constitutional freedoms and rights are thus significantly circumscribed by his conviction. He no longer enjoys the absolute presumption of innocence available to a person facing trial at the first instance. In admitting such a person to bail the court ought to, in addition to the principles governing admission to bail pending appeal, bear in mind the possible dilemma of resending such a person to prison in event that his/her appeal fails.”***

5. It is however a statutory discretion to grant bail pending appeal under **Section 357 (1)** of the **Criminal Procedure Code** which provides 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.”***

6. The grant of bail pending appeal is a matter of the court's discretion which must be exercised judiciously. The main principle that must be taken into account in so doing is whether the appeal has overwhelming chances of success. The court will also consider whether there are exceptional circumstances that will justify the grant of bail pending the hearing and determination of the Appellant's appeal. The Court in the case of **Jivraj Shah vs Republic** laid down the principles as follows:-

*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. The Appellant contends that his appeal has overwhelming chances of success. However, a careful perusal of the proceedings and judgment of the trial court reveal that the Appellant indeed received the sum of Kshs. 920,000/= from the complainant with a promise to help him acquire plots within the scheme but never did. Further, I note from the evidence that the complainant was informed by the DC at Thika that the Kiandutu Settlement Scheme was actually non-existent. In view of the foregoing, and without pre-empting the outcome of the Appellant's appeal, this court finds that the appeal is arguable but does not necessarily have overwhelming chances of success.

8. As regards to exceptional circumstances, the Appellant stated that the fact that he was out on bond throughout his trial without absconding was proof that he would comply with the conditions attached to bail/bond pending the hearing and determination of his appeal. He also pointed out that his advanced age coupled with his deteriorating health was incompatible with the prison environment.

9. Although the court sympathizes with the Appellant's medical condition, I am alive to the fact that these two particular factors do not constitute exceptional and/or unusual circumstances which can warrant the grant of bail pending appeal. This is particularly in view of the fact that prisons are equipped with medical facilities which cater for sick prisoners accordingly. Furthermore, the diet sheet exhibited does not show its origin. The medical sheet he provided on the other hand only attests that he went to hospital but the nature of the treatment is not disclosed. I am guided by the Court of Appeal in the case of **Dominic Karanja v Republic (1986) KLR 612** where it was held thus;

*“b) The previous good character of the applicant and the hardships facing his family, and his ill health, where there existed prison medical facilities for prisoners, are not exceptional or unusual circumstances; c) A solemn assertion, even if supported by sureties, that the applicant will not abscond if released is not sufficient ground for releasing a convicted person on bail pending appeal..”*

10. In the present application therefore, the only exceptional circumstance which would justify the release of the Appellant on bail is that he is likely to serve a substantive part of his sentence by the time his appeal is heard and determined. I note that the Appellant was sentenced to serve three years imprisonment on 14<sup>th</sup> September 3018. He has therefore only served only six months of the jail term. I disagree with both the learned counsel for the Appellant and the Sate Counsel that there are no available dates for appeal in the registry. To the contrary, the court is currently hearing appeals for the year 2018. What this means is that the Appellant will certainly be heard on his appeal by the end of the next term of the court. It then suffices to state that he is unlikely to serve a substantial part of his sentence before the appeal is heard and determined. Furthermore, this ground would succeed if, prima facie, the court were to find that the appeal has high chances of success. The reverse is the case in the instant case.

11. In the end, I find that this is an application lacking in merit. I dismiss it with no orders as to costs. The Appellant should fast track the service of the record of appeal after which the Hon. Deputy Registrar of this court should ensure that the appeal is admitted and fixed for hearing before the end of the next term of the court.

**DATED and DELIVERED this 5<sup>th</sup> day of March, 2019**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. Gatumuta for the Appellant/Applicant.

2. M/s Atina for the State/Respondent.