



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 2 OF 2018

(From original conviction and sentence in criminal case No. 295 of 2016 of the Senior Resident Magistrate's Court at Gichugu)

CHARLES NJAGI KANGERI.....1ST APPELLANT

ANTHONY GITHINJI KANGERI.....2ND APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

RULING

1. The applicants Charles Njagi Kangeri and Anthony Githinji Kangeri filed this application under **Section 357 of the Criminal Procedure Code** Cap 75 Laws of Kenya praying that they be admitted to bail/bond pending the hearing and determination of their appeal against the Judgment of Hon. A. N. Makau – Senior Resident Magistrate delivered on 12/1/2018 in Gichugu Criminal case No. 295/2016.

2. The application is based on the following grounds:

- (a). The appellants were convicted and sentenced on 12th January 2018 to serve a term of 5 years imprisonment.
- (b). The appellants have preferred an appeal in this court which has overwhelming chances of success.
- (c). The appellants pray to this court that they be admitted to bail/bond pending the hearing and determination of their appeal.
- (d). The appellants have requested for proceedings and judgment from the Magistrate's Court at Gichugu for purposes of appeal.
- (e). The appellants were informed at the Court Registry that the earliest the proceedings can be availed is probably in March later in the year due to the backlog of the proceedings to be typed and more so because the court typist is on leave and is expected to resume in February 2018.
- (f). The appellants have young families who depend on them entirely for their daily bread, wellbeing and upkeep.
- (g). The Appellants are not flight risk and will abide by all and any conditions given by this court as condition for the grant of bail and/or bond.
- (h). The appellants conducted their trial in the Principal Magistrate's Court while on bail. The appellants attended court all the time they were required to attend and abided by the bail terms.
- (i). The appellants' appeal is likely to take long before it is heard and determined by which time if the appeal is successful the appellants will have served a substantial jail term.
- (j). It is necessary and in the interest of justice that the application be heard urgently and the appellants be admitted to reasonable bail/bond terms pending the hearing and determination of their appeal.

3. The application is also supported by the affidavits of Charles Njagi Kangeri and Anthony Githinji Kangeri where they depones that they were sentenced to serve five years imprisonment for the offence of grievous harm contrary to **Section 234 of the Penal Code** and assault contrary to **Section 251 of the same code**. They were dissatisfied with the conviction and sentence and filed this appeal which they allege has overwhelming chances of success. That there will be delay in hearing and determination of the appeal as the lower court could not supply the proceedings in good time. That he has a young family who depend on him and is not a flight risk. That he is lively to serve a substantial

part of the sentence before the appeal is heard and determined.

4. The state opposed the application and submits that the application does not meet the threshold for granting the application as the grounds do not show that the appeal has overwhelming chances of success.

5. I have considered the application. Bail pending appeal is provided under **Section 357(1) of the Criminal Procedure Code**. It provides:

“ After entering of an appeal by a person entitled to appeal, the High court which convicted and 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 this appeal.”

When considering an application for bail pending appeal, the court exercises its discretion as unlike in bail pending trial which is a right, the appellant is presumed to be properly convicted and held in prison until the court holds otherwise. The discretion must be exercised judiciously. There are various factors to be considered. This include:

- 1) Whether the appeal has overwhelming chances of success.
- 2) There are exceptional circumstances or unusual circumstances to warrant the court’s exercise of its discretion.
- 3) There is a high probability of the sentence being served before the appeal is heard.

6. The leading authority in this matter is **Somo –v- R**, where the Court held that the most important ground in deciding whether to grant bail or whether the appeal has an overwhelming chance of being successful and there were no exceptional or unusual circumstances to justify the grant of bail. The applicant is supposed to satisfy the existent of one or a combination of the conditions mentioned in the above authority.

7. Overwhelming chance of **being successful**. For the court to ascertain this, the court is obliged to go through the proceedings and the Judgment of the trial court and make a finding without going into any detail so as not to prejudice the court which will hear the appeal.

8. This court has not had the benefit of looking at the proceedings and the judgment and its therefore not able to determine whether this ground has been established. I am of the view that the grounds of appeal are not sufficient in the absence of the proceedings and judgment, for this court to determine whether the appeal has overwhelming chances of success. As submitted by Mr. Obiri, State Counsel the grounds of appeal do not provide the bench mark to persuade the court to grant bail pending appeal. The applicants have not demonstrated that the appeal is likely to succeed.

7. The applicants have referred this court to various authorities. In **Dominic Karanja –v- R (1986) eKLR** where the court stated:

“that the most important issue is whether the appeal has overwhelming chances of success, and therefore there would be no justification of depriving the appellant his liberty and the minor relevant considerations would be whether there are exceptional circumstances.”

In **Chimambhai –vs- R 1971 E. A. 343** where it was stated:

“Anticipated delay in the hearing of the appeal together with other factors could constitute good grounds for granting bail.”

In **Jivraj shah –v- Republic (1986) KLR 605** where it was stated:-

“The Principal consideration is an application for bail pending appeal is the existence of exceptional or unusual circumstances upon which the court can fairly conclude that it is in the interest of justice to grant bail. If it appears prima facie from the totality of the circumstances that appeal is likely to be successful on account of some substantial point of law to be argued that the sentence or substantial part of it will have been served by the time the appeal is heard conditions for granting bail will exist. 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 appeal being allowed and the proper approach is consideration of the particular circumstances and weight and relevance of the points to be signed.

In **Peter Hiaga –v- R(2015) eKLR**, The court while pointing out the grounds stated above stated that bail is granted at the discretion of the court.

9. These authorities have settled the law of granting bail pending appeal. My view is that the ground of appeal do not meet the criteria for consideration in granting bail pending appeal. The applicants have failed to demonstrate that the appeal has overwhelming chances of success.

Exceptional or unusual circumstances:-

This has not been proved no facts are disposed in the affidavits to prove any exceptional circumstances which may persuade this court to grant bail.

10. The appellants have not proved that there is likely to be delays in the disposal of the appeal. The appellants deposes that they were sentenced in January 2018 and the trial court stated that proceedings would be ready in March 2018. It is presumed they are how ready. It is not likely that there will be delay in the determination of the appeal.

I am of the view that the applicants have not proved any of the considerations set out for the granting of bail pending appeal. I find that the application is without merits.

CONCLUSION:

The application is dismissed.

Dated and delivered at Kerugoya this 12th day of July 2018.

L. W. GITARI

JUDGE

12/7/2018

Read out in open court,

Mr. Obiri for the state,

Mr. Mwiti for the applicants,

The applicants present,

C/Assistant – Naomi.

Mr. Mwiti:-

May the court call for the records of the lower court to enable the applicants to prosecute the appeal.

L. W. GITARI

JUDGE

Order:-

The Deputy Registrar to urgently call for the proceedings of the lower court to enable the appellants to pursue the appeal.

Mention on 10/10/18.

L. W. GITARI

JUDGE