



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

MISC. CRIMINAL APPLICATION NO 25 OF 2018

FARID JAMALI SHEBWANA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. This ruling is in respect prayer (4) of the applicant's notice of motion dated 24/10/2018. Prayers 2 and 3 were granted when this application first came up on 25/10/2018.
2. The applicant's prayer is to be released on bail pending appeal. The applicant was tried and convicted of the offence of trafficking narcotic drugs contrary to section 4 (d) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994 (NPSA). The documents filed in this application however do not show the sentence that the applicant is serving. The certified proceedings attached have missing pages while the Notice of Motion and the Supporting Affidavit make no mention of the sentence.
3. The application is brought on grounds that section 357 (i) of the Criminal Procedure Code envisages bail pending appeal; that the appeal has overwhelming chances of success and that the appellant has demonstrated that he will not fail to attend the appeal. These grounds are reiterated in the supporting affidavit sworn by Yusuf M. Aboubakar who is the appellant's counsel.
4. Mr. Aboubakar filed extensive submissions in which he elaborated on each ground. He subsequently highlighted the submissions at the hearing of the application.
5. Mr. Kasyoka for the respondent did not object to the application.
6. I have considered the application along the grounds put forth by the applicant. With respect to the law the applicant has correctly stated the applicable law and principles. Section 357 (11) of the Criminal Procedure Code provides a basis for bail pending appeal. The section however does not take away the discretion of the court which must be exercised judiciously. The main consideration, as submitted by the applicant, is that the appellant shall be available to attend court for his appeal. On this score the applicant has pointed out that he was granted bond in the lower court and that he attended his trial. He undertakes to attend the appeal.
7. It is true that the applicant attended his trial and may be trusted to attend court on his appeal. However, without knowing what sentence he is serving it would be difficult to assess the level of risk. This gap makes it difficult for the court to exercise discretion in favour of the applicant.
8. Mr. Aboubakar made extensive submissions that the appeal had overwhelming chances of success. He cited the case of **Somo V Republic [1972] EA** for the proposition that the most important ground is that the appeal has an overwhelming chance of being successful. He cited various instances where in his view the law was not upheld in the investigation and trial stating that the trial court overlooked breaches to the law.
9. I have already stated that the proceedings supplied to the court are incomplete. Each subsequent page was skipped. This makes it difficult for the court to see the relevant testimonies of the witnesses and the gaps put forth by the appellant's counsel. In consequence thereof it is not possible for the court to consider the chances of the appeal succeeding.
10. I have considered all the other grounds upon which bail may be granted to an appellant. While it is trite that an appellant is entitled to exhaust the right of appeal it is also true that an appellant seeking to be released on bail pending appeal lacks the presumption of innocence having been convicted by a court of competent jurisdiction. See **Jeremiah Wachira Wachira Muchiri v Republic [2016] eKLR**.
11. In the final analysis, I have come to the conclusion that the application is not merited. It is dismissed.

12. I direct that the appellant files and serves the record of appeal for expeditious disposal of the said appeal.

Orders accordingly

Ruling delivered dated and Signed at Garsen on 19th day of November 2018.

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R.LAGAT KORIR

JUDGE

In the presence of:-

.....C/A

.....Appellant

.....For Appellant

.....For Respondent