



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL APPEAL NO. 34 OF 2018

BONIFACE MWANGI KAMAU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal from the conviction and sentence dated 30th October 2018 in the chief magistrate's court at Narok in criminal case NO 1542 of 2015, Republic v Boniface Mwangi Kamau]

RULING

1. The applicant has through his notice of motion dated 12th November 2018, applied for bail pending appeal pending the hearing and determination of his appeal pursuant to section 357 of the Criminal Procedure Code [Cap 75] Laws of Kenya.
2. The application is supported by both the grounds that are set out on the face of the notice of motion and on the 12 paragraphs supporting affidavit of his advocate dated 12th November 2018.
3. The major grounds in support of the application are as follows. The applicant has stated his appeal has overwhelming chances of success. Furthermore, he has stated that his appeal involves unusual and unique circumstances. Finally, he has stated that there is a real likelihood that he will have served a substantial part of his sentence before his appeal is heard.
4. In his supporting affidavit, counsel for applicant has deposed to the following major matters. He has averred that prior to being charged and convicted of this offence, the complainant and the applicant had amicably settled a similar complaint to the current one. As a result, the matter was marked as unconditionally withdrawn against the applicant in the spirit of section 176 of the Criminal Procedure Code [Cap 75] Laws of Kenya. He has deposed that the court allowed the applicant to be charged, prosecuted, convicted and sentenced to two years imprisonment.
5. Furthermore, counsel has deposed that the case was not proved beyond reasonable doubt. Instead, counsel deposed that the case was decided on a balance of probability and that the burden of proof was shifted to the applicant. He has also deposed that the applicant stands to serve either the whole or a substantial part of his sentence before his appeal is concluded. Finally, he has deposed that the applicant religiously and timeously attended all his court appearances during the entire period of his trial. It is for these reasons that the applicant urges the court to release him on bail pending the hearing and determination of his appeal.
6. Counsel for the applicant has filed written submissions in support of the application. He has cited a number of authorities including section 357 of the Criminal Procedure Code and *Jivraj Shah v Republic [1986] KLR 605*. According to those authorities an applicant for bail pending appeal has to show the existence of overwhelming chances of success in his appeal. In the alternative, he may also show the existence of unusual or unique circumstances in his appeal to warrant being released on bail.
7. The respondent through her counsel, Ms Torosi has filed written submissions in opposition to the application. She has submitted that for an application for bail pending appeal to succeed, the applicant has to show the existence of overwhelming chances in his appeal or that the appeal involves unusual or exceptional circumstances. She cited this court's decisions in *Munjia Michubu v Republic [2014] eKLR* and *Patrick Nzioka David [2015] eKLR*. She has, based on those authorities submitted that the applicant has not demonstrated that his appeal has overwhelming chances of success or that it involves exceptional or unusual circumstances. She has therefore urged the court to dismiss the appeal.

ISSUES FOR DETERMINATION

8. In the light of the affidavit evidence and the applicable law, I find the following to be the issues for determination.

1. Whether or not there are exceptional or unusual circumstances in the appeal

2. Whether or not the applicant has demonstrated the existence of overwhelming chances of success

3. What are the appropriate orders to be made?

ISSUE 1

9. According to counsel for the applicant, the unusual or exceptional circumstances of the appeal are as follows. The complainant and the accused had amicably settled a similar, complaint as a result of which the complaint was unconditionally withdrawn. Following that settlement, the applicant who was detained at Narok police station was set free. Counsel has therefore submitted that the prosecution and the resulting conviction were in breach of the spirit embodied in section 176 of the Criminal Procedure Code, which imposes a duty on the court to promote reconciliation for *'common assault, or for any other offence of a personal or private nature not amounting to a felony, and not aggravated in degree, on terms of payment of compensation or other terms approved by the court, and may thereupon order the proceedings to be stayed or terminated.'*

10. It is clear from the foregoing that a court is not allowed to promote reconciliation in respect of offences termed as felonies. The applicant is convicted of the offence of cheating, which is a felony. Reconciliation in respect of that offence is therefore not permitted.

11. Furthermore, the ground that the applicant will have served the whole or a substantial part of the sentence is not correct as the appeal may fixed and set down for hearing within 2 months from now; since the record of appeal appears to be ready. In the circumstances, this ground cannot constitute an exceptional or an unusual circumstance.

12. It therefore follows that the applicant has failed to demonstrate that there are exceptional or unusual circumstances in his appeal.

ISSUE 2

13. I also find that the applicant has failed to demonstrate that his appeal has overwhelming chances of success.

ISSUE 3

14. The upshot of the foregoing is that the application fails, with the result that it is hereby dismissed in its entirety.

Ruling delivered in open court this 11th day of December, 2018 in the presence of Mr. Kilele for the appellant and Mr. Omwega for the state.

J. M. Bwonwonga

Judge

11/12/2018