



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

CRIMINAL APPEAL NO. 50 OF 2015

KIOKO MUSYOKA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant was charged with four counts of causing death by dangerous driving contrary to section 46 of the Traffic Act, and a fifth count of carrying excess passengers contrary to section 100(2) of the Traffic Act, in Traffic Case No. 129 of 2015 at the Kithimani Principal Magistrate's Court. He was convicted on the five counts on his own plea of guilty, and sentenced to serve 4 years in jail for the first four counts which sentences were to run concurrently, and to pay a fine of Kshs 10,000/= and in default to serve 3 months in jail for the fifth count. The sentence in default for the fifth count was also ordered to run consecutively with the sentence imposed in counts one to four.

The Applicant subsequently filed an appeal against the judgment of the trial Court by way of a Petition of Appeal dated and filed in Court on 1st April 2015. He also filed an application by way of a Notice of Motion dated 16th April 2015 seeking orders that he be granted bail pending outcome of his appeal. The main grounds of his application are that his appeal is likely to succeed and that he will abide by any bond/bail conditions that the court shall impose.

The Applicant learned Advocate, Leonard Nzioka Ngolya, averred in a supporting affidavit sworn on 16th April 2015 that the Applicant has set forth substantial points of law in his appeal, the most significant one being that he was convicted when his plea did not constitute unequivocal admission of the offence charged. Further, that he was also convicted without being explained to the substance and legal ingredients of the offence charged. It was also contended that the offence on which the Applicant was convicted is bailable, and that he may end up serving a substantial part of his sentence if he is not granted bail pending appeal.

The Applicant's learned counsel also filed written submissions dated 10th December 2015 wherein he reiterated that the plea in the trial Court was mechanically taken, the language used was not stated, and that there was no evidence that translation was done.

The learned Prosecution Counsel, Cliff O. Machogu opposed the application in a replying affidavit he swore on 25th November 2015, wherein he deposed that the Applicant has not demonstrated that his appeal has high chances of success. Further, that the solemn assertion by an Applicant that he will not abscond if released, even if it is supported by sureties, is not sufficient ground for releasing a convicted

person on bail pending appeal.

The learned Prosecution counsel filed written submissions dated 15th May 2015, wherein he contended that a plea of guilty can only be entered by a Court if it is satisfied that a plea is unequivocal and after it confirms the facts are correct. Further, that the Applicant's appeal can be heard on priority basis, so as to address the concern that the Applicant may be prejudiced by serving a substantial part of his sentence before his appeal is heard. It was further submitted by the counsel that the Applicant's application lacks any exceptional circumstance to warrant the grant of bail pending appeal, and reliance was placed on the decision in **Hasbon Kiruja Murithi vs R [2014] e KLR.**

I have considered the pleadings and submissions by the Applicant and Prosecution. I note that unlike an application for bail pending trial where the Applicant has a constitutional right to be considered innocent until proved guilty, an Applicant for bail pending appeal stands on the premise that he has already been found guilty of the offence. In **Mutua vs R, [1988] KLR 497** the Court of Appeal stated thus:

“ It must be remembered that an applicant for bail has been convicted by a properly constituted court and is undergoing punishment because of that conviction which stands until it is set aside on appeal. 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.”

A different test from that applied in bail pending trial is therefore applied in bail pending appeal. When considering an application for bail pending appeal, the court has discretion in the matter which must be exercised judicially taking into consideration various factors as follows:

- a. Whether the appeal has overwhelming chances of success. See **Ademba vs Republic (1983) KLR 442, Somo vs R [1972] E.A 476, Mutua vs R [1988] KLR 497** in this regard;
- b. There are exceptional or unusual circumstances to warrant the court's exercise of its discretion. In this regard see **Ragbir Singh Lamba vs R [1958] E.A 337; Somo vs R (supra.); Mutua vs R (supra.)**
- c. There is a high probability of the sentence being served before the appeal is heard as held in **Chimabhai vs R, [1971] E.A 343.**

In the instant application, I have perused the record of the trial Court, and noted the procedure used in taking the pleas for the five counts the Applicant was charged with. It is an arguable issue as to whether the said procedure can be faulted. The Court also notes that the Applicant was sentenced on 26th March 2015 to imprisonment for four years concurrent sentences, and has therefore served almost one year of his term. It is therefore unlikely that he may serve a substantial part of his prison term before the appeal is heard and determined. I also note that four of the five counts that the Applicant was convicted of do not have the option of a fine.

Given the above circumstances, I am satisfied that this is not a proper case in which to exercise this court's discretion in favour of the Applicant. I accordingly decline to grant the prayer for bond pending appeal in the Applicant's Notice of Motion dated 16th April 2015.

There shall be no order as to costs.

It is so ordered.

DATED AT MACHAKOS THIS 10TH DAY OF FEBRUARY 2016.

P. NYAMWEYA

JUDGE