



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 36 OF 2015

JOSEPH NYAGA KARIUKI.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in CR 1309/12 at Embu Chief Magistrate's Court by P. Biwott (SPM) on 5th May, 2015)

RULING

1. By his notice of motion filed in court on 29th June 2015 and supported by his affidavit, the appellant has applied for bail pending the hearing of his appeal under section 357 of the Criminal Procedure Code (Cap 75) Laws of Kenya. According to his affidavit, the appellant was convicted and sentenced to imprisonment for 15 years in respect of a charge of defilement by the court of the Senior Principal Magistrate on 5th May 2015 at Embu. Furthermore, he has stated that following his conviction and sentence, he lodged an appeal which is yet to be heard and determined. Additionally he says that he was on bail/bond during the original trial that gave rise to this appeal. And for that reason, he has asserted that he will always abide by the terms and conditions which this court will attach to his release on bail. Finally, he has also stated that his appeal has overwhelming chances of success and that he will suffer serious prejudice if he is not released on bail pending appeal.

2. The state through Ms Mbae has opposed the release of the appellant on bail pending appeal. In her written submissions of 24th February 2016, she has submitted that the grounds advanced in support of the application do not meet the threshold for the release of the appellant. According to her, the fact that the appeal was admitted into hearing does not presuppose that it raises triable issues with a likelihood of success. She also adds that the admission of an appeal into hearing is done by the Deputy Registrar, whose work is to confirm compliance, that is to say, whether the record of appeal is in order and then proceed to fix a date for hearing of the appeal. It is not the duty of the Deputy Registrar to determine whether there are triable issues or not. And for this reason, the application of the appellant should be dismissed.

3. In response to ground 3 of the notice of motion, which states that the appellant has a strong arguable appeal and that it raises triable issues, she submits that the prosecution evidence was consistent and corroborated and the prosecution had proved its case beyond reasonable doubt. She has also submitted the fact that the appellant was on bail/bond during trial does not justify his release on bail/bond. The reason being that following his conviction and sentence, the appellant became a convict. In that regard, she cited *Dominic Karanja v. R (1986) KLR 612*. These are her major submissions in opposing the release of the appellant on bail pending the hearing of the appeal.

4. I have considered the rival submissions of both parties. According to **Somo v. R (1972) EA 476**, for an applicant to succeed in being released on bail pending the hearing of his appeal, he must satisfy the following conditions:

1. The applicant must show that he has overwhelming chances of success in his appeal, or
2. There are exceptional or unusual circumstances in his appeal.

5. Admittedly, the threshold set by **Somo v. R, supra** is high. The reason for this is that by virtue of being convicted, the applicant thereby loses his constitutionally guaranteed presumption of innocence in terms of **Article 50 (2) (a) of the 2010 Constitution of Kenya**. The burden is therefore rightly placed on the applicant to meet the threshold before he is released on bail pending appeal.

6. The reasons advanced by the appellant in his supporting affidavit and the notice of motion in my considered view fall short of demonstrating that the appellant's appeal has overwhelming chances of success. Additionally, I also find that the appellant has not shown that there exceptional or unusual circumstances in the appeal. The fact that the appellant was on bail/bond during his trial in the magisterial court does not constitute an exceptional or unusual circumstances to warrant his release on bail pending appeal. According to **R v Kanja (1946) 22 KLR 17** there are exceptional or unusual circumstances in a case where one accused is released on bail and a co-accused is denied bail by the trial court pending the entering of an appeal in terms of section 356 of the Criminal Procedure (Cap 75) Laws of Kenya. In that case a co-accused was released on bail by the High Court, which the trial court had denied him. The co-accused was in a similar position like that of the accused who was released on bail by the trial court.

7. Furthermore, the fact that his appeal has been admitted into hearing under section 352 of the Criminal Procedure Code does not demonstrate that the appellant's appeal has overwhelming chances of success as submitted in ground I of his notice of motion. It shows that there is merit in the appeal, but does not meet the threshold of showing that the appeal has overwhelming chances of success. The admission into hearing of the appeal merely shows that the appeal is not frivolous and is not an abuse of the process of court. It does not in itself demonstrate that the appellant has overwhelming chances of success in his appeal.

8. Counsel for the respondent has submitted that the admission into hearing of an appeal is done by the Deputy Registrar, whose work is to confirm compliance, amongst other matters, that the record of appeal has been prepared. She further submitted that the Deputy Registrar does not determine whether there are triable issues or not. This submission is wrong in point of law. The reason is that the act of admitting an appeal into hearing or summarily reject the same is not an administrative act or ministerial act. It is a judicial act which a judge of the High Court is required to perform. And that is clear from **section 352 (1) of the Criminal Procedure Code**. In terms **section 352 (1)** states as follows:

“When the High Court has received the petition and copy under section 350, a judge shall peruse them, and, if he considers that there is no sufficient ground for interfering, may, notwithstanding the provisions of section 359, reject the appeal summarily”

The summary rejection is a judgement from which an appeal lies to the Court of Appeal. This is clear from the Court of Appeal in **Arnold Pudo Aranda v R (1960) EA 380**.

9. It is for the above reason that in terms of section 352 (3) of the Criminal Procedure Code that the Attorney General (now the Director of Public Prosecutions by virtue of Article 157 of the 2010 Constitution of Kenya) and the appellant or his advocate must be notified of the summary rejection of the appeal, to enable the appellant to appeal, if so desires. The summary rejection is in law a judgement of the High Court which entitles the appellant to appeal to the Court of Appeal. That makes it crystal clear that the summary rejection is not an administrative or ministerial act to be performed by the Deputy Registrar, whose duties are purely ministerial in nature. For these reasons, I reject the submission by counsel for the respondent that the admission into hearing of the appeal is done by the Deputy Registrar.

10. The upshot of the foregoing is that the appellant's application is hereby dismissed in its entirety.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **11th** day of **APRIL 2016**

In the presence of Appellant and Ms Manyala for the State

Court clerk Njue

J.M BWONWONGA

JUDGE

11.04.16