



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**CRIMINAL APPEAL CASE NO. 4 OF 2016**

**NATHANIEL NJAGI KARIBA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**RULING**

- 1. NATHANIEL NJAGI KARIBA** the appellant/applicant herein was charged with the offence of being in possession of *cannabis sativa* contrary to **Section 3 (1)** as read with **Sub section 2 (a)** of **Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994**. He was tried and found guilty vide Gichugu Principal Magistrate's Court Criminal Case No. 39 of 2014 where he was sentenced to serve 2 years imprisonment. He was aggrieved and filed this appeal now pending in this Court.
2. The Appellant has now moved this Court through a Notice of Motion dated 24<sup>th</sup> May, 2016 for bail pending appeal on grounds that the appeal filed has high chances of success and that he may serve a substantial part of his sentence by the time this appeal is heard and determined.
3. In his supporting affidavit sworn on 24<sup>th</sup> May, 2016, the applicant has deposed that he resides within the local jurisdiction of this court and is therefore unlikely to abscond if granted bail.
4. The applicant through counsel submitted that the offence upon which he was convicted did not involve violence. It was contended that the Appellant was convicted of an offence which did not cause harm to the society and therefore he should be considered for bail. He cited the case of **Samuel Macharia Njagi -Vs- R** (Nyeri H.C. Cr. A No. 50/13) to support this contention.
5. The Applicant's counsel submitted that the exceptional circumstance in this appeal is the likelihood of the Appellant serving his term in jail before the appeal is concluded.
6. The Respondent has opposed this application through a replying affidavit by E. P. O. Omayo, learned counsel in the Office of Director of Public Prosecution. Mr. Omayo has contended that the appeal pending herein has no chance of success given the evidence tendered at the trial court. He also contested the contention that ill health should be a factor in considering whether to grant bail pending appeal faulting the Appellant for not annexing any medical documents to demonstrate ill health.
7. Mr. Omayo further contested the Applicant's contention that he should be admitted to bail because he was also out on bond during trial submitting that circumstances have now changed as the Appellant is now a convict. He submitted that granting bail to the Applicant could cause harm to the society since in his view the Appellant could not account for the bhang he was arrested with. It was submitted that the same poses major risk to the society.

8. On authorities cited by the Applicant, the Respondent submitted that the same are not relevant as in his view the prosecution case at the trial was overwhelming and no exceptional circumstances have been pointed out by the Applicant to warrant him getting released on bail pending determination of the appeal herein.

9. The Respondent also contested the fact that this appeal could take long to be disposed of and submitted that the appeal will not take more than a year to be determined.

10. I have considered this application and submissions of both counsels. It is true that given the sentence handed out to the Appellant, a substantial part of that sentence will have been served by the time this appeal is heard and determined. That is one of the factors to be considered whether or not to grant bail or to admit an appellant on bail pending appeal. However, there are other considerations and principles which have been examined before in this respect. The decision in **JIVRAJ SHAH –VS- R [1986] KLR** considered these principles well. In that case the court observed as follows:

***“The principle consideration in an application for bail pending appeal is;***

***1. The existence of exceptional or unusual circumstances upon which the court of appeal can fairly conclude that it is in the interest of justice to grant bail.***

***2. If it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of some substantial point of law to be urged and 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.***

***3. 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 the appeal being allowed and the proper approach is the consideration of the particular circumstances and weight and relevance of the points to be argued.....”***

The above decision shows that the pertinent issue to consider in an application for bail pending appeal under **Section 357** of the **Criminal Procedure Code** is the chances of the appeal and next issue is existence of exceptional or unusual circumstance and then the length or the period of sentence in that order. I have considered the petition of appeal herein and the evidence tendered by the prosecution at the trial. At this stage this Court is unable to establish any point that shows that the appeal pending herein stands high chances of success. The inconsistencies pointed out by the Applicant’s counsel were contested by the Respondent and I consider it save at this stage to leave the issue for canvassing and more interrogation at the hearing of the appeal itself.

11. The Applicant has not also shown this Court any unusual circumstance in this appeal. The contention that he is unwell and that previously he was out on bond during trial is not an unusual circumstance or a factor to be considered. (See the decision in **Daniel Dominic Karanja -Vs- R (1986) eKLR**). I am also not convinced that the nature of the charge upon which the Appellant was convicted does not pose danger to the society. I agree with the State Counsel that on the contrary bhang does pose great danger to the youth and society in general and that is why the sanctions against the offence is tough. This brings me to the next issue which is the sentence handed out to the Appellant. Under **Section 2 (a)** of the **Narcotic Drugs and Psychotropic Substances Act No. 4 of 1994**, a person who is convicted is liable to imprisonment for ten years if the person satisfies the court that the cannabis was solely intended for his own consumption and in any other case imprisonment for 20 years. I am inclined to agree with the Respondent that the sentence meted out against the Appellant was too lenient and could be enhanced by this Court depending on the determination of this appeal. This therefore negates the basis for this application which is the fact that the Appellant may serve a substantial part of his sentence before the appeal is heard and determined.

12. I have considered the authorities cited and besides the fact that the same are not binding to this Court, the same are not relevant because the circumstances obtaining in the cited cases are different from this

case. In the case of **Samuel Macharia Njagi -Vs- R** (Criminal appeal No. 50 of 2013 at Nyeri High Court) the court opined that the offence upon which the accused was convicted did not pose any risk to society or to himself. In this case however, I find that the offence under which the appellant was convicted upon does pose a threat to the society. In the case of **Peter Hinga Ngatho -Vs- R [2015] eKLR** the court found out that the mere fact of anticipated delay was not sufficient to grant bail but found other favourable circumstances which included non-compliance by the trial court of **Section 200** of the **Criminal Procedure Code**. In this appeal I have found no other favourable factors to the Applicant's application. I found the Ugandan decision cited ineligible so I was unable to get the *ratio decidendi* of the decision and its relevance to this application.

13. As I have already pointed out above, the Applicant has not supported his contention of ill health with medical evidence and even if he is suffering from a medical condition, the same can be managed at the prison facility where the Appellant is held. There is no evidence tendered that the condition cannot be managed from the prison.

I have also looked at the record of appeal and note that the appeal was admitted on 6<sup>th</sup> April, 2016. There is nothing preventing the Appellant from setting down his appeal for directions with a view to disposing it. In the premises and in view of the reasons given above, I find no merit in the application dated 24<sup>th</sup> May, 2016. The same is dismissed. The Appellant is at liberty to taken a date for directions or straight away take directions and a date for hearing of the appeal.

***Dated and delivered at Kerugoya this 7<sup>th</sup> day of September, 2016.***

**R. K. LIMO**

**JUDGE**

7.9.2016

Before Hon. R. K. Limo J.,

State Counsel Mr. Omayo

Court Assistant Naomi Murage

Appellant present

Interpretation: English-Kikuyu

Omayo for State present

Gitonga holding brief for Maina for appellant.

**COURT:** Ruling dated, signed and delivered in the open court in the presence of Gitonga holding brief for Maina advocate for the appellant and Mr. Omayo appearing for the State.

**R. K. LIMO**

**JUDGE**

7.9.2016