



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISC.CRIMINAL APPLICATION NO.129 OF 2015

JAMES THURANIRAMBURUGU.....APPELLANT/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

This application was brought by way of Chamber Summons dated 23rd April 2015 brought under Article 24(1) of the Constitution; Sections 356 & 357 of the Criminal Procedure Code Cap. 75 Laws of Kenya and all the enabling provisions of the law.

The applicant herein prays that he be admitted to bail pending the hearing and determination of his intended appeal, and that the sentence being appealed against be suspended pending the hearing and determination of the appeal.

The grounds on which the application is premised are that the applicant's grounds of appeal are strong and have overwhelming chances of success, that the applicant is presently serving his sentence pursuant to a conviction and sentence meted on 13th April, 2015, that the applicant is the sole supporter of an ailing sister who suffered a stroke and paralysis due to demyelinating disease and ischemic demyelination, that the applicant is the sole breadwinner of his family and finally that the applicant is ready and willing to comply with all the requirements demanded of him by the Honourable Court as a condition of granting bail or suspension of the sentence pending the hearing and determination of the appeal.

The application is supported by the affidavit of the applicant sworn on the 23rd of April, 2015 which reiterates the grounds upon which the application is premised. Further, it is deponed that the charges as drawn and prosecuted were incurable and defective in law and a conviction on the same could not be sustained since it did not meet the threshold set in law for a safe conviction. A Supplementary Affidavit sworn by the applicant on the 12th May, 2015 was filed by which he annexed copies of the charge sheet, the judgment and proceedings of Criminal Case No. 891 Of 2013 from which he was convicted on a charge of stealing contrary to Section 268(1) 2(a) as read with Section 215 of the Penal Code and sentenced to two years imprisonment.

The learned counsel for the applicant submitted on his behalf that the learned magistrate erred in holding that there was a conspiracy and proceeding to convict the applicant on a charge of stealing. He asserted that the applicant was improperly and unlawfully convicted on a charge of stealing when the evidence adduced was all pointing to conspiracy. He rightly referred the court to the case of **Edwin Ndegwa Justus -Vs- Republic [2010] eKLR** where the court granted bail pending appeal on the basis that the

evidence tendered did not establish the offence before the court and further that the evidence was contradictory.

Learned counsel for the appellant concedes to the application. He submitted that the evidence that was tendered supported a different offence other than the one with which the applicant was convicted for.

Having considered the application and the respective submissions, I shall now refer to the circumstances that must exist in order for an application for bail pending appeal to be successful. The circumstances that would lead this court to grant this application in favour of the applicant were echoed in the case of **Ademba vs Republic [1983] KLR 442**, where the court of appeal held inter alia that;

1. **Bail pending appeal may only be granted if there are exceptional or unusual circumstances;**
2. **The likelihood of success in the appeal is a factor to be taken into consideration in granting bail pending appeal. Even though the appellant showed serious family and personal difficulties in view of the unlikelihood of success in this appeal, the application could not succeed.**

In the instant case, the applicant submitted that he had serious family issues namely, that he was taking care of his ailing sister and also orphaned children of his deceased sister, and that he was the sole breadwinner of his family. In reference to the second ground in Ademba's case, such family issues stated by the applicant cannot aid in the grant of this application in his favour.

Further, in **Dominic Karanjavs Republic (1986) KLR 612**, it was held inter alia that **"The previous good character of the applicant and the hardships, if any facing his family were not exceptional and unusual factors..."**

The applicant ought to show that there are exceptional and unusual circumstances and that there is a high likelihood that his appeal will be successful. One of the grounds on which this application was premised was that the applicant's grounds of appeal are strong and have overwhelming chances of success. The applicant through his Learned Counsel submitted that he was charged with the wrong offence which fact the counsel for the respondent conceded to. In his submission, counsel for the respondent stated that the offence should have been one of conspiracy to defraud and not the offence of stealing. He conceded that the charge sheet was fatally defective in that respect.

I have perused the proceedings which show that, prima facie, the wrong charge may have been preferred against the applicant. I am minded that the appellate court may nonetheless convict an appellant of an offence other than the one charged if there is sufficient evidence to do so. I think it is prudent at this stage to leave it to the appellate court to critically evaluate the evidence and come up with its own finding on whether a conviction for the offence of conspiracy would stand.

This being a preliminary application and on the ground of the likelihood of success of appeal, I shall find for the applicant. In the result this application is allowed. The applicant shall execute a bond of Ksh.500,000/= with one surety of a similar amount to be assessed by the Deputy Registrar of this court.

DATED and DELIVERED at NAIROBI this 2nd day of July, 2015

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:-

1.No appearance for applicant

2.M/S Aludafor the respondent

