



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CRIMINAL APPLICATION NO.153 OF 2015

JULIUS MUGWERU KAMAU.APPLICANT

VERSUS

REPUBLICRESPONDENT

RULING

This application is brought by way of Chamber Summons dated 11th May, 2015 brought under Section 357 of the Criminal Procedure Code and any other enabling provisions of law.

The applicant prays that he be granted bail pending appeal, which application is premised on grounds that the offence for which the applicant was convicted are bailable, that the appellant is the sole breadwinner of a very young family, that there is overwhelming probability of the appeal succeeding and finally that the applicant will not abscond but will abide by the terms of bail that shall be granted by this Honourable Court.

The application is supported by the applicant's supporting Affidavit sworn on 11th May, 2015 in which he deposes that he was charged and convicted in Criminal Case Number 145 of 2013 and that the judgment was entered and delivered against him, which judgment he intends to appeal against. He further reiterates that he has an arguable appeal with overwhelming probability of success.

A Further Affidavit sworn by Learned Counsel, Njugu B. Gachogu on 13th May, 2015 was filed by which he attached the Petition of Appeal in Criminal Appeal No.67 of 2015, authorizing the grounds of appeal.

In her submissions, the Learned Counsel for the state Ms. Atina conceded to the application on grounds that the applicant having been charged with handling stolen property and sentenced 2 years imprisonment, by the time the appeal is heard and determined he shall have served a substantial part of the sentence and the appeal shall be rendered nugatory. The learned counsel for the applicant on the other hand maintained that the appeal will succeed since in reaching the judgment, the appellant's documentary evidence was not considered.

I have carefully considered the application, the Petition of Appeal of the applicant and also the submissions of both the respondent and of the applicant. I have also had the opportunity to peruse the proceedings and the judgment on record. The duty before the court is to establish whether there are sufficient grounds for this application to be determined in favour of the applicant.

Of the four grounds on which this application is premised, three of the grounds namely; that the applicant is the sole breadwinner of a young family or that the offence for which the applicant was convicted is bailable or that the applicant will not abscond but will abide by the terms of bail to be granted by this

Honourable Court are not sufficient grounds to warrant the grant of bail pending appeal.

In the case of **Dominic Karanja –vs – Republic (1986) KLR 612** the Court of Appeal held, inter alia, that;

- a. **The most important issue was that if the appeal had such overwhelming chances of success. There is no justification for depriving the applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances.**
- b. **The previous good character of the applicant and the hardships, if any, facing his family were not exceptional or unusual factors.....**
- c. **A 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.**

In **Jivraj Shah –Vs- Republic (1986) KLR 605**, the Court of Appeal held inter alia:

1. **The principle consideration in an application for bail pending appeal is the existence of exceptional or unusual circumstances upon which the court can fairly conclude that it is in the interests 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 an account of some substantial point of law to be argued and the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail 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.**

I find that the third condition in **Jivraj’s case** is relevant in the instant case in that the applicant through his counsel submitted that there is a high chance that the appeal will succeed since the learned trial magistrate in reaching her decision did not consider relevant documentary evidence produced by the defence.

According to the proceedings on record, the applicant was charged with handling of stolen goods contrary to Section 332(2) of the Penal Code. He was convicted and sentenced to 2 years imprisonment. He produced evidence showing that he had hired the said subject items from the complainant. However, in the judgment it was stated that the applicant did not have receipts for the payment made to the complainant. This is a serious matter of law which is likely to weigh in favour of the applicant as the trial court appears to have seemingly deliberately omitted to give reference to evidence that was before it This ground therefore warrants the grant of bail pending appeal.

On the second condition mentioned in **Jivraj’s case**, the same would apply if on totality of evaluation of the evidence on record, the appeal ought to succeed. Having already observed that the appeal has a likelihood of success, and further taking into account that the length of the penalty is only two years, there is a possibility that the applicant shall have served a substantial period of the sentence by the time the appeal is heard. This becomes an added advantage, edging upwards the grounds on which the application should be granted.

In the end, the application succeeds. The applicant shall execute a bond of Kshs.200,000/- with one surety of a similar amount to be assessed by the Deputy Registrar of this court. In the alternative, he shall pay a cash bail of Kshs.100,000/-.

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

G. W. NGENYE-MACHARIA

JUDGE

In the presence of:-

1Mr. Njugi for the applicant.

2Ms. Aluda for the respondent