



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL NO. 126 OF 2015

PETER GICHAMBA KIRATUAPPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant was charged with the offence of driving a motor vehicle under the influence of alcohol contrary to section 85 of the Traffic Act. The particulars were that on 18th July 2015 at about 13.00 hours along Nairobi Mombasa Highway at Emali Pipeline area Nzau District, Makueni County, being the driver of motor vehicle registration number KCE 893G/ZE 9216, he drove the said vehicle while drunk on the said road. The Applicant was convicted on his own plea of guilty by the trial court, and thereafter sentenced to imprisonment for one year and his licence cancelled for life.

The Applicant subsequently filed an appeal against the judgment of the trial Court, and also filed an application by way of a Notice of Motion dated 24th September 2015 seeking the following orders:

1. That pending the hearing and determination of the appeal herein, the Applicant be admitted to bail and/ or bond.
2. That pending the hearing and determination of the appeal herein, this court be pleased to suspend the order that permanently disqualifies the Applicant from holding or obtaining a driving licence made by Hon. P. Wambugu (SRM) on 19th day of August 2015 in Kilungu SRMTRC No. 293 of 2015,- Republic vs Peter Gichamba Kiratu.

The Applicant urged his grounds for the application in the said Notice of Motion, and in a supporting affidavit sworn by his Advocate, Norbert Okumu on 24th September 2015. These grounds are that his appeal has overwhelming chance of success because when the Applicant was arraigned at Kilungu Senior Resident Magistrate's Court on 19th August 2015, and charged with the offence of driving under the influence of alcohol his response was equivocal, thus a plea of guilty could not be entered against him.

Further, that on the same day the Applicant was arraigned in court, he was convicted and sentenced to 1 year imprisonment without the option of fine, and that the prosecutor did not avail the facts to the court, but rather opted to adopt the particulars in the charge sheet as the facts. In addition, that no report was presented to court by the prosecution as an exhibit to prove the drunkenness of the Applicant, and thus the procedure by the learned magistrate in arriving at a conviction was defective.

The Applicant also contended that the trial court permanently disqualified him from holding or obtaining a driving license, despite the fact that section 85 of the Traffic Act does not donate authority to judicial officers to cancel the driving licence of an accused person or at all. Further, that the Applicant has no other career apart from being a driver wherefrom he earns and sustains his wife and children, and that it will be in the interest of justice to suspend the order disqualifying him from holding or obtaining a driving licence.

According to the Applicant, the sentences were excessive in the circumstances and/or contrary to law, considering the fact that he was convicted on a plea of guilty and that there were no previous criminal records against him. Further, that there are exceptional circumstances to tilt the balance in favour of admitting the Applicant to bail/bond pending appeal. Lastly, that the Applicant risks spending substantial part of his sentence in jail if the court declines to admit him to bail and/or bond.

The State conceded to the application in a replying affidavit sworn on 7th October 2015 by Cliff Machogu, the Prosecution Counsel, wherein he deponed that the facts of the offence were never read to the Applicant when he pleaded guilty during the trial, and that section 85 of the Traffic Act does not provide for the cancellation of a driving licence as a penalty.

I have considered the pleadings and submissions by the Applicants 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 **Raghibir 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.**

On the issue of suspension of the Applicant's sentence, it is provided in section 357 of the Criminal Procedure Code as follows:-

“357(1) After the entering of an appeal by a person entitled to appeal, the High Court, or the subordinate court which convicted or sentenced that person, may order that he be released on bail with or without sureties, or, if that person is not released on bail, shall at his request order that the execution of the sentence or order appealed against shall be suspended pending the hearing of his appeal;

Provided that, where an application for bail is made to the subordinate court and is refused by that court, no further application for bail shall lie to the High Court, but a person so refused bail by a subordinate court may appeal against refusal to the High Court and, notwithstanding anything to the contrary in Section 352 and 359, the appeal shall not be summarily rejected and shall be heard, in accordance with such procedure as may be prescribed, before one judge of

the High Court sitting in chambers.

(2) If the appeal is ultimately dismissed and the original sentence confirmed, or some other sentence of imprisonment substituted therefor, the time during which the appellant has been released on bail or during which the sentence has been suspended shall be excluded in computing the term of imprisonment to which he is finally sentenced.

(3) The Chief Justice may make rules of court to regulate the procedure in cases under this section.”

This court is thus clothed with the power to grant bail/bond pending appeal with or without sureties, or to suspend execution of any sentence imposed by the subordinate court pending the hearing of the appeal. The issue in this application then is whether there are circumstances that exist that warrant this Court to exercise its discretion in the Applicant’s favour.

In the instant application, the State has conceded the Applicant’s prayers on account of no facts having been read in the trial Court, and the sentence not being provided for. I have perused the record of the trial Court, and read section 85 of the Traffic Act. Notwithstanding that the Applicant has been convicted of the offence provided for under the said section, I note that there are issues of law raised as to the manner of taking of the plea in the trial court and the legality of the sentence meted out on the Applicant which are likely to swing the scales in his favour. The Court also notes that the Applicant was sentenced on 19th August 2015 to imprisonment for one year, and it is therefore likely that he might serve a substantial part of his prison term before the appeal is heard and determined.

Given the above circumstances, I am satisfied that this is a proper case in which to exercise this court’s discretion in favour of the Applicant. I accordingly allow the application in the Notice of Motion dated 24th September 2015 on the following terms:-

1. That pending the hearing and determination of the appeal herein, the Applicant be released on his own bond of Kshs.500,000/= (Kenya Shillings Five Hundred Thousand) with two (2) sureties of a like amount;
2. The sureties shall be approved by the Deputy Registrar of the Machakos High Court;
3. The Applicant will attend mentions before the Deputy Registrar of the High Court, Machakos once every month until his appeal is heard and determined.
4. The Applicant shall be required to attend court for the hearing of the appeal without fail.
5. That pending the hearing and determination of the appeal the order that permanently disqualifies the Applicant from holding or obtaining a driving licence made by Hon. P. Wambugu (SRM) on 19th day of August 2015 in **Republic –vs- Peter Gichamba Kiratu, Kilungu SRMTRC No. 293 of 2015**, be and is hereby suspended
6. In default of orders 1, 2, 3, and 4 hereinabove, the bond shall be cancelled immediately and sureties called to account.

It is so ordered.

DATED AT MACHAKOS THIS 10TH DAY OF NOVEMBER 2015.

P. NYAMWEYA

JUDGE

