



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CRIMINAL APPEAL CASE NO.150 OF 2015

DOMINIC MWAMISO MWACHOFIAPPELLANT/APPLICANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentenced in Criminal case No 88 of 2014 of the Chief Magistrate's court at Mombasa – by Hon. J. Kamau –R M)

R U L I N G

By Notice of Motion application dated the 24th August 2015 and brought under section 357(1) of the Criminal Procedure Code and Article 49 (i) (h) of the Constitution, the applicant/appellant seeks orders that he be admitted to bail/bond during the pendency of his appeal.

The grounds of the application are set out on the face of the supporting affidavit of MWANAISHA SAIDA SHARIFF, the applicant's counsel. They are as follows:

1. That the intended appeal has overwhelming chances of success.
2. That there could be a delay in the hearing of the appeal which would cause irreparable loss to the applicant/appellant if the same is allowed, such as losing his job.
3. That the applicant complied with the bail terms he had been granted by the lower court and is therefore prepared to comply with any other provided by this court.
4. That the appellant is not a flight risk.
5. That it is likely to take time before the appeal is heard and determined.

Attached to the application is a memorandum of appeal and a letter to the Chief Magistrate Criminal Registry requesting for uncertified copies of the proceedings and certified copy of judgment.

In opposing the application, the learned state counsel, Mr Masila submitted that the application is misplaced since Article 49 (1) (h) of the Constitution on of the provisions of the law upon which the application is premised, deals with the grant of bail for an arrested person pending trial and not for one convicted and sentenced by a court of competent jurisdiction such as the applicant in this case.

He submitted that he had looked at the memorandum of appeal filed by the applicant and found no exceptional circumstance or likelihood of success of the appeal that would justify the release of the

appellant on bail pending appeal.

He also submitted that the applicant was sentenced to 5 years imprisonment on 23.7.2015 and was unlikely to be prejudiced if he remained in prison during the pending of the appeal.

To support this position, Mr Masila relied on the case of **DOMINIC KARANJA VS REPUBLIC (1986) KLR.**

He went on to submit that the assertion that the applicant will not abscond if released even if supported by sureties was insufficient. He also disregarded another assertion that the applicant is employed and risks losing his job.

He added more authorities for the court to consider being Kisumu Cr Appeal No. 70/1983, Adenba vrs Republic and High Court Criminal Appeal No 727/13 Doris Bochere Nyanchogi vrs Republic.

In response M/s sherry reiterated that the appeal has over whelming chances of success, which burden she laid on the court to decide.

She submitted that the owner of the alleged stolen items was not called as a witness.

She reiterated that the fact that the appellant will not abscond is a relevant ground.

The main consideration in granting bail during the pendency of an appeal was laid down in the case of ***SOMO vrs Republic (1972) EALR page 476***, where it was held:

- (i) The question is whether there are exceptional and unusual circumstances.
- (ii) That the appellant is of good character, that the appeal has been admitted for hearing, that the offence did not involve personal violence are not exceptional or unusual circumstances.
- (iii) The most important ground is that the appeal has a over whelming chance of being successful. In that case there is no justification for depriving the applicant of his freedom.

I have perused the record of proceedings and noted that the applicant was charged with house breaking and stealing contrary to section 304(1) of the penal code and handling stolen property contrary to section 322 (2) of the penal code. He was sentenced to serve 5 years imprisonment on 23.7.2015, which sentence was meted out by a court of competent jurisdiction in accordance with the law. I have, however not come across some irregular feature of the trial process that could predispose the appeal to likely success. I also find that there is a little likelihood that the applicant will serve the five years imprisonment before his appeal is heard and determined.

In my considered opinion, and in line with the decisions in **DOMNIC KARANJA VS REPUBLIC (1986) KLR 612 and CRIMINAL APPEAL NO. 70/1983. ADEMBA VRS REPUBLIC**, the applicant has not demonstrated that this is a fit case for his admission to bail pending appeal.

His application is therefore dismissed.

Ruling dated, signed and delivered this 2nd day of December 2015.

D. CHEPKWONY

JUDGE

In the presence of

M/s Ocholla for state

M/s Masila for the applicant

C/Assistance Mr. Kiarie