



REPUBLIC OF KENYA

High Court at Meru

Criminal Miscellaneous Application 57 of 2012

ESEKIA MWENDA ALIAS FRANCISAPPELLANT

VERSUS

REPUBLICRESPONDENT

RULING

The Application is a notice of motion brought under Article 49(h) of the Constitution and all enabling provisions it seeks the following orders:

- 1. That the appellant/applicant be granted bond/bail pending appeal.**
- 2. That the appellant/applicant be present during the hearing or for orders which application is granted on the annexed affidavit of EsekiaMwenda Elias Francis and on the grounds that:-**
 - (a) That the appeal has overwhelming chances of success.**
 - (b) That unless the application is released on bond/bail he will suffer irreparable damages.**
 - (c) That the applicant is ready to abide to any bond/bail other if so granted.**
 - (d) That the applicant is more useful value while out on bond/bail other than being in prison custody.**
 - (e) And other grounds to be adduced at the hearing thereof.**

The Applicant appeared in person before the court to argue his application. In his brief submissions he urged the court to grant him bail for the reasons that he suffers from ulcers and he is diabetic. The applicant relied on his application and his affidavit. In brief the affidavit deposes that the Applicant has an overwhelming chance of success in his appeal and that that if he is denied bond he will suffer irreparable damages. He also deposes that he is suffering from acute diabetes and high blood pressure and that no medical attention can be provides by prison dispensary. In his oral application the applicant urged further that he was unable to get the diet that he should have in prison.

Mr. Moses Mungai appeared for the State. The learned state counsel opposed the appeal on grounds that the Applicant had not demonstrated that his appeal has high chances of success and that it has substance. Mr. Mungai further urged that the Applicant had not given any other exceptional circumstances warranting his release against bail pending appeal. The learned state counsel urged that the ground given that the applicant was sick was not an exceptional circumstance as there are dispensaries in prison and medical facilities are provides as of right. Mr. Mungai urged that the applicant was convicted of a serious

offence and his chances of absconding was high. This principle has been set out over the years of the High Court for instance in case of Abdulahi vs. Republic 1971 EA 346 Hon. Kneller, J. as he then was held:

“Bail for a man who has been convicted and sentenced before his appeal has been heard will only be granted in exceptional circumstances

The dangers against which the court must guard in the granting of bail pending appeal are that the appellant may in the meantime either abscond or commit further offences.

The court has a discretion in the matter and must exercise its judiciary on the particular facts in each application before it. “

The court of appeal has had occasion to consider similar applications and has approved the principles set out by Kneller J. in the above case in several of its cases. Nyarangi, Gachuhi and Apallo, JJA in JIVRAJ SHAH -VS- REPUBLIC [1986] KLR 605 held, inter alia:

“The principal consideration in an application for bail pending appeal is, the existence of exceptional or unusual circumstances upon which the court of Appeal can fairly conclude that it is in the interests of justice to grant bail.

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.”

In Dominic Karanja vs. Republic [1986] KLR 612 the Court of Appeal held:-

“The most important issue was that if the appeal had such overwhelming chances of success, there was no justification for depriving the applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances.”

I have carefully considered this application. In an application for bail pending appeal an applicant has to demonstrate that he has exceptional or unusual circumstances and that there is a likelihood of success in his Appeal.

The Applicant was tried before the Chief Magistrate’s Court Meru four one counts of defilement contrary to section 8(1) (4) of the Sexual Offences Act No. 3 of 2006. He was found guilty and convicted in all four counts of defilement. The learned trial magistrate sentenced the accused to the minimum sentence provided under the law which was 15 years imprisonment on each count. The sentences were to run concurrently.

Before this court the Applicant did not substantiate the averment in his supporting affidavit why he believed that his appeal had a likelihood of success. All that the Applicant argued was that he was diabetic and had ulcers. The learned state counsel has urged that the Prison’s Department had dispensaries and medical facilities and were therefore capable of providing the medications, treatments and such medical support as the Applicant may require. I take Judicial Notice of the fact that Prisons in Kenya do have medical facilities and that where they are insufficient inmates are escorted to public facilities especially the Government Hospitals including the National Hospitals in Nairobi and Eldoret where necessary. The Applicant’s condition that is ulcers and diabetes can easily be managed while in prison. Nothing has been presented before this court to suggest that the Applicant’s life is in danger due to his alleged ailment just because he is in prison. Not to mention that the Applicant has not demonstrated that he suffers from ulcers and diabetes since he did not attach any document to establish that he either suffers from the alleged from the alleged illnesses or that he is being treated for such conditions.

I have considered the fact that the Applicant was sentenced on 11th July 2012. I am privy to the fact that his appeal will be heard within this year or latest next year all going well as intended in regards to the appeals pending before this court. The Applicant is therefore unlikely to serve a substantive portion of his sentence before his appeal is heard.

For these reasons I find no merit in the Applicants application for bail pending appeal as set out in his Notice of Motion dated 21st September, 2012. This Application is therefore dismissed.

DATED, SIGNED AND DELIVERED AT MERU THIS 7th DAY OF MARCH, 2013.

LESIT, J.

JUDGE