



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MURANG'A**

**MISCELLANEOUS APPLICATION NO. 4 OF 2012**

**SAMUEL NJUGUNA KANGU.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

By a chamber summons dated 19<sup>th</sup> March, 2013 brought to court under certificate of urgency of the same date, the applicant asked this court to be admitted to bail pending the hearing and determination of his appeal or alternatively, his appeal be fixed for hearing. The application was supported by the applicant's own affidavit sworn on 19<sup>th</sup> March, 2013.

It is clear from the learned magistrate's judgment that on the 9<sup>th</sup> November, 2012, the applicant was convicted of the offence of causing death by dangerous driving contrary to **section 46** of the **Traffic Act, Chapter 403 Laws of Kenya**. He was sentenced to serve five years in prison.

As at the time the applicant filed and argued his application, he had not filed his appeal; he had instead filed an application dated 7<sup>th</sup> December, 2012 in which he sought leave of this honourable court to file his appeal out of time. This application had not been determined and it is therefore obvious that there was no pending appeal when the applicant prosecuted his present application.

In the absence of an appeal, the applicant's application can only be presumed to have been made under **section 356(1)** of the Criminal Procedure Code which empowers a subordinate court which convicts or sentences a person or the High Court to grant bail pending the entering of an appeal. When an application is made under this section, the court is bound to consider granting bail or staying execution of a sentence on ***"such terms as to security for the payment of money or the performance or non-performance of any act or the suffering of any punishment ordered by or in the sentence or order as may seem reasonable to the High court or the subordinate court."*** (See **section 356(1) of the Criminal Procedure Code**).

The ground upon which the applicant sought for bail in these circumstances is that he has contracted tuberculosis which, in his view, can only be treated outside the prison. It is for this particular reason that he not only sought for his application to be heard urgently but also sought for bail without having filed an appeal.

Besides the terms or conditions which the court is bound to impose upon a successful applicant for bail under **section 356(1)** of the **Criminal Procedure Code**, the grounds upon which bail may be granted before an appeal is heard and determined are well settled. The main ground is of course that the appeal must have overwhelming chances of success; the other consideration would be whether there exist circumstances that may be described as exceptional or unusual. In the case of **Dominic Karanja versus Republic (1986) KLR 612** where this issue was considered the Court of Appeal stated at page 613 thus:

**"The most important issue here is if the appeal has such overwhelming chances of success there is no justification of depriving the applicant of his liberty. The minor relevant considerations would be whether there are exceptional or unusual circumstances."**

In the application before me, the applicant has neither demonstrated that his appeal has any chance of success nor that there are exceptional or unusual circumstances that would warrant his release before his

appeal is heard. Although he has complained of suffering from tuberculosis, he never provided any evidence to support his claim. In any event an applicant's medical condition may not satisfy what amounts to be exceptional or unusual circumstances as to be admitted to bail pending the hearing and determination of his appeal. This question arose in the case of **Dominic Karanja versus Republic (supra)**; while refusing an application for bail, the Court of Appeal said of the applicant's health as far as the application for bail is concerned that;

**“The applicant was certified to be fit by a doctor on September 23, 1986 and so no issue of ill health arose. We are not to be taken to mean that ill-health *per se* would constitute an exceptional or unusual circumstance in every case. There exist medical facilities for prisoners in the country.”**

In the application before me, there is no proof of the applicant's ill-health which, as the court of Appeal noted, is not sufficient in itself to constitute exceptional circumstances. Even if it were to be considered as such, the applicant has still failed to demonstrate that his appeal has overwhelming chances of success which is a condition precedent to granting bail pending appeal.

The applicant asked me to list the appeal for hearing should his application for bail pending appeal fail. I would have readily done so had an appeal been filed; so far the appellant's application to file an appeal out of time is still pending for determination and therefore there exists no appeal for admission and hearing. The alternative limb of the applicant's application, cannot, in the circumstances, be sustained.

For the reasons I have given the applicant's application dated 19th March 2013 is dismissed.

**Signed, dated and delivered in open court at Murang'a this 1<sup>st</sup> day of November, 2013**

Ngaah Jairus

**JUDGE**