



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Criminal Application 344 of 2012

FREDRICK NDUNGU KIRORIAPPLICANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 501 of 2009 in the Chief Magistrate's Court at Thika – B. A. Owino (SRM) on 30th

March 2011)

RULING

- 1.** This is a Notice of Motion dated 29th June 2012, brought under **Section 357** of the **Criminal Procedure Code, Cap 75 laws** of Kenya. The applicant, **Fredrick Ndungu Kirori** seeks to be admitted to bail/bond pending the hearing and determination of appeal No. **177 of 2012**, that he has filled in the High Court. The appeal stems from a conviction in **CM Cr. Case No. 501 of 2009** by B.A. Owino, the Senior Resident Magistrate Thika law court. In the said **CM Cr. Case No. 501 of 2009**, the applicant was tried and convicted on counts No. **3, 4, and 5** for committing unnatural offence contrary to **Section 215** of the **Criminal Procedure Code**, and was sentenced to serve 5(five) years imprisonment on each count. The sentences were ordered to run consecutively.
- 2.** The main thrust of this application, as urged by learned counsel Mr. Oundo on behalf of the applicant, is that the applicant's appeal has overwhelming chances of success. His submissions were that the applicant, is not a flight risk person because he was on bail during trial and he complied with conditions thereof.
- 3.** On the chances of success of the pending appeal the learned counsel Mr. Oundo submitted that the judgment of the court delivered on 30th March 2011 had an error apparent. That the applicant was convicted and sentenced to five years on three charges of unnatural offences which were ordered to run consecutively and that this had no basis in law, since the offences involved the same parties. The offences were said to have been committed on the 21st, 22nd, 23rd, 24th and 25th of January 2009.
- 4.** In **Mule v Rep HCCC 837 of 1992 [1983] KLR**, to which the learned counsel referred me, it was stated that where the charges arise from the same transaction the sentences should run concurrently as opposed to consecutively. According to the learned counsel Mr. Oundo the applicant is in essence being punished three times for the same offence.

5. Secondly the learned counsel urged that the trial magistrate ignored the evidence of the medical officer and the investigating officer. The learned trial magistrate noted that their evidence was formal but did not analyse it, or she would have found that the examination revealed that there was no evidence that the complainant had been sodomised or that the applicant was the culprit.
6. The learned counsel Mr. Oundo also urged that there was bias in the manner of sentencing, which led to the applicant being acquitted of offences committed on 21st and 22nd of January 2009 but convicted for the offences committed on 23rd, 24th and 25th January 2009, yet the witnesses were the same, and that the evidence was contradictory.
7. Mr. Oundo relied on Jivraj Shah v Rep [1986] KLR which held that bail pending appeal may be granted where the appeal has overwhelming chances of success, and on Arthur Muya Muriuki v Rep which upheld the principles in Jivraj Shah v Rep. He also relied on Edwin Ndegwa Justus v Rep Cr. Case No. 60 of 2010 at Nyeri (unreported), where the appellant was admitted to bail because the appeal had high chances of success, and on John Cardon Wagner v Republic where the appellant was convicted on three counts of child molestation and sentenced to 15 years to run concurrently. He was subsequently admitted to bail because his appeal had high chances of success on account of the contradictions in the evidence.
8. I was further urged on behalf of the applicant, to consider granting him bail pending appeal, for the reasons that his health is deteriorating, he is the sole bread winner and his children are about to drop out of school, because of his absence.
9. Miss Maina, learned state counsel opposed the application stating that the filed appeal had no chances of success. She gave a summary of the prosecution's case stating that the applicant herein had employed the complainant, and that they used to sleep in the same bed. That on the nights of 23rd, 24th and 25th January 2009 the applicant sodomised the applicant, and the fact that his anal opening had no bruises was neither here nor there since he was an adult.
10. The principles to be considered in an application for bail or bond pending appeal are now settled. In the case of Dominic Karanja v Republic [1986] KLR pg. 612, the Court of Appeal held that:
- 1. 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.**
 - 2. The previous good character of the applicant and the hardships, if any, facing his family were not exceptional or unusual factors.**
11. I have perused the evidence and judgment on record, as well as the submissions from the appellant and the respondent. Without delving into the merits and demerits of the appeal, I am not persuaded that the appellant has demonstrated that his appeal has overwhelming chances of success.
12. It shall be remembered that bail pending appeal is not automatic because the applicant no longer enjoys the presumption of innocence, having lost it when he was convicted. The previous good character of the applicant and the hardships, if any, facing his family were not exceptional or unusual factors, neither is the applicant's observance of his bond term while on trial. These are not unusual circumstances upon which I can conclude that it is in the interest of justice to grant the bail sought, in light of the conviction already in place.
13. For the foregoing reasons, I therefore find that the application before me is lacking in merit and decline to grant it. The application is dismissed.

SIGNED DATED and DELIVERED in open court this *1st day of November 2012*.

L. A. ACHODE

JUDGE