Mwangi v Republic (Criminal Application 4 of 2018)
[2023] KECA 444 (KLR) (14 April 2023) (Ruling)

Neutral citation: [2023] KECA 444 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPLICATION 4 OF 2018

F SICHALE, LA ACHODE & WK KORIR, JJA

APRIL 14, 2023

BETWEEN

ISAAC WAWERU MWANGI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An application for bail pending the hearing of an intended appeal against the judgment of the High Court of Kenya at Nakuru (M. A. Odero, J.) delivered and dated 3rd November 2017 in HC Criminal Appeal No. 145 of 2015)

RULING

1. The application before us is brought pursuant to articles 22(1) and 29(1) of the *Constitution*, sections 123, 124, 125 and 357(1) of the *Criminal Procedure Code* as well as rules 5(1) & (2), and 59 of the *Court of Appeal Rules, 2010*. The applicant, Isaac Waweru Mwangi, seek orders that he be released on bail pending appeal and that the Prison authorities be compelled to release medical reports in support of this application.

2. The application is supported by grounds on its face as well as the supporting affidavit sworn by the applicant. It is the applicant's case that he was convicted for the offence of robbery with violence and sentenced to death. His sentence was confirmed by the first appellate court. He also states that he has contracted diabetes during his incarceration thereby causing him distress and suffering. He also argues that his continued stay in prison will subject him to irreparable suffering, loss and harm. In his view, it is in the interest of justice that the orders sought are granted and that his intended appeal has high chances of success.

3. When the matter came up for hearing on December 13, 2022, the parties made oral submissions in support of their respective positions in regard to this application. The applicant appeared in person and urged that he has been in custody for long and prayed that his application should be allowed. He

also argued that his probation report was positive and that he was a first offender and that he will attend court if released on bail.

4. Ms Mburu who appeared for the respondent opposed the application stating that the poor health of the applicant is not a ground for release on bail pending appeal and that within the Prison facilities, there were hospitals where the applicant could get medical attention. Counsel also argued that the fact that the applicant still had a long period to serve rendered him a flight risk if released on bail pending appeal. Ms Mburu held the position that bail pending appeal is not a constitutional right per se because the applicant is already convicted and also that the appeal has no chances of success. In conclusion, counsel urged this court to dismiss the application.

5. The nature of this application is one which calls for the exercise of this court's discretion under rule 5(2)(a) of the *Court of Appeal Rules*. The main issue for our determination is whether the applicant has advanced a case for grant of bail pending appeal. The principles guiding the exercise of the court's discretion in such an application is whether there exist exceptional circumstances to warrant grant of bail pending appeal and whether the appeal has high chances of success. At the risk of repetition, we add our voice to the long list of authorities that bail pending appeal is different from bail pending trial. In the former, the applicant is presumed to have been accorded a fair hearing and has been rightly found guilty by a competent court. An applicant therefore has lost his innocence as he has already been convicted. In the latter, an applicant is yet to be found guilty and is therefore presumed innocent until proved guilty. See *Francis Kamote Mutua v Republic* [1988] eKLR.

6. In *Jivraj Shah v Republic* [1986] eKLR, this court outlined the factors to be considered in an application for bail pending appeal as follows:

> "...the principal consideration is if there exist exceptional or unusual circumstances upon which this court can fairly conclude that it is in the interest 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 a substantial part of it, will have been served by the time the appeal is heard, conditions for granting bail will exist. The decision in Somo v Republic [1972] EA 476 which was referred to by this court with approval in Criminal Application No NAI 14 of 1986, Daniel Dominic Karanja v Republic where the main criteria was stated to be the existence of overwhelming chances of success does not differ from a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed. The proper approach is the consideration of the particular circumstances and the weight and relevance of the points to be argued."

7. Adopting the views in the authority cited above, this application will therefore be considered in light of whether there exist exceptional circumstances which makes it just to grant bail and whether the appeal is likely to succeed after a substantial part of the sentence has been served.

8. The first inquiry is whether the application establishes exceptional circumstances upon which we can conclude that it is in the interest of justice to grant bail. On this limb, the applicant argued that he contracted diabetes while in prison and this has led to his suffering. He also submitted that he has been in prison for over 5 years and his continued stay exposes him to irreparable loss of his liberty. Still on this issue, the applicant contended that his probation report was positive and that he was a first offender. On its part, the respondent argued that the fact that the applicant is unwell is not a ground for grant of bail and that he can be offered medical attention within the prison premises. The respondent also contended that the applicant still has a long sentence to serve and admitting him to bail pending appeal renders him a flight risk.

9. The applicant in this case was sentenced to death upon conviction for the offence of robbery with violence contrary to section 292(2) of the *Penal Code*. From the onset, we are cognizant that under rule 5(1) of the Rules of this court, a sentence of death cannot be carried out before the period for lodging an appeal has lapsed or before an appeal is heard and determined. The applicant therefore has his life automatically preserved by the existence of his intended appeal. We also note that the applicant was sentenced to death on May 28, 2015. Up to the date of this ruling, he has been in custody for close to 8 years from the date of sentencing. The period already served in prison vis-à-vis the sentence issued against him cannot be said to be prejudicial to the applicant.

10. There is also no indication that the hearing of his appeal will be delayed for much longer. As for the claim of the appellant being of ill health, no evidence was placed before us to support that allegation. And, as correctly submitted by the respondent, medical attention is available in prisons and sickness cannot therefore be a valid reason for granting somebody bail pending appeal. Going by the facts established in our short analysis, we find that the applicant has not made out a case to be granted bail pending appeal. The reasons advanced by the applicant falls short of establishing exceptional circumstances to warrant grant of bail pending appeal. Furthermore, the nature of the offence and the sentence passed and affirmed by the first appellate court being death, there would be an involuntary desire by every human, even if not the applicant, to take flight.

11. Our conclusion on this limb is in line with the decision in *Daniel Dominic Karanja v Republic* [1986] eKLR where this court pointed out that:

> " The previous good character of the applicant and the hardship, if any, facing the wife and children of the applicant are not exceptional or unusual factors: see Somo v Republic [1972] E A 476. A solemn assertion by an applicant that he will not abscond if he is released is not sufficient ground, even with support of sureties, for releasing a convicted person on bail pending appeal. The applicant was certified to be fit by a doctor on September 23, 1986 and so no issue of ill health arises. 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."

12. The second line of our inquiry is whether the intended appeal has high possibility of success. To ascertain whether an appeal has high probability of success, the court is called upon to consider the applicant's grounds of appeal against the impugned judgment within the boundaries of this court's mandate as a second appellate court. In doing so, the court must proceed with caution not to prematurely render itself on the merits of the appeal. The applicant's intended appeal being a second appeal, this Court will not enter into the realm of factual considerations but will be limited to issues of law and the legality of the sentence. Adopting that procedure, we have reviewed the draft memorandum of appeal dated March 7, 2018 and our conclusion is that the intended appeal does not have overwhelming chances of success. That is not the same as saying that the intended appeal is hopeless and the appellant should consider withdrawing it and waiting for his date with the hangman. What we are saying is that at this point in time there is no obvious point of law that can lead us to conclude that the applicant's intended appeal is destined for success. Having said so, we embrace the principle that it is inadvisable to discuss the merits or otherwise of the individual grounds of appeal at this stage lest we embarrass the judges who will eventually hear the substantive appeal.

13. It is therefore our finding that, based on the material placed before us, the law and principles, the application falls short of establishing the requirements for grant of bail pending appeal. Consequently, we find that the Application dated March 7, 2018 has no merit and is hereby dismissed.

DATED AND DELIVERED AT NAKURU THIS 14TH DAY OF APRIL, 2023

F. SICHALE

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR