



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, WARSAME & GATEMBU, J.J.A)

CRIMINAL APPLICATION NO. NAI 8 OF 2017

BETWEEN

JACKSON MAINA WANGUI.....APPLICANT

AND

REPUBLIC.....RESPONDENT

(An application for bail/bond pending the hearing and determination of Criminal Appeal

No. 42 of 2017 against both conviction and sentence of the High Court of Kenya

at Nairobi (S. N. Mutuku, J) dated 14th February, 2017

in

H. C. Cr. C. No. 35 of 2012)

RULING OF THE COURT

By his motion dated the 17th October, 2017, the applicant seeks an order granting him "***Bond/Bail pending the hearing and final determination of Criminal Appeal No. 42 of 2017***". In the alternative, he seeks an order to "***stay and/or suspend the execution of the judgment, conviction and sentence of the High Court***". He does not stop there but seeks "***any other order the court may deem fit and expedient in the circumstances***".

The prayers are predicated on various provisions of the law including: **Order (sic) 5 (2)(a)** of the **Court of Appeal Rules, 2010**; **Articles 20(2), 3(a) and (b); 21(1) and (3), 49(1)(h), 50(2)(q) and 51(1)** of the **Constitution**; and **Sections 3, 3A and 3B** of the **Appellate Jurisdiction Act**.

Despite the expansive nature of the prayers, learned counsel for the applicant, **Mr. Timothy Naeku** restricted his submissions to bail pending appeal under **Rule 5(2)(a)** of this Court's Rules. The Director of Public Prosecutions (DPP) through **Mr. Peter Mailanyi**, SADPP, did not oppose the The brief background to the application is this:

The applicant was one of two persons charged and tried before the High Court (**Stella Mutuku, J.**) with the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code. It was alleged in the Information filed by the DPP that on the night of 7th/8th May, 2012 at Click Club along Baricho Road, Nairobi, the two murdered Kevin Oduor Onyango (deceased). After hearing 13 prosecution witnesses and considering submissions of counsel, the trial court acquitted the 2nd accused under **section 306** of the Criminal Procedure Code (CPC), but put the applicant on his After hearing the defence and considering the submissions of counsel, the trial court came to the conclusion that the offence of murder had not been proved but the evidence on record supported the offence of manslaughter contrary to **section 202** as read with **section 205** of the Penal Code. It proceeded to convict the applicant for that offence and sentenced him to serve five years imprisonment after conducting a sentencing hearing. That was on 14th March, 2017.

Aggrieved by the conviction and sentence, the applicant filed a notice of appeal and lodged the main appeal on 4th July, 2017. It is still pending hearing.

In his affidavit in support of the application, the applicant deposed that he had been admitted to cash bail of Sh. 1 million in the trial court on 21st May, 2012 and was of good character, observing all bail terms throughout his trial for five years until he was sentenced to serve a jail term on 22nd March, 2017. In his view, there were substantial points of law raised in the memorandum of appeal which stand a high chance of success including the failure to invite the applicant to defend himself after the finding was made on the lesser charge; misapprehension of the law on justifiable homicide; and failure to give any reasons for the finding made that the offence of manslaughter was proved beyond reasonable doubt.

The applicant further swore that there were exceptional circumstances to support his plea in that the trial court made exculpatory findings that the appellant's intention was to rescue the deceased rather than harm him, and that the applicant shot the deceased in self defence. The trial court further failed to enumerate any unlawful acts constituting the offence of manslaughter, thus vitiating the conviction. The applicant expressed the fear that he would serve the entire sentence before the appeal is heard, having served 10 months before the application was heard.

In written submissions filed by his former advocates M/s Bowry & Company and orally highlighted by Mr. Naeku, it is contended that bail pending trial or appeal is a constitutional right and the appellant was entitled to fair treatment pending appeal as spelt out in **Articles 49(1)(h), 50(2)(q) and 51(1)** of the Constitution. Such right, it is submitted, can only be denied if there are compelling reasons to deny bail. Counsel referred to paragraphs 4.30 and 4.31 of the Bail and Bond Guidelines which guide the court on the terms of granting bail and requires the applicant to demonstrate overwhelming probability of success of his appeal. He also cited the High Court case of ***Kiprono Maiyo & 2 Others vs Republic [2006] eKLR***, and submitted that a convict who has a pending appeal is still presumed to be innocent until the appeal is determined. As for the issues for consideration by the court, counsel relied on the cases of ***Dominic Karanja vs Republic (1986 KLR 612)***; ***Jivraj Shah vs Republic (1986) KLR 605*** which laid out two basic issues of '**overwhelming chances of success**' and '**exceptional and unusual circumstances**' and submitted that the applicant need only raise one *prima facie* substantial point of law in the appeal to satisfy those requirements. He added that even one *bona fide* arguable point, which need not necessarily succeed, was sufficient to satisfy the standards for grant of bail pending appeal.

We have given careful consideration to the application and have formed the following view of it. The grant of bail/bond pending trial or appeal is a matter for the discretion of the court which, as always, must be exercised judiciously. It is contended by the applicant that there is no difference between bail pending trial and bail pending appeal since both are constitutionally guaranteed under **Article 49(1)(h)** of the Constitution. The Article states:-

“An arrested person has the right -

(a)

(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released”.

It is plain to us that the Article relates to bail pending trial when the innocence of the accused is presumed, but even then, it is not absolute but depends on demonstration of compelling reasons. With respect, the case of ***Kiprono Maiyo (supra)*** in which the High Court opined that '*the presumption of innocence continued until the appeal against conviction is concluded*' is of doubtful authority and not binding on us. The correct position was stated in the case of ***Mutua vs Republic (1988) KLR 497***, where the Court of Appeal stated thus;

“It must be remembered that an applicant for bail has been convicted by a properly constituted court and is undergoing punishment because of that conviction which stands until it is set aside on appeal. It is not wise to set the applicant at liberty either from the point of view of his welfare or of the state unless there is a real reason why the court should do so.”

Having said that, the jurisdiction of this Court to grant bail pending appeal is well grounded in **section 379 (4)** of the CPC which provides:-

“Save in a case where the appellant has been sentenced to death, a judge of the High Court, or of the Court of Appeal, may, where an appeal to the Court of Appeal has been lodged under this section, grant bail pending the hearing and determination of the appeal.”

Rule 5(2)(a) of the Court's Rules goes further and provides:

“5. (2) subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution but the Court, may –

(a) In any criminal proceedings, where a notice of appeal has been given under rule 59, order that the appellant be released on bail or that the execution of any warrant of distress be suspended pending the determination of the appeal”.

Those provisions do not provide the circumstances in which bail pending appeal may be granted but this is a territory well covered by previous court decisions. As correctly submitted by counsel for the applicant, the applicant must demonstrate that the appeal has '**overwhelming chances of success**' and that '**exceptional and unusual circumstances**' exist in the appeal. We cannot, however, accept his further submission that a sole arguable point which need not succeed on appeal is sufficient demonstration of those two factors. It may well be sufficient for purposes of an order for stay of execution in a civil matter under **Rule 5(2)(b)** but, in our view, it falls short of the standard required in a criminal appeal. As the court stated in the case of ***Somo vs Republic (1972) EALR 476***:

"The question is whether there are exceptional and unusual circumstances...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...The most important ground is that the appeal has a over whelming chance of being successful." [Emphasis added].

In the *Jivraj case (supra)*, this Court also stated as follows:

"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 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 substantial part of it will have been served by the time the appeal is heard, conditions for granting bail will exist. The main criteria is that there is no difference between overwhelming chances of success and a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed and the proper approach is the consideration of the particular circumstances and weight and relevance of the points to be argued..."

With those principles in mind, we have examined the circumstances surrounding the conviction of the appellant and the grounds of appeal put forward to challenge it. For obvious reasons, we cannot delve into full analysis of the appeal lest we prejudice the hearing of it, but we are satisfied that apart from the grounds of appeal being arguable, there is no guarantee of success. The SADPP, whilst conceding the application, vaguely referred to mistakes made at the trial without identifying any. We ignore the concession, as it forms no basis for changing our analysis and understanding of the law as applied to the facts before us.

The trial court was evaluating circumstantial evidence relating to the shooting to death of bar patron by the appellant who was a Director in the Club. It formed the view that although the applicant may not have formed the intention, or malice aforethought, to kill the deceased:

"his conduct in carrying a cocked gun around, especially in a crowded Club which was selling alcoholic drinks so late at night portrays a very careless and reckless person. His conduct of walking away after the shooting and the realization that the deceased had been hit by a bullet and fallen down portrays a person who did not care for the life of the deceased."

There was power under *section 179 (2)* of the CPC to convict for the minor offence on the basis of the same facts and we find nothing exceptional about the procedure adopted by the trial court. The fact that the applicant had been admitted to bail during the trial is a positive consideration but is not exceptional. So is the fear that the applicant may serve the sentence before the appeal is heard, which is unlikely, but is curable by an order for expeditious hearing and disposal of the appeal, which we hereby make.

All in all, we are not persuaded that we should exercise our discretion in favour of the applicant in this matter. There are no exceptional or unusual circumstances to do so. See *Raghibir Singh Lamba vs Republic (1958) EA 337* and *Ademba vs R. [1983] KLR 442*. The application is devoid of merit and we order that it be and is hereby dismissed.

Orders accordingly.

Dated and delivered at Nairobi this 20th day of April, 2018.

P. N. WAKI

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JUDGE OF APPEAL

M. WARSAME

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR