



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KARANJA & G. B. M. KARIUKI, JJ.A)

CRIMINAL APPLICATION NO. 7 OF 2015 (UR 6/2015)

BETWEEN

JOHN NJENGA KAMAU APPLICANT

AND

REPUBLIC RESPONDENT

(An application for stay of execution pending the hearing and determination of an appeal from the Ruling of the High Court of Kenya at Nairobi (Kimaru, J.) dated 8th October, 2015

in

Misc. Criminal Appl. No. 355 of 2015)

RULING OF THE COURT

1. The applicant was charged and convicted in the Chief Magistrate’s Court for the offence of obtaining a sum of Kshs.1,175,000/= by false pretences contrary to **section 313** of the Penal Code. He was sentenced to 3years probation and directed to refund the said amount within that period. The applicant made an offer which was accepted by the trial court to pay the same in monthly installments of Kshs.35,000/=.
2. Dissatisfied with both his conviction and sentence, the applicant preferred an appeal in the High Court. Simultaneously, he also filed an application under **section 356** of the Criminal Procedure Code seeking *inter alia* stay of execution of the sentence issued and in particular the order to refund the sum of Kshs.1,175,000/= pending the hearing and determination of the High Court appeal. Upon considering the said application on merit, the learned Judge (Kimaru, J.) by the ruling dated 8th October, 2015 dismissed the same and directed the applicant to pay the said amount within 90 days failure of which leave would issue to the prosecution to apply for review of the non-custodial sentence. Aggrieved with that decision, the applicant has lodged a notice of appeal indicating his intention to appeal against the entire ruling.
3. We are seized with a notice of motion filed pursuant to **Rules 5 (2) (a)** of the Court of Appeal Rules (the Rules) wherein the applicant seeks stay of execution of the said ruling pending the hearing and determination of the appeal before this Court. The application is premised on the grounds that the learned Judge had no jurisdiction to review or vary the sentence issued by the trial court; the appeal is arguable and finally that unless the order sought is granted the applicant’s appeal would be rendered nugatory.

4. Mr. W. Gichango, learned counsel for the applicant, argued that the only issue was the mode of payment of the amount directed by the trial court. He maintained that the applicant was not in a position to pay more than Kshs.35,000/= per month. He faulted the learned Judge for ordering the applicant to pay the entire amount within 90 days which according to him, was tantamount to review contrary to **section 356 (1)** of the Criminal Procedure Code.

He urged us to allow the application.

5. On the other hand, Mr. O. J. Omondi, Senior Assistant Director of Public Prosecutions, in opposing the application, submitted that the learned Judge had jurisdiction to issue the orders he did under **section 356** of the Criminal Procedure Code. He further submitted that there was neither an application nor an order for stay before the subordinate court.

6. We have considered the application, the rival arguments and the law. In ***R -vs-The Kenya Anti-Corruption Commission & 2 Others [2009] eKLR*** Tunoi, J.A (as he was then) in dealing with the issue of the jurisdiction of the Court to grant an order of stay of criminal proceedings, expressed himself as follows:

“It would appear logical to say that it seems that the Court can [grant an order of stay] if petitioned on time to stay the order and/or decree of the superior court which will in turn have the effect of staying the criminal proceedings in the superior court. Further, as to whether it can do so or not depends on the particular circumstances of each case and especially so, what exactly the applicant is asking the Court to do and how the Court is approached.”

7. In an application such as this the applicant must satisfy two twin prerequisites namely, that the intended appeal is arguable and that unless the orders sought are not granted the intended appeal would be rendered nugatory. See ***Helmuth Rame -vs- R (2015) eKLR***.

8. On whether or not an appeal is arguable, we remind ourselves that an arguable appeal is not necessarily one that will succeed, but one that raises an issue that should be argued before the Court. It was the applicant’s contention that the learned Judge erred in varying the sentence by reducing the repayment term from three years to 90 days; he had no jurisdiction to order as he did under **section 356**

(1) of the Criminal Procedure Code. **Section 356 (1)** provides:-

“The High Court, or the subordinate court which has convicted or sentenced a person, may grant bail or may stay execution on a sentence or order pending the entering of an appeal, 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.”

Without delving into the merits of the intended appeal, an application under **section 356** is primarily for orders of stay of execution and bail pending the entering of an appeal. As to whether the learned Judge could reduce the period of repayment as he did under the said section to us raises an arguable point.

9. On the nugatory aspect the applicant claims that there is real likelihood that the prosecution would apply for review of the non-custodial sentence. We note from the applicant’s deposition that he has not defaulted in his payments of Kshs.35,000/= per month. We also note that he did not depose in his affidavit that he was incapable of paying the outstanding amount in lump sum. His advocate stated so from the bar, but there is no evidence before the Court. There is also no evidence that in the event the appeal is successful that the complainant would not be in a position to refund the amount paid. We find that the applicant has failed to establish this principle.

10. Having found that the applicant has failed to establish one of the two principles which are adjunctive we decline to exercise our discretion in his favour. Consequently, the application herein is dismissed.

Dated and delivered at Nairobi this 11th day of March, 2016.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

G. B. M. KARIUKI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR