



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MALINDI
(CORAM: GITHINJI, MAKHANDIA & OUKO, JJ.A.)
CRIMINAL APPLICATION NO.1 OF 2013

BETWEEN

NYONGA DAVID MAKEMBA APPLICANTS

AND

REPUBLIC THROUGH

DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT'S

(Being an application for bail pending appeal from the ruling of the High Court in election No.8 of 2013 (Ochieng, J.) dated 9th September, 2013

in

H.C.ELECTION PETITION NO.8 OF 2013)

RULING OF THE COURT

This is an application under **rule 5(2)(a)** of the Court of Appeal Rules and **Articles 22,23,28,47,50** and **165(3)(d)** of the Constitution, wherein the applicant seeks bail pending the hearing and determination of his appeal against the ruling and order of **Ochieng, J.** made on the 9th September, 2013 in **Election Petition No.8 of 2013** sentencing him to three (3) months imprisonment for perjury. The main order being sought is as follows:-

“1.

2. That pending the hearing and determination of this appeal, the Court be pleased to issue an order for the release of Mr Nyonga David Makemba on bail in respect of the sentence of three (3) months imprisonment imposed by the election Court (Hon Justice Ochieng) on 9th September, 2013 in Mombasa Election Petition No.8 of 2013 whereby the applicant was convicted of the offence of perjury.”

The application is founded upon nine grounds, a summary of which is that, the applicant was taken through an extra ordinary trial process where his constitutional rights were breached, that no plea was

taken, that no witness was called hence contravening the provisions of **section 111** of the Penal Code, that the intended appeal raise serious questions of law and that may serve his full sentence while the appeal is pending.

This is a brief background to the application.

The applicant was a second witness for the petitioner in ***Election Petition No.8 of 2013 Hassan Ali Joho & Anor vs Said Shahbal & 2 others*** at Mombasa. Subsequently, he swore an affidavit dated 10th April, 2013 and proceeded to testify before court on diverse dates, being, 30th July, 2013, 4th September, 2013, and 9th September, 2013. The applicant claims that following his testimony of 4th September, 2013 he was summoned to appear before court on 9th September, where the court asked him several questions regarding his testimony to which he answered truthfully. According to his affidavit sworn on 20th September, 2013, the court then proceeded to summarily convict him of the offence of perjury and sentenced him to serve three (3) months imprisonment. This he contends, was done unprocedurally to wit, no plea was taken and no witness testified against him. Thus, he alleges that this went against the provisions of **section 111** of the penal Code as well as **Article 50** of the Constitution.

Following the said conviction and sentence, the applicant filed a constitutional petition but later withdrew it upon the respondent raising certain jurisdictional issues. Subsequently, he filed a Notice of Appeal under **Rule 59** of this Court's Rules and thereafter the present application seeking bail pending appeal.

The application was placed before us on 25th September, 2013 when it was canvassed by Mr Gikandi, learned counsel for the applicant and **Mr Oyiembo**, the Assistant Director of Public Prosecutions on behalf of the respondent.

Mr Gikandi submitted that the appeal was arguable and stood high chances of success. He also argued that the application was in the nature of **rule 5(2)(a)** which grants the court unfettered discretion. He further argued that since the appeal has overwhelming chances of success, it would be unfair to have the applicant remain in prison as he may most likely have served his full term by the time the appeal comes up for hearing and in the premises, his freedom will have been curtailed. He thus contended that the process adopted by the trial court that led to the conviction and sentence of the applicant went against the well-known norms of a judicial process.

On his part, Mr Oyiembo opposed the application. Although he admitted that the appeal was arguable, he contended that the applicant had not demonstrated the existence of exceptional circumstances to warrant the application being allowed. He thus argued that the application had not met all the conditions governing the grant of bail pending appeal. In a rejoinder, **Mr Gikandi** argued that the respondent having admitted that the appeal has overwhelming chances of success, it was not necessary to consider the other limbs.

As already stated, this application has been brought under **rule 5(2)(a)** of this Court's Rules which provides **inter alia**:-

“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 notice of appeal has been given in accordance with 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.” (emphasis provided)

Upon careful reading of the above provision, it is apparent that this Court has wide and unfettered discretion to release a convicted person on bail pending the hearing and determination of the appeal, once a Notice of Appeal has been given. The question which then arises is, to what extent such discretion can be exercised?

The case of **Jivraj Shah vs Republic [1986] KLR 605** lays down the principles upon which this Court may grant an applicant bail pending appeal under **rule 5(2)a)**. The learned Judges rendered themselves thus:-

“1. 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 interests of justice to grant bail.

2. 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.

3. 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.”

Turning to the instant application, counsel for the applicant argued before us that the intended appeal will deal with pertinent issues touching on various constitutional provisions as well as section 111 of the penal Code. **Section 111** of the Penal Code provides that a person cannot be convicted of committing perjury solely upon the evidence of one witness as to the falsity of any statement alleged to be false. From the arguments before Court, it is alleged that the applicant was convicted based on his own admission, thus casting doubt on the legality of his conviction. There is also the issue of the infringement of the applicant's rights under **Article 50** of the Constitution, to wit, the right to be informed of the charge, with sufficient detail to answer it as well as the right to have adequate time and facilities to prepare a defence.

However, since it is premature for us to express any considered or settled views on those issues at this stage, we will not delve into them further than we have done already. Suffice to say, that these are substantial points of law with overwhelming chances of success at the hearing of the appeal. Indeed, the respondent's counsel did concede to this fact.

As was partially held in the case of **Dominic Kranja vs Republic (1986) KLR:-**

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

We hold the same view.

Besides, there is no way of determining how long the intended appeal may take before it is heard but there is a real probability that by the time it is determined the applicant may well have served a substantial portion of the sentence if not the entire sentence of three months imprisonment imposed. In our view, all these considerations amount to unusual or exceptional circumstances and hence there is a strong basis therefore for the exercise of our discretion in favour of the applicant.

Accordingly, the application is granted as prayed. The applicant may be released pending the hearing of his appeal upon execution of a bond for the sum of Kshs.200,000/- with two sureties of similar amount or in the alternative, upon depositing with the court cash bail for the sum of Kshs.50,000/-.

Those are our orders.

Dated and delivered at Malindi this 3rd day of October, 2013.

E.M. GITHINJI

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

WILLIAM OUKO

.....

JUDGE OF APPEAL

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

REGISTRAR

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