



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CRIMINAL APPLICATION NO. 5 OF 2008**

**BONIFACE NGANGA ..... APPLICANT**

**AND**

**THE REPUBLIC OF KENYA ..... RESPONDENT**

***(Application for bail pending the hearing and determination of appeal in Criminal Appeal No. 13 of 2008***

***in***

***H.C.C.R.A. NO. 298 OF 2006)***

**\*\*\*\*\***

**RULING OF THE COURT**

Before us is an application by way of Notice of Motion expressed as having been brought “***Under Order 5(2)(a) of the Rules of Court of Appeal and Section 379(4) of The Criminal Procedure Code.***” In this application, the applicant **BONIFACE NGANGA**, seeks the following reliefs:-

***“(a) The applicant herein be admitted to bail pending the hearing and determination of the appeal in Criminal Appeal No. 13 of 2008.***

***(b) There be a stay of the execution of the sentence imposed pending the hearing of this appeal.”***

On the outset we wish to point out that we do not have such a thing as “***Order 5(2)(a) of the Rules of Court of Appeal.***” What we have is ***rule 5(2)(a)*** of the Court of Appeal Rules.

This application came up for hearing before us on 18<sup>th</sup> November, 2008 when ***Mr. E. Oduk*** appeared for the applicant, while ***Mr. B.L. Kivihya***, appeared for the State. In his submissions, ***Mr. Oduk*** contended that there were overwhelming chances of the applicant’s appeal succeeding, in that the applicant’s co-accused ***Caroline Wanjiku Githinji*** was acquitted and yet the two had been arraigned before the trial Court on a joint charge. He went on to submit that the acquittal of ***Lucy Wanjiru Karanja*** ought to have applied to the applicant.

The other point raised by ***Mr. Oduk*** was that the magistrate who heard the witnesses was not the one who wrote the judgment and hence the requirement of ***section 200*** of the ***Criminal Procedure Code*** was not met. That, in his view, will be a substantial point of law to be raised in the appeal.

We were also asked to release the applicant on bail on the ground that he was in a poor state of health and for that reason the applicant required further surgery. It was Mr. Oduk's contention that the applicant's state of health was an exceptional circumstance which should be considered in the applicant's favour. Mr. Oduk reminded us that the appellant's sentence of *three (3) years* imprisonment started running as from *8<sup>th</sup> March, 2008* so that by the time his appeal comes up for hearing he will have served a substantial part of that sentence.

To buttress his submissions, Mr. Oduk cited a number of authorities e.g. ***SHAH V. R. (1986) KLR 528***.

On his part, Mr. Kivihya opposed this application contending that it lacked merits. He submitted that the record was clear that **section 200** of the *Criminal Procedure Code* was complied with. Mr. Kivihya was of the view that the learned trial magistrate was right in convicting the applicant.

What is before us is an application to release the applicant on bail pending appeal. **Section 379(4)** of the *Criminal Procedure Code* 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.”***

From the foregoing, it is clear that this Court has the discretion to grant an application of this nature. What is to be remembered is that we are not dealing with the appeal. However, sight should not be lost of the fact that the two courts below (*the trial court and the High Court*) have reached concurrent findings to the effect that the applicant had inflicted serious injuries to the complainant (***Lucy Wangari Karanja***). The facts accepted by the two courts below were that the complainant was working in a bar at Kahuho Trading Centre within Kiambu District and that this bar was owned or operated by both ***Boniface Ng'ang'a Githinji*** (*applicant herein*) and his wife ***Caroline Wanjiku Githinji***. The complainant asked for her two months pay but the applicant's wife slapped her. The complainant decided to wait for the applicant so that she could report to him that applicant's wife had slapped her and request for her salary. When the applicant came back he set upon her (complainant) with kicks and fists. He kicked her at the genital area and as a result she started bleeding. The bleeding led to a miscarriage as she was two months pregnant.

We would refrain from commenting on the facts and the law since that is a matter for the appeal. Our concern here is whether what has been urged before us would entitle the applicant to being released on bail.

In ***ADEMBA V. R. [1983] KLR 442*** it was held:-

- “1. Bail pending appeal may only be granted if there are exceptional or unusual circumstances.***
- 2. The likelihood of success in the appeal is a factor taken into consideration in granting bail pending appeal. Even though the appellant showed serious family and personal difficulties, in view of the unlikelihood of success in this appeal, the application could not succeed.***
- 3. The Court of Appeal has no jurisdiction to entertain an appeal from a refusal of the High Court to grant bail to a convicted person pending an appeal against the decision to that court.***
- 4. The applicable law regarding applications to the High Court for bail pending appeal were sections 356 and 357 of the Criminal Procedure Code (Cap 75) and not section 379(4) as stated by the appellant's advocate.”***

And in ***MUTUA V. R. [1985] KLR 497*** it was held:-

- “1. The main problem was whether the appeal had overwhelming chances of success for if it did not,***

***then this Court would not grant bail pending the appeal by virtue of the Court of Appeal Rules rule 5(2)(a).***

***2. The test was whether there were exceptional or unusual circumstances, the most important ground being whether the appeal had overwhelming chances of being successful.***

***3. 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.***

***4. There was no overwhelming probability that the sentence would be reduced since the appellate court could not deal with the issue of sentence, and on the other grounds, it was not apparent as a matter of law that the appellant would succeed.”***

The foregoing holdings of this Court give what may be considered as the guiding principles in an application of this nature. For an applicant to be granted bail at this stage it is upon him to demonstrate that there are exceptional or unusual circumstances to warrant his release on bail. The likelihood of success in the appeal is a factor to be taken into consideration. But it must also be remembered that an applicant seeking bail has been convicted by a properly constituted court and is undergoing punishment because of that conviction which stands until it is set aside.

We have heard the submissions for and against this application. Taking into account the guiding principles as set out above, we are of the view that the applicant has not demonstrated any exceptional or unusual circumstances to warrant his being released on bail pending appeal.

In view of the foregoing, we agree with Mr. Kivihya that this application has no merits. Accordingly, the application is hereby dismissed.

***Dated and delivered at NAIROBI this 19<sup>th</sup> day of December, 2008.***

***E.O. O’KUBASU***

.....

***JUDGE OF APPEAL***

***E.M. GITHINJI***

.....

***JUDGE OF APPEAL***

***J.W. ONYANGO OTIENO***

.....

***JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR**