



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Criminal Appli 3 of 2006

SIMON MWANGI KIRIKAAPPLICANT

AND

THE REPUBLIC.....RESPONDENT

**(An Application for bail pending appeal from the decision of the High Court of Kenya at Nairobi
(Mbogholi Msagha, J.) dated 18.06.2006**

in

H.C.CR.A NO. 1312 OF 1998

RULING OF THE COURT

The application before us is fairly straightforward and is not opposed by the Attorney General. It is a notice of motion expressed to have been taken out under **section 356 and 357** of the **Criminal Procedure Code**, but learned counsel for the applicant, Mr. Kingori Kariuki must have realised that those provisions obtain only in respect of applications before the High Court. He informed us at the commencement of his submissions that the application was made under **Rules 1(3) and 5 (2)(a)** of the Rules of this Court. The former relates to the inherent jurisdiction of this Court and is obviously inapplicable where there are express provisions for seeking the intended orders. The order sought in the motion is that the applicant be granted bail pending the hearing of an intended appeal. **Rule 5(2)(a)** of our Rules and **section 379(4)** of the **Criminal Procedure Code** expressly confer on this Court the jurisdiction to grant such order.

The facts leading to the application may be related briefly. The applicant was tried and convicted before Nairobi Chief Magistrate, Omondi Tunya (as he then was) on two counts of manslaughter and four other counts of contravention of various Local Authority By-laws relating to building construction. He was sentenced to serve three years imprisonment on each of the two manslaughter counts the prison terms to run concurrently, and to a fine of Shs.2000/= (in default 3 months imprisonment) on each of the four other counts. That was on 21st October,1998. Aggrieved by that decision, the applicant preferred an appeal to the High Court (**Cr. Appeal No. 1312/98**) and in the meantime, sought and was granted bail pending the hearing of that appeal. His expectation was that he would be notified when such hearing was due. But no notice was served on him or his advocates on record.

To his consternation, he was, on the authority of warrants issued by the High Court, arrested and taken before that court on 5th January, 2006 where his bond was cancelled, his sureties discharged, and he

was sent back to prison to finish his sentence. It was on that day that he learned that his appeal had been dismissed in his absence on 18th June, 2002, and the reason given by the court (Mbogholi Msagha J.) for the dismissal was “*want of prosecution*”. The applicant then applied to have the order reviewed and the appeal re-instated for hearing but Makhandia J. who heard the plea rejected it on the ground that there was no provision in the ***Criminal Procedure Code*** for review or setting aside a dismissal of an appeal, and in any event, he could not review an order made by another Judge of coordinate jurisdiction or sit on appeal thereon. He advised the appellant to seek redress in the Court of Appeal. That was on 12th January, 2006.

The applicant took that advice and sought extension of time to mount an appeal against the dismissal of his appeal and the extension was granted by a single Judge of this court, Onyango Otieno J.A on 31st January, 2006. On the same day, the notice of appeal and the application now before us were filed.

The principles upon which this Court may grant an applicant bail pending appeal under ***rule 5(2)(a)*** of the Rules have been examined before and we need only cite ***Jivraj Shah v Republic [1986] KLR 605*** where it was held:

“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.”

In this matter, we are told that the intended appeal will raise the pertinent issue whether the applicant’s appeal which was pending before the superior court could have been dismissed for want of prosecution as it was. A view previously given by this Court in ***John Olira Taro v Republic, Cr. C. No. 52/99*** will be put forward that there is no legal basis for such dismissal and the only way open for an appellate court which found itself without an appellant on the day scheduled for hearing, was to hear the appeal *ex parte* or adjourn it. We need not express any considered view on that issue at this stage. Suffice it to say that it is a substantial point of law which could result in the appeal being allowed. There is no way of determining how long the intended appeal may take before it is heard but clearly, by the time it is determined the applicant may well have served a substantial part of the sentence. We are further told in affidavit evidence, which is not controverted, that the applicant is an old man of 65 years who suffers from acute hypertension and suffered a stroke in 1996. He is currently on medication for that condition and requires close supervision. We think all these amount to unusual or exceptional circumstances and there is a firm 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 Shs. 500,000/= with two sureties of similar amount or in the alternative, upon depositing with the court cash bail for the sum of Shs. 500,000/=.

Those are our orders.

Dated and delivered at Nairobi this 5th day of May, 2006.

S.E.O. BOSIRE

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR