



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO E044 OF 2021

ANDREW KIPSIGEI CHOGE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

INTRODUCTION

1. In his Notice of Motion application dated 26th October 2021 and filed on 28th October 2021, the Appellant sought for orders that he be admitted to bail or bond pending the hearing of this appeal.
2. In his Affidavit in support of the application that he swore on 26th October 2021, he averred that his appeal had high chances of success and therefore urged this court to release him on bail or bond.
3. He added that when he was arrested, he was given bond of Kshs 100,000/= and he availed himself in court when required without fail and therefore he had no reason to abscond if he was admitted to bond/bail pending appeal.
4. He contended that he was ready to abide by any terms and condition of this court. He added that he was married with five (5) children and he was their sole breadwinner as his wife was unemployed with no means to cater for the education, food, clothing and medical needs of the children.
5. In opposition to the said application, on 6th December 2021, the Respondent filed its Grounds of Opposition dated 3rd December 2021. It contended that there were no inconsistencies in the Prosecution's case and that the Appellant had not demonstrated any unusual circumstances to warrant bail pending appeal. It added that the fact that the Appellant was a breadwinner in his family was not justifiable reason to warrant bail pending appeal.
6. It placed reliance on the case of **Shah vs Republic [1986] eKLR** where the court provided the conditions precedent for granting of bail pending appeal. It urged this court to dismiss the Appellant's application for lack of merit.
7. The Appellant's Written Submissions were dated 10th January 2022 and filed on 11th January 2022, which the Appellant relied upon in their entirety. The Respondent did not file any Written Submissions herein. On 9th September 2022, it informed this court that it would rely entirely on the aforesaid Grounds of Opposition.
8. This Ruling is based on the said Appellant's Written Submissions and Respondent's Grounds of Opposition.

LEGAL ANALYSIS

9. The Appellant submitted that having been dissatisfied with the judgment of Hon. P. Rugut in **Tamu Sexual Offences No E004 of 2021**, he preferred the Appeal and the present application herein.
10. He placed reliance on the case of **Jivraj Shah vs Republic (1986)** (sic) where the appellant therein filed application for bail pending appeal stating that he had overwhelming chances of success, that he had been unwell and further that he had served a substantial part of the sentence amongst other reasons.
11. He contended that he was not granted fair hearing during trial stage as required under Article 50 of the Constitution of Kenya 2010 and for that reason argued that his appeal had high chances of success.

12. He asserted that the general principles which guide the court in granting and/or denying bail or bond were the right of presumption of innocence until proven guilty, right of liberty of the applicant versus the right of the victims, probability of the applicant attending court if released on bail/bond, chances of the accused or appellant succeeding in any given case, the age, health and security of the accused or appellant.

13. He submitted that in light of the above general principles, he would attend court if granted bail/bond and that considering that he was married and had children who depended on him, it was unlikely that he would abscond. He further submitted that his place of abode was known which was Fort-Ternan and which was within the jurisdiction of this Court.

14. He added that there were exceptional circumstances to warrant his/her release on bail pending appeal. He argued that he had pleaded guilty to the offence that he was serving sentence for and that the requirements of plea of guilty laid by the Court of Appeal in the case of Adan vs Republic (1973) EA 445 were not met.

15. He asserted that with regard to this, he should be given a benefit of doubt to enjoy the right of presumption of innocence until the contrary is proven as provided for under Article 50 of the Constitution of Kenya, 2010. He was categorical that his case was an exceptional case where he pleaded guilty while not understanding the consequences of pleading guilty and not understanding the charge facing him before Trial Court.

16. He was emphatic that his case qualified for a new trial and urged the court to grant him bail/bond unless there were compelling reasons not to be released as provided for under Article 49 (h) of the Constitution of Kenya, 2010. He urged this Court to grant him bail/bond terms and promised to abide by the terms that would be provided.

17. This court considered the principles of granting bail/bond pending appeal that were laid down in the case of Jivraj Shah vs Republic (1986) eKLR. These were that:-

1. There must be in existence of exceptional or unusual circumstances upon which the court can fairly conclude that it is in the interest 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 argued and that the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail exists.

18. Having said so, grant of bail pending appeal is at the discretion of the court. As was stated in the case of Daniel Dominic Karanja vs Republic [1986] eKLR, availability of sureties, ill health, suffering of a convict's family were not grounds for the granting of bail pending appeal. However, the anticipated delays in hearing an appeal, the length of the sentence, whether or not the applicant had pleaded guilty and/or admitted the offence and option of a non-custodial sentence were factors that an appellate court could take into account when considering an application for bail pending appeal.

19. The Appellant herein did not furnish this court with the proceedings of the lower court. However, it was clear from his Written Submissions that he pleaded guilty and was convicted of a sexual offence. Notably, offences under the Sexual Offences Act have no option of a fine which would prejudice an applicant if his or her appeal was found to have been successful as he or she would ordinarily have served a prison term despite having had an option of a fine.

20. At this stage, a court ought to be very cautious not to look into the merits or otherwise of the appeal as that is under the purview of the appellate court. It should only be concerned with the question of whether or not the appeal would be rendered nugatory if bail/bond pending appeal is not granted.

21. This court noted that the Appellant herein admitted to having committed the offence as he pleaded guilty. He had now argued that he had not understood the consequences of pleading guilty to such an offence that faced him. Without pre-empting the merits or otherwise of the Appeal, the onus was on him to demonstrate that he had an appeal with overwhelming chance of success. However, there was a challenge as he had pleaded guilty to the charge that faced him.

22. Going further, he failed to demonstrate that exceptional circumstances existed to warrant him being granted bail /bond pending appeal. The fact that he had a family that depended on him was not a reason for him to be granted bail/bond pending the hearing and determination of the Appeal herein. His assertion that he did not abscond court during trial was also not sufficient reason to grant him bail/bond at this stage.

23. This court also took judicial notice that there were no delays in hearing of appeals presently sufficient to cause the Appellant to serve a substantial part of his sentence before his Appeal could be heard and determined. The onus was on him to lodge his Record of Appeal without any delay.

24. It was therefore the considered view of this court that this was not a suitable case for it to exercise its discretion and grant the Appellant bail/bond pending the hearing and determination of the Appeal herein.

DISPOSITION

25. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Notice of Motion application dated 26th October 2021 and filed on 28th October 2021 was not merited and the same be and is hereby dismissed.

26. The Court Administrator of Tamu Law Courts be and is hereby directed to facilitate the typing of the proceedings and preparation of the

Record of Appeal to enable the Appellant lodge the said Record of Appeal within forty five (45) days from the date of this Ruling.

27. Matter to be mentioned on 19th July 2022 to confirm if the Appellant will have filed the said Record of Appeal and/or for further orders and/or directions.

28. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 28TH DAY OF APRIL 2022

J. KAMAU

JUDGE