



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL APPEAL NO. E001 OF 2021

DAUDI OBIERO NYAKWEBA.....APPELLANT/APPLICANT

-VRS-

THE REPUBLIC.....RESPONDENT

{Being an Appeal against the Judgement of Hon. W. C. Waswa (Mr.) – RM Nyamira

dated and delivered on the 27th day of January 2021 in the original Nyamira

Chief Magistrate’s Court Criminal Case No. 327 of 2018}

RULING

Before me is the Notice of Motion dated 11th February 2021 filed herein on 12th February 2021 in which the appellant seeks orders as follows: -

“1. (Spent)

2. (Spent)

3. There be a temporary stay of execution of the Sentence made on the 3rd February 2021 in Nyamira Criminal Case No. 327 of 2018 against the Applicant DAUDI OBIERO NYAKWEBA delivered by Honourable W. C. WASWA (RM).

4. THAT, the order made by Honourable W. C. WASWA, requiring the appellant herein to vacate parcel of land no. WEST Mugirango/Siami/5344 within 14 days be stayed pending appeal.

5. THAT the Honourable Court be pleased to grant the Applicant Bail/Bond pending the outcome of the Appeal in Nyamira HCCR No. 1 of 2021.

6. THAT upon grant of Prayer four (4) above the Appellant/Applicant be released on reasonable Bond/Bail terms pending the Hearing and determination of the Nyamira HCCR No. 1 of 2021 file herein.

7. THAT Costs of this Application be provided for.”

The application is premised on the grounds on the face thereof and in the supporting affidavit sworn by the applicant on 11th February 2021. The grounds on the face of the application are: -

“1. THAT the judgement convicting the Appellant/Applicant for the Charge of Forcible Detainer contrary to Section 91 of the Penal Code CAP 63 Laws of Kenya was delivered on the 27 January 2021 in Nyamira Criminal Case No. 327 of 2018 by the Trial Magistrate Honourable W. C. WASWA (RM)

2. THAT Sentencing for the Charge of Forcible Detainer contrary to Section 91 of the Penal Code CAP 63 Laws of Kenya was meted against the Appellant/Applicant on the 3rd February 2021.

3. THAT the Appellant/Applicant being aggrieved by the conviction and sentence meted on him has already preferred and filed an Appeal vide Nyamira HCCR No. 1 of 2021 yet to be heard and determined.
4. THAT the appeal lodged before the High Court at Nyamira raises arguable points of law and fact with high Chances of Success.
5. THAT there is no stay of execution of the Judgement and Sentence prescribed and the Appellant stands to suffer immeasurably.
6. THAT if the instant application is not allowed and the appellant later on succeeds on appeal the appellant/applicant will suffer great loss and damage Appellant/Applicant shall have served his sentence substantially.
7. THAT the Appellant/Applicant is not a flight risk and has a fixed abode who diligently attended court during trial and has undertaken to attend court diligently.
8. THAT the Appellant/Applicant is willing and ready to abide by any terms and conditions that might be given by this honourable Court in allowing this application.
9. THAT no prejudice will occasion on the part of the Respondent if this application is granted.”

The application was argued orally on 1st March 2021. Ms. Ang’asa Advocate represented the appellant/applicant and Senior Prosecution Counsel Majale the State.

The jurisdiction of this court to grant bond/bail pending appeal is derived from **Section 357 (1)** of the **Criminal Procedure Code** which states: -

“(1) After the entering of an appeal by a person entitled to appeal, the High Court, or the subordinate court which convicted or sentenced that person, may order that he be released on bail with or without sureties, or, if that person is not released on bail, shall at his request order that the execution of the sentence or order appealed against shall be suspended pending the hearing of his appeal.....”

The above section does not by itself set out the conditions upon which the application should be granted but there is more than sufficient case law to guide this case. The leading authority in that regard is the often cited case of **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 the case of **Dominic Karanja v Republic [1986] KLR 612** cited by Counsel for the State the Court of Appeal held that: -

“1. The most important issue was that if the appeal had such overwhelming chances of success, there was no justification for depriving the applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances.

2. The previous good character of the applicant and the hardships, if any, facing his family were not exceptional or unusual factors. Ill health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners.

3. A solemn assertion by an applicant that he will not abscond if released, even if it is supported by sureties, is not sufficient ground for releasing a convicted person on bail pending appeal.

4. Upon considering the relevant material in this case, there was no overwhelming chance of the appeal being successful.”

This court also derives guidance from **Paragraph 4.30 on page 27 of the Bail and Bond Policy Guidelines** which state: -

“4.30 With respect to bail pending appeal, the burden of proof is on the convicted person to demonstrate that there is an “overwhelming probability” that his or her appeal will succeed.”

The applicant herein was charged with the offence of **forcible detainer contrary to Section 91 of the Penal Code**. Upon finding him guilty and convicting him the trial court ordered him to pay the complainant Kshs. 50,000/= as compensation and also ordered him to vacate the land or in default serve a term of imprisonment for one year. It is the applicant's contention that the punishment was harsh and excessive and that he should be granted bail because he is advanced in age. His Advocate in fact argued that as a vulnerable person the appellant should be at home in line with the Ministry of Health guidelines on the Covid-19 pandemic. Counsel also argued that if the sentence is not stayed the appellant is likely to suffer substantial loss as he will have been evicted from the land the subject of the appeal.

The application is vehemently opposed and having considered the rival submissions I am not persuaded that the applicant meets the conditions requisite for grant of bond pending appeal. Whether the sentence is harsh or excessive is a matter to be determined at the appeal and given the nature and circumstances of the offence the advanced age of the appellant is in my view not an exceptional circumstance. Moreover, in this court appeals are heard in real time and there is no likelihood that he will serve a substantial part of the sentence before the appeal is heard. I must also, at the risk of being accused of determining the appeal, say that upon a perusal of the judgement of the trial court vis a vis the grounds set out in the memorandum of appeal there is nothing to demonstrate that the appeal has **overwhelming probability or** chances of success. In any event should the appellant pay the adjudged compensation and the appeal succeeds the sum paid can always be refunded. The application for bond pending appeal is therefore rejected. However, this court finds it only just that whereas the order requiring the appellant/applicant to vacate the land shall remain whatever structures he has built thereon are not to be demolished or destroyed until this appeal is heard and determined. To expedite the hearing of the appeal Counsel for the appellant is directed to file and serve the record of appeal within fourteen days of this ruling and the appeal shall be mentioned for directions on 12th April 2021. It is so ordered.

SIGNED, DATED AND DELIVERED ELECTRONICALLY AT NYAMIRA THIS 18TH DAY OF MARCH 2021.

E. N. MAINA

JUDGE