



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

HIGH COURT CRIMINAL APPEAL NO 28 OF 2019

(From Original Conviction and Sentence in Criminal Case No. S. O.

5 of 2017 of the Senior Resident Magistrate's Court at Gichugu)

FRANCIS KAMAU MATE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING:

1. The appellant has filed a Notice of Motion dated 9-9-2019 seeking an order that he be released on bail pending the hearing and determination of this appeal.
2. The application is based on the ground that he was convicted and sentenced life imprisonment on 7-5-2019 at Senior Resident Magistrate's Court Gichugu in Case number (S.O) 5/ 2017 for the offence of defilement. He filed this appeal on 20-5-2019. The trial Magistrate released him on bail pending trial and never absconded or jumped bail. The appeal has high chances of success. That if granted bail he will abide with the bond terms which the court may set.
3. That it is in the interest of justice that the appellant be admitted to bail pending hearing and determination of the appeal.
4. The application is based on the affidavit of the applicant where he has reiterated the above grounds.
5. The state opposed the Notice of Motion and filed grounds of opposition dated 28th of October, 2019. He has stated that the respondent states that the applicant has not satisfied the conditions and principles for granting bond pending appeal, the appeal is not arguable and does not have overwhelming chances of success. There is no exception and unusual circumstances, the appeal is ready for hearing. There is chance for delay in disposing the appeal.
6. The appellant filed written submissions and submits that in his appeal he has raised ground number 3 in the petition of appeal stating that the trial magistrate erred in law and fact by failing to subject the appellant to a psychiatrist before the trial commenced.
7. It was for the [prosecution to subject the appellant to a psychiatrist before commencement of the trial and satisfy the court that the appellant was fit to stand trial.
8. On that on the hearing of the appeal he demonstrate that the appellant was at the time of the commission of the offence mentally handicapped and on the same breath urge the court to order that the appellant be subjected to mental assessment.
9. I have considered the application the principles upon which this court this may grant bond pending appeal have been highlighted in the case of **Jivarar Shah -versus – Republic (1986) KLR 605** where the court laid down the criteria for release of an accused person on bail pending appeal.

This are:

- (i) **Existence of exceptional or unusual circumstances upon which an appellate court can fairly conclude that it is in the best interest of justice to grant bail.**

(ii) Where 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 in addition the sentence or substantial part of it will have been served by the time the appeal is heard.

10. Further the leading authority in the subject of bail pending appeal is the case of: SOMO -VERSUS – REPUBLIC (1972) E.A 476. Enumerated the principles for admission to bail pending in Kenya have over 40 years been clustered around this decision. This principles are that the applicant must demonstrate the existence of overwhelming chances of success. The applicant ought to be in a position to persuade the court that his or her appeal is so strong, so meritorious that at the end the probabilities will favour an acquittal.

11. It is the appellant who has the burden to prove that there are some critical issues of law or an issue as to the mode of application of evidence.

12. The provision of law that applies to bond pending appeal is Section 357 (1) (2) of the Criminal Procedure Code which provides as follows;

“ (i) After the entering of an appeal by a person entitled to appeal, the High Court, or the sub-ordinate court which convicted or sentenced that person, may order that he be 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:

Provided that, where an application for bail is made to subordinate court and is refused by that court, no further application for bail shall lie to the High Court, but a person so refused bail by a sub-ordinate court may appeal against refusal to the High Court and notwithstanding anything to the contrary in Section 352 and 359, the appeal shall not be summarily rejected and shall be heard, in accordance with such procedure as may be prescribed, before one judge of the High Court sitting in chambers.

(2) If the appeal is ultimately dismissed and the original sentence confirmed, or some other sentence of imprisonment substituted therefore, the time during which the appellant has been released on bail or during which the sentence has been suspended shall be excluded in computing the term of imprisonment to which he is finally sentenced.”

13. A person seeking release on bail pending appeal seeks the exercise of discretion by the court because unlike in application for bail pending trial, which is a Constitutional right in bail pending appeal the person has been convicted and there is presumption that he has been properly convicted.

In the case of; Chimambhai -versus- Republic (1971) EA 343 J.HARRIS made an observation in application for bail pending appeal when he stated

“ the case of an appellant under sentence of imprisonment seeking bond lacks one of the strongest elements normally available to an accused person seeking bail before trial namely, the presumption of innocence but nevertheless the law of today frankly recognizes to an extent at one time unknown the possibility of the conviction been erroneous or the punishment excessive a recognition which is implicit in the registration creating the right of appeal in a Criminal case.”

14. I have considered the application and having considered the above authorities I find that the burden lies with the applicant to establish that the appeal has high chances of success or is likely to serve a substantial part of the sentence before the appeal is heard.

15. I have considered the grounds of appeal the appellant has stated that the appeal has high chances of success. There appellant has also stated that the prosecution failed to bring to the attention of the court that he was mentally retarded.

16. I have considered the record of appeal and the proceedings before the trial court and I find that there was no indication that the appellant was mentally retarded. The document attached to the submissions shows that he dropped out in Class two (2) and that when he dropped out he was mentally handicapped. Nothing has been shown that the appellant despite that has been undergoing treatment or that the disability was such that he was not fit to stand trial, and I find that this evidence is not sufficient to establish that there is an exceptional circumstance to warrant this court to exercise discretion in his favour.

17. I have considered the record before the trial magistrate and I find that the appeal cannot be stated to have overwhelming chances of success.

18. The judgment of the trial magistrate which I have perused and I find that the trial magistrate properly considered the law and evidence, and the defence of the accused.

19. There are no exceptional circumstances. The appellant was sentenced to imprisonment for life, there is no possibility that we will serve a substantial part of the sentence before the appeal is heard and determined and I find that the application has not met the threshold laid down in the Case of; Somo -versus- Republic (1972)476 and the other authorities which I have considered above.

20. I therefore, find that this application is without merit. The issue is that the appellant was mentally retarded can be considered in this appeal when it comes up for hearing.

21. I therefore dismiss the application.

Dated, signed at Kerugoya this 29th day of May 2020

L.W. GITARI

JUDGE