



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO. 45 OF 2020

HENRY NDAMBUKI MBATHA.....APPELLANT/APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

This ruling is in respect to the Appellant/Applicant's Notice of Motion dated 21st May 2020, seeking his release on bail/bond pending the hearing and determination of his appeal. The application is supported by the grounds on its face plus his supporting affidavit.

All he states in the grounds and supporting affidavit, is that he was convicted of the offence of defilement and sentenced to fifteen (15) years' imprisonment. That he had previously been on bond and never absconded upto the date of judgment.

He also avers that in the event of a successful appeal, he will have served a substantial portion of his sentence, hence the need for his release on bail/bond. He expresses his willingness to abide by the bond terms.

In her submissions in support of the application, Mrs. Isika states that the application is grounded on section 357(1) Criminal Procedure Code. That the two main issues for consideration are:

- a. Whether the appeal has overwhelming chances of success and,**
- b. Whether there are exceptional circumstances warranting the release of the Applicant on bail pending appeal.**

On the first issue she submits that the evidence by the witnesses had discrepancies which created doubts as to the guilt of the Applicant. In other words, the prosecution case was not proved to the required standard. On this, she cited the cases of: -

- i. Samuel Macharia –vs- Rep (2013) eKLR and,**
- ii. Chimambhai –vs- Rep (No. 2) (1971) E.A 343.**

On the second issue she submits that the Applicant is a family man and is therefore not a flight risk. That he faithfully attended court in the lower court when released on bond upto the date of judgment. Relying on the case of **Tom Omare Magutu –vs- Rep (2017) eKLR** counsel submits that the Applicant will have served a substantial part of the sentence by the time the appeal is heard and determined.

Counsel also referred to the case of **Gerald Macharia Githuka –vs- Rep Criminal Appeal No. 119 of 2004** where the court stated:

“The cornerstone of the justice system is that no one will be punished without the benefit of due process including the right to exhaust the right to appeal. Incarceration before trial or pending hearing of an appeal cuts against this principle...” (emphasis is mine.)

It was therefore her submission that bail pending appeal is a right which the Applicant should not be denied.

The application is opposed by the Respondent through the replying affidavit of learned counsel Mrs. Ann Gakumu. She avers that upon conviction the Applicant waived some of his rights to liberty as provided for under Article 29 of the constitution. That he has not demonstrated that his appeal has overwhelming chances of success. He urged the court to deal with the appeal as soon as possible so that the Appellant can know his fate.

In her submission, counsel has referred the court to the case of **Jane Nyambura Ngari alias Nesta Wangigi Ileri –vs- Rep (2018) eKLR** where the court found that the Applicant had lost the presumption of innocence by virtue of the conviction.

She further contends that the Applicant had not raised any unusual circumstances upon which this court can conclude that it was in the interest of justice for bail to be granted. She cited the case of **Jivraj Shah –vs- Rep (1986) KLR 605** to support this argument. Counsel also referred to the case of **Dominic Karanja –vs- Rep (1986) KLR 612** where the Court of Appeal stated: -

a. The most important issue was that the appeal had such overwhelming chance of success, there is no justification for depriving the Applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances.

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

c. A solemn assertion by the Applicant that he will not abscond if released, even if sureties support it, is not sufficient ground for releasing a convicted person on bail pending appeal.

Unlike bond/bail pending trial, bond/bail pending appeal is not a constitutional right (*See Article 49* of the constitution) but may be granted under section 357 of the Criminal Procedure Code. The reason for the distinction is that in the case of an appeal the Appellant has already been tried and found guilty by a competent court of law. Therefore, an application for bond/bail pending appeal attracts stringent conditions which must be considered. It therefore follows that the granting of bond/bail pending appeal is discretionary depending on the circumstances of each case.

The main issues for consideration in such an application have been set out in a number of decisions. In the case of **Jivraj Shah –vs- Rep (1986) KLR 605** the Court of Appeal stated this:

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.”

This followed its decision in **Dominic Karanja –vs- Rep (supra)**.

On whether the appeal has overwhelming chances of success, I will state that the victim was aged 17 years of age. The trial Magistrate who saw and heard her testify believed her. Infact the main issue in the appeal is one of identification of the perpetrator, since age and penetration were proved. The appeal is therefore arguable.

On the issue of special circumstances, I really seem not to find any proved. The Applicant says he has a family and a young child aged less than a year and he wants to be with them. He was convicted and sentenced on 12th February 2020. He has been in prison for four (4) months now. Owing to the covid 19 pandemic, the best place for him to be for now is where he is.

Yes, he may have been very faithful to the bond terms in the lower court but that in itself is not good ground for his release on bond pending appeal, especially when the court considers the seriousness of the offence.

There is no allegation or indication of any delay in hearing the appeal. Counsel should make a follow up to ensure that the appeal is admitted within the shortest time from now. The Respondent has undertaken to deal with the appeal expeditiously.

I do not find any merit in the application which I hereby dismiss.

Orders accordingly.

Delivered, signed & dated this 23rd day of June 2020, in open court at Makueni.

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H. I. Ong’udi

Judge