



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO. 50 OF 2020

SAMUEL OMBOKE OKODA.....APPELLANT/APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

This ruling is in respect to the Appellant/Applicant's Notice of Motion dated 13th March 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 the supporting affidavit of his counsel Mr. Omondi Sam Ogutu.

In his grounds and supporting affidavit, he states that he was convicted on a defective charge sheet, plus evidence that was full of inconsistencies, omissions and gaps. That he is a perfect candidate for bail/bond since he had diligently complied with the bond terms during the trial before the lower court. He states that according to the grounds of appeal raised, his appeal has overwhelming chances of success.

The application is opposed by the Respondent who has filed a replying affidavit and submissions by learned counsel Mrs. Anne Gakumu. She has averred that upon conviction, the Applicant waived some of his rights to liberty as provided for under Article 29 of the constitution 2010. That the fact of the appeal having overwhelming chances of success in itself is not sufficient ground for seeking release on bail/bond. She further avers that the long sentence of ten (10) years can easily tempt him to abscond. She urged the court to disallow the application and allow the parties to expeditiously deal with the appeal.

Mr. Ogutu in his submissions filed on 18th June 2020 acknowledges that release on bail/bond pending appeal is discretionary. At **paragraph 7** of his submissions, he reiterates the grounds that convince him of the appeal's overwhelming chances of success. He asks the court to consider the said grounds and find prima facie that the prospects of success are high.

Counsel expressed the Applicant's anxiety over delay in hearing the appeal due to the prevailing circumstances, in the country. Moreso, the crowding in prisons itself was a threat to spread of the COVID-19

Counsel Anne Gakumu in her submissions filed on 15th June 2020 and while relying on the case of **Jane Wambura Ngari alias Nesta Wanjigi Ireri Criminal Appeal No. 52/2017 (2018) eKLR** states that bail pending appeal is not a constitutional right as the presumption of innocent is lost upon conviction.

Further relying on the case of **Jivraj shah –vs- Rep (1986) KLR 605** she submits that the Applicant has not demonstrated any unusual circumstances to make this court grant bail. In the said case it was held thus: -

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."

She also contends that failure to jump bail in the lower court is not in itself an exceptional or unusual factor to support this application. She has cited the case of **Dominic Karanja –vs- R (1986) KLR 612** where the Court of Appeal held:

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.

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

Being guided by the decisions cited above, I have considered the application, the evidence on record, the grounds of appeal and the submissions. An issue about the defect in the charge sheet was raised in the lower court but it was not addressed in the judgment. There are other issues raised in respect to the weight of the evidence adduced and whether it was sufficient to found a conviction. I will not get into the merits of all this, but in a nutshell state that the appeal is arguable. It would go either way.

On whether there are exceptional circumstances I find none raised and proved by the Applicant. The Applicant has been in prison since the outbreak of the COVID19. It would not be advisable to have him move to and fro from there now. The best that this court and both counsel can do for him is to have the appeal heard and determined expeditiously.

The good news is that the lower court record has been received and the appeal was admitted on 16th June 2020. Let both counsel collect the Record of Appeal within the shortest time and seek directions on how to argue the appeal.

I therefore find the circumstances herein not to warrant the release of the Applicant on bail/bond. Application is dismissed.

Orders accordingly.

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

H. I. Ong'udi

Judge