



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

HCCRA NO. 31'B' OF 2018

MADRINE GATWIRI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the conviction and sentence of the senior Principal Magistrate's

Court at Chuka Hon. M. Sudi (SRM) dated 26th November, 2018 in the

Chief Magistrate's Court Criminal Case No.841 of 2013).

R U L I N G

1. The applicant herein, **MADRINE GATWIRI**, has moved this court through a Notice of Motion dated 18th December, 2018 under **Section 124** of the **Criminal Procedure Code** and **Articles 20(3) and (4), 21(1), 23(3) and (4), 49(1)h and 50(2)** of the **Constitution** of Kenya. The applicant has also cited the provisions of **Section 357** of the **Criminal Procedure Code** in asking this court to release her on bail pending appeal.

2. The grounds upon which this application has been brought are as follows namely:

(i) That she was convicted and sentenced to four years imprisonment.

(ii) That the applicant was on bail during trial at the Subordinate Court and attended court without fail.

(iii) That she is a single mother of two disabled children aged 2 years and 15 years respectively and that the two children required constant care and would suffer hardship and trauma unless the applicant is granted bail.

(iv) That unless she admitted to bail, she will substantially serve her term in prison rendering her appeal nugatory to her detriment.

3. The applicant has sworn an affidavit in support of the above grounds and exhibited an end of year letter from a school for the deaf in Siakago. The letter exhibited however does not contain the names of the children that the applicant has referred to in her application.

4. The applicant believes that her appeal stands high chances of success because in her view her conviction in the Lower Court was based on insufficient and contradictory evidence. She opines that her dispute with the complainant was of a civil nature and should not have been criminalized.

5. The applicant's learned counsel has urged this court to release the applicant on bail citing the decision in ***Tom Omare Magutu -vs- Republic [2017]eKLR*** which held that a convict can be released on bail only where special circumstance exists. She submitted that the special circumstance existing in this instance is the fact the applicant has two disabled children who require care that can be provided only by their mother, the applicant herein.

6. The respondent, through the Director of Public Prosecution has opposed this application through a Replying Affidavit of Erick Momanyi, learned counsel from the office of the Director of Public Prosecution.

7. The respondent has contested the applicant's contention that her chances to succeed on appeal are high. The respondent opines that their case against the appellant at the trial was strong backed with evidence.

8. The respondent has further contended that the applicant has not demonstrated the existence of an exceptional circumstance that would warrant grant of bond/bail pending appeal. Mr. Momanyi has cited the decision of Nahashon Kepkemei -vs- Republic [2015] eKLR where the court stated that upon conviction, the presumption of innocence is lost and a convict should continue serving the sentence meted out unless good reasons are advanced.

9. This court has considered this application, the ground upon which the applicant relies and the opposition mounted by the respondent. A right to bail is a right only available to arrested person or persons charged in Court. That right is anchored under **Article 49(1)(h)** of the **Constitution** of Kenya. On the other hand, bond/bail pending appeal is a discretionary matter as provided under **Section 357 (1)** of the **Criminal Procedure Code**. The operative word used in that section is "**may**" and it states that an appellate court may order that a person entering an appeal may be granted bond with or without sureties. This therefore clearly shows that granting or refusal to grant bail is a discretionary matter which is of course exercised judiciously taking into consideration circumstances of each case. In the case of SIMON MWANGI KIRIKA -VS- REPUBLIC [2006] eKLR, the Court of Appeal citing JIVRAS SHAH -VS- REPUBLIC (KLR) 605 re-stated the following guiding principles in granting bail pending appeal:-

"(i) The principal consideration is existence of exceptional or annusual circumstance upon which an appellate court can fairly conclude that it is in the interest of justice to grant bail.

(ii) 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.

(iii) That 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 being allowed and the proper approach is the consideration of the particular circumstance and weight and relevance of the points to be argued."

10. In this matter, the applicant has urged me to consider the fact of disability of her two children as a special circumstance. However as I have observed above, the applicant has not demonstrated that she has two children with some disabilities to enable me consider whether the disability of the children can be considered by this court as an exceptional or unusual circumstance. The copy of the birth certificate just shows that the applicant is the mother of a child born on 18th May 2004 and named LM whose father is named as GNN. The contention that the applicant is a single parent does not appear to be consistent with that birth certificate.

Secondly and more importantly is that the 2nd exhibit is a copy of a letter from [particulars withheld] High School for the Deaf in Siakago but there is no evidence from the said letter that any of the appellant's children are students in that school. There is therefore no evidence or a clear demonstration that her children are afflicted with some disabilities. It is therefore apparent that the applicant has failed to satisfy the primary consideration in the exercise of discretion by this court to grant bail pending appeal.

11. On the question of chances of success in appeal, is that this court is unable to make any informed decision on the issue because the applicant failed to annex the copy of the proceedings from the lower court which would have informed this court on the existence of any obvious error that might justify the applicant's contention that her chances of success in this appeal is high. The respondent for good measure has exhibited a copy of the Judgment from the lower court which is now the subject of this appeal. However looking at the Judgment only without the proceedings is insufficient to enable this court determine whether the appeal filed has demonstrated on a prima facie basis a high chance of success. So whether the judgment delivered by the learned magistrate is well grounded as advanced by the Respondent or whether the same is not supported by the evidence tendered is really an issue that I cannot determine at this stage.

12. I am also not persuaded that the appellant will have served a substantial part of her sentence by the time this appeal is heard and determined. She is serving a sentence of 4 years imprisonment and I doubt if this appeal will take more than year to be determined given the workload in this court.

In the premise, this court finds no merit in this application. The appellant is advised to make a follow up with the proceedings in order to expedite the hearing and determination of this appeal. Otherwise for the reasons aforestated, the application dated 18th December, 2018 is disallowed.

Dated, signed and delivered at Chuka this 30th January, 2019.

R.K. LIMO

JUDGE

30/1/2019

Ruling dated, signed and delivered in the open court, in presence of the applicant, Kaaria for applicant and Momanyi for State.

R.K. LIMO

JUDGE

