REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO.56 OF 2018

PETER MWANDIA WAITHAKA…….....…….…..APPELLANT

V E R S U S

REPUBLIC…….…RESPONDENT

RULING

The applicant **Peter Mwandia Waithaka** was convicted by **Hon. Wanjala** on two counts of Committing an Indecent Act with a child Contrary to Section 11(1) of the Sexual Offences Act.

He was sentenced to serve 10 years imprisonment on each count and the sentences were ordered to run consecutively.

The applicant is aggrieved by the said conviction and sentence and filed this appeal attacking the same.

The applicant has also filed a Chamber Summons under Section 357(1) of the Criminal Procedure Rules seeking an order that pending the hearing and determination of the appeal, this court be pleased to release the applicant on bond. The application is premised on an affidavit sworn by counsel for the applicant, Mr. Maina Kairu. He is of the view that there exist exceptional circumstances that warrant the grant of bond; that the appeal is likely to succeed and that the applicant was on bond in the trial court and attended the court faithfully; that the applicant was a first offender and therefore a person of good character and will attend court as will be required of him.

On whether the case has high chances of success, counsel urged that the witnesses' evidence contradicted the statements made to the police and evidence was contradictory and that some crucial witness were not called.

It was also urged that the applicant is ailing whereby he has a metal inserted in his hand and is causing his hand to twist due to the cold in prison and that he requires urgent medical attention. Lastly, that this appeal is likely to take long before it is heard as proceedings have not been typed and the applicant is likely to have served most of the sentence by the time the appeal is heard. Counsel relied on the decision in ***Peter Hinga Ngatho v Republic Cr.A.2/2015***.

The application was opposed by Mr. Mutembei, learned counsel for the State who submitted that there was no possibility of the appeal succeeding and no likelihood of the applicant serving most of the 20 years before the appeal is heard. It was his view that there are no exceptional circumstances that warrant the applicant's release on bond and the medical condition can be taken care of in prison.

This application is brought under Section 357(1) Criminal Procedure Code which provides as follows:

> ***"Section 357(1)***
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> ***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 case of ***Jivraj Shah v Republic (1986) KLR 608*** laid down the principles that guide the court in applications of bail pending appeal. They are as follows:

> ***"(1) The principle 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 interest of justice to grant bail;***
>
> ***(2) If it appears prima facie from totality of the circumstances that the appeal is likely to be successful on account of some***

substantial point of law to be argued and that the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail exists;

(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."

The above principles can be summarized into two; that is, whether the appeal has high chances of success and whether there are exceptional circumstances to warrant the release of the applicant on bail pending appeal.

It is worth noting that an application under Section 357 is different from that under Article 49(1)(h) of the Constitution.

Under Article 49, the applicant still enjoys the presumption of innocence until proven guilty. However under Section 357, the applicant has already been found guilty and it is presumed that the applicant has been properly convicted by a competent court of law. That right to presumption of innocence has been lost. It is therefore the applicant to satisfy the court that he is deserving of the orders. Despite the above, the law still recognizes the fact that the conviction may be erroneous or sentence excessive and it is the duty of the applicant to demonstrate that. See the case of ***Chimambhai v Republic (1971) EA 343***.

I have considered the decision of Justice Mativo cited by the applicant's counsel Peter Hinga's case where the court considered the Ugandan case of ***Arvind Patel v Uganda*** S.C.Cr.App.1/2003 where the court also listed the following as some of the issues to be considered:

(1) The character of the applicant;

(2) Whether he/she is a first offender;

(3) Whether the offence involved personal violence;

(4) Whether the appeal is frivolous and not likely to succeed;

(5) The possibility of substantial delay in the determination of the appeal;

(6) Whether the applicant complied with bond terms in the trial court.

I have also considered the case of ***Dominic Karanja v Republic (1986) KLR 612*** where the court said in part:

"(b) 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;

(c) 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 bond pending appeal;

(d)……."

From a reading of the above decisions, it is clear that the grant of bail pending appeal is an exercise of the court's discretion and each case will depend on its own special circumstances save for the key considerations espoused in the **Jivraj case**.

In this case, I have had a cursory look at the proceedings and grounds raised in the appeal, I find that the trial court's judgment is not so hopeless that it is automatic that the appeal will succeed.

As for the applicant's ailment, there is no evidence that the same cannot be taken care of by the prison medical facilities. Mere allegations that one is sick would not entitle one to bond because most of the prisoners would plead the same excuse.

As regards the contention that the applicant was on bond in the trial court, in my view, the conditions have changed. The applicant now faces a 20 year term and the temptation to abscond would not be remote.

The applicant was sentenced to 20 years imprisonment on 29/10/2018. The court has now got sufficient secretaries to type proceedings and there is no likelihood that there will be a delay in preparation of the record of appeal.

In the end, I find no merit in the application. The applicant will remain in prison pending hearing of the appeal. The application is hereby dismissed.

Dated, Signed and Delivered at NYAHURURU this 15th day of March, 2019.

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R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Maina Kairu for applicant

Mbiyu – Court Assistant

Applicant - present