



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 11 OF 2019

KIGORO MACHORO.....PETITIONER/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

A. Introduction

1. The applicant was convicted of the offence of defilement contrary to **Section 8(1) (2) of the Sexual Offences Act** and sentenced to life imprisonment. Being dissatisfied with the conviction and sentence, he filed an amended petition of appeal on the 29th March 2019. On the 1st April 2019, the applicant filed this application that seeks for orders that the he be released on bail pending appeal.

B. Applicant's Grounds and Submissions

2. It is the applicant's submission that he is over 90 years old and of ill health which may further deteriorate by his continued stay in prison. He further states that the appeal has a high chance of success.

3. It is further stated that the applicant strictly abided by the bond terms in the subordinate court and will similarly abide by those that this court shall set and thus it is in the interest of justice that his application be allowed.

4. The applicant through his counsel states that the challenge of the judgement of the trial court via this appeal restores the presumption of innocence until the appeal is determined

C. Respondent's Case

5. In their reply to the application, the prosecution opposed the application on the grounds that the applicant had been convicted rightly as there were no inconsistencies in the witness testimonies and evidence on record.

6. The prosecution further deposed the fact that the applicant was an old man was not a justifiable reason or special circumstance to warrant release of the applicant on bail pending appeal considering that the applicant's victim's peace and safety shall be interfered with if the applicant is released on bail. The prosecution relied on the case of **Jibrash Shah v Republic [1986] KLR** which provided the conditions precedent for granting of bail pending appeal.

D. Analysis of the Law

7. Section 357 (1) of the Criminal Procedure Code provides admission to bail pending appeal, it states that:

“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.”

8. The principles for granting bond pending an appeal were reiterated in the case of **Jivraj Shah v Republic [1986] KLR 605** which laid down the principles as follows;

“(1) The principal consideration in an application for bond 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 face from the 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.”

9. In the case of Chimambhai v Republic 1971 EA 343, J. Harris made another observation in such an application when he said

“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 being erroneous or the punishment excessive, a recognition which is implicit in the legislation creating the right of appeal in criminal cases.....”

10. Under Article 49 of the Constitution an accused person who is facing a criminal charge has a right to bond because he is presumed to be innocent till proved guilty, unlike a case where one is already convicted.

11. In the above cases, the courts also held that anticipated delay in the hearing of the appeal, together with other factors may be grounds for grant of bail pending appeal.

12. In Dominic Karanja v Republic (1986) KLR 612, the Court of Appeal stated in alia:

(a) The most important issue was that if the appeal had such overwhelming chances 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 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 bail pending appeal;

(d)

13. Having considered the above decisions, I must point out that grant of bail is the discretion of this court guided by the principles in the **Dominic Karanja case** and the discretion must be exercised judicially.

14. In the Bond and Bail policy in such an application, the burden lies with the applicant to establish that the appeal has high chances of success or that he is likely to serve a substantial part of the sentence before the appeal is heard.

15. The issues for determination are whether the appeal has overwhelming chances of success and whether there are exceptional circumstances warranting the release of the Appellant on bail pending appeal.

16. Thus, the burden is on the applicant to prove that he should be granted bail pending the hearing of his appeal. He should demonstrate that the appeal has overwhelming chances of success.

17. The defence argued that once a judgment has been challenged on appeal, the presumption of innocence on part of the applicant should be applied. I am not in agreement with this argument because the conviction still stands until it is overturned on appeal.

18. It is pleaded that the conviction handed to the applicant was wrong as the complainant was above 11 years old. Further that his defence was not considered and further that the prosecution did not prove its case beyond reasonable doubt. On the issues raised, the applicant will be given a chance to present his arguments during the hearing of the appeal.

19. In the instant application, it is argued that the applicant is ailing and is aged over 90 years and that his appeal has high chances of success. I have made my observation in court on the age of the applicant. I am of the view that he is not 90 years old but may be approximately 80 years. I am persuaded to take the factor of the applicant’s age as an of exceptional circumstance in this application. The factor of age considered together with his medical condition as shown by the report from Bethany hospital shows that the applicant has a history of hypertension and osteoarthritis. This health condition and the age factor justifies considering the applicant for release on bail pending appeal.

20. I hereby allow this application for bail pending appeal dated 1st April 2019 in the following terms: -

a) The applicant be released on bond of Kshs. 300,000/= with one surety of a like amount.

b) He will attend monthly mention before the Deputy Registrar till the case is disposed of.

c) He will not leave the jurisdiction of this court without its permission.

21. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 23RD DAY OF MAY 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mati for Respondent

Mr. Eddie Njiru for Applicant

Applicant in person