



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA. NO. 120 OF 2019

NICHANOR AGONDA RADOLO.....APPELLANT/ APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. **Nichanor Agonda Radolo** the Appellant/Applicant filed the application dated 1st August 2019 for bail pending appeal. The application is brought under Rule 3(1) & (2) of the High court (*practice and procedure*) Rules, Articles 48, 50, 51 and 159 of the Constitution, Sections 123, 124 and 357 Criminal Procedure Code Cap 75 Laws of Kenya.

2. The application is supported by the following grounds: -

- i. **That** the Applicant herein together with another were charged with the offence of trafficking in narcotics drugs contrary to Section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994 by Hon. C. A Mayamba at the Kilungu Law Courts.
- ii. **That** the Applicant was sentenced to pay a fine of Kshs.1,700,000/= (*one million seven hundred thousand*) or in default to serve 10 years in prison.
- iii. **That** the Applicant being dissatisfied with the judgment and sentence has lodged an appeal.
- iv. **That** given the time it will take to hear the appeal, the nature of the sentence and the specialized medical attention the Appellant needs urgently, if the Appellant succeeds in the appeal he is likely to have served a substantial part of the sentence which cannot be reversed.

3. It is further supported by the affidavit of Edith Onyango his advocate. In supporting the application and the grounds, she avers that the Applicant is unable to pay the fine imposed against him, and is fearful that by the time the appeal is heard and determined if successful, he may have served a good part of the sentence. She further submits that the Applicant was on bond in the lower court and faithfully attended court until judgment was delivered.

4. She averred that the Appellant is suffering from a peculiar and serious medical condition on his leg which requires specialized treatment, which has been unavailable.

5. In her written submissions, counsel states that the issue of granting bond pending appeal is purely at the discretion of the court and the same is governed by Section 357 of the Criminal Procedure Code as stated in **Samuel Macharia Njagi –vs- Republic (2013) eKLR and (ii) Dennis Yobesh Ombogo & Anor –vs- Republic (2014) eKLR.**

Counsel submits that it is in the interest of justice that the Applicant be granted bail as failure to do so would cause him to suffer great prejudice. She added that the appeal has overwhelming grounds and the chances of success are high. Counsel also referred to the grounds laid down in the case of **Arvind Patel –vs- Uganda Supreme court of Uganda Criminal Appeal No. 1 of 2003, for grant of bail pending appeal.**

6. The State through Mrs. Monica Owenga relied on her replying affidavit sworn on 13th September, 2019 in opposing the application. She has averred that the Applicant has been convicted of a serious offence which led his being fined Kshs.one million, seven hundred thousand shillings (Kshs.1,700,000/=) in default ten (10) years imprisonment. She argues that the default sentence is a long period of confinement which is likely to tempt the Appellant/Applicant to abscond court attendances, if released on bond.

7. That the appeal's overwhelming chances of success alone should not be the basis for seeking his release on bond. Infact for her, that

should be a reason for seeking to have the appeal heard and determined soonest. She expressed her willingness to have the appeal dealt with as soon as possible to its logical conclusion.

8. She further submitted that the Applicant has not demonstrated any compelling reason to warrant his release on bond pending hearing and determination of his appeal. Further that the fact of a conviction by the lower court automatically led to a waiver of some of his rights to liberty as provided under Article 29 of the Constitution.

9. I have considered the application, affidavits and the parties' submissions. The provision of law that applies to bond/bail pending appeal is Section 357 Criminal Procedure Code which provides as follows: -

357(1) 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.

Provided that, where an application for bail is made to the subordinate court and is refused by that court, no further application for bail shall lie to the High court, but a person so refused bail by a subordinate court may appeal against refusal to the High court and, notwithstanding anything to the contrary in sections 352 and 359, the appeal shall not be summarily rejected and shall be heard, in accordance with such procedure as may be prescribed, before one judge of the High court in chambers.

357(2) If the appeal is ultimately dismissed and the original sentence confirmed, or some other sentence of imprisonment substituted therefor, the time during which the Appellant has been released on bail or during which the sentence has been suspended shall be excluded in computing the term of imprisonment to which he is finally sentenced."

10. The grant of bond/bail pending appeal is an exercise of discretion by the court. The Court of Appeal in the case of **Mutua –vs- Republic (1988) 497** stated this of the exercise of such discretion:

"It must be remembered that an Applicant for bail has been convicted by a properly constituted court and is undergoing punishment because of that conviction which stands until it is set aside on appeal. It is not wise to set the Applicant at liberty either from the point of view of his welfare or of the state unless there is a real reason why the court should do so"

11. The court of appeal in **Jivraj Shah –vs- R (1986) KLR 605** also set out the principles for grant of bail pending appeal as follows:

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.

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.

12. In the case of **Arvind Patel –vs- Uganda** (supra) the Supreme Court of Uganda set down some grounds which should be considered in an application of this nature. These were: -

1. *"The character of the offender;*

2. *Whether the Applicant is or not a first offender;*

3. *Whether the offence of which the Applicant is convicted involved personal violence;*

4. *The appeal must not be frivolous and has reasonable chance of success;*

5. *The possibility of substantial delay in the determination of appeal and;*

6. *Whether the Applicant complied with bail conditions granted before the Applicant's conviction during the pendency of the appeal."*

13. Bearing in mind all that has to be considered in an application of this kind, I have carefully perused the judgment in Kilungu Criminal Case No. 513/2018. The judgment sets out a summary of the evidence of the four (4) prosecution witnesses and the defence.

14. This court is mainly concerned with three issues as far as this application is concerned.

a. Whether the appeal has overwhelming chances of success. See **Somo vs- R (1972) E.A 476; Jivraj Shah –vs- R (supra); Mutua**

–vs- R (*supra*).

b. Whether there are exceptional or unusual circumstances to warrant the court’s exercise of its discretion in the matter. See **Jivraj Shah –vs- R (*supra*)**.

c. Whether there is a high probability of the sentence being served before the appeal is heard and determined. See **Arvinal Patel –vs- Uganda (*supra*); Jivraj Shah –vs- R (*supra*)**.

15. The Applicant has raised issue with the inconsistencies in the evidence by the prosecution and that his defence was not considered by the trial court. The judgment clearly shows that the learned trial magistrate considered the defence and made a finding. The merit of that finding will be addressed during the hearing of the appeal. This court will not at this stage get into an analysis of the evidence adduced as that would amount to determining the appeal. The learned trial magistrate has explained how he arrived at the decision he made.

16. The issues being raised by the Applicant are the ones that form the basis of the arguments to be presented during the appeal. The Applicant says he has a problem with his leg. That has been addressed by this court and the prison department and is no longer an issue.

17. The default sentence in this case is ten (10) years. There is no way the Appellant can serve even ¼ of that sentence before the appeal is heard and determined unless he chooses to derail the hearing process himself.

18. I am satisfied that there is nothing exceptional that has been presented before this court to make it exercise its discretion in favour of the Applicant. The application dated 1st August, 2019 is therefore disallowed.

Orders accordingly.

Delivered, Signed and Dated this 29th Day of October, 2019, in Open Court at Makueni.

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H. I. Ong’udi

Judge