



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 32 OF 2019

CHARLES WAFULAAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal against the conviction and sentence of the Chief Magistrate's Court at Kisumu (Hon. J. N. Wambilyanga PM) dated the 26th June 2019 in Kisumu CMCCRC No. 632 of 2017]

RULING

The Applicant, **CHARLES WAFULA**, was convicted for the offence of **GRIEVOUS HARM** Contrary to **Section 234** of the **Penal Code**.

1. He was then sentenced to a Fine of Kshs 100,000/= or in default, 12 Months Imprisonment.
2. The conviction and sentence were handed down on 26th June 2019. On the following day, the Applicant lodged a Petition of Appeal at the High Court.
3. Simultaneously with the Petition of Appeal, the Applicant lodged an application for Bond pending appeal.
4. When the application was scheduled for hearing on 24th July 2019, the Applicant's advocate was absent, resulting in an adjournment.
5. On 24th September 2019, the Applicant's advocate, once again failed to attend court, leading to another adjournment.
6. When the advocate failed to attend court on 29th October 2019, the Applicant made a conscious decision to proceed with the application, notwithstanding the absence of his lawyer.
7. When canvassing the application, the Applicant pointed out that he has a family, and that he was the sole bread-winner for the family.
8. He also said that he was sickly, and would thus be unable to withstand the prison environment.
9. In answer to the application, the learned State Counsel, Mr. Muia submitted that the Applicant had failed to provide any proof of the alleged sickness.
10. It is true that the Applicant did not provide this court with evidence to show that he was sickly, and that he therefore could not withstand the prison environment.
11. The Respondent submitted that the appeal which was pending before this court, did not have high chances of success.
12. Of course, if an appeal was unlikely to be successful, the appellate court would be unlikely to grant Bond pending the determination of that appeal, because the Appellant would not be prejudiced if he prosecuted the appeal whilst in custody.
13. In this case, the Applicant did not strive to demonstrate that his pending appeal had a probability of success.
14. However, I am unable to declare that the appeal was so hopeless that it was almost certain to fail.
15. In other words, the appeal appears arguable.

16. Having been convicted in June 2019, the Applicant would be entitled to release from prison custody in March 2020, if he earns remission.

17. As at today, the Applicant has already serve five (5) months in jail: that is just over one-half of the period he would serve, if remission is taken into account.

18. In instances such as the one before me, the Court would have preferred to delve straight into the substantive appeal, rather than, first, determine an application for Bond pending the appeal.

19. However, the Applicant's advocate failed to attend court on 3 occasions, between 9th July 2019 and 24th September 2019, thus leaving the Applicant without the benefit of legal advice.

20. I cannot speculate whether or not there could have been any exceptional circumstances in this case, if the application had been handled differently.

21. In the result, I find no merit in the application, and it is therefore rejected.

22. However, being aware of the need to resolve the appeal as soon as possible, lest it become an academic exercise, I order that the appeal be prosecuted at the earliest opportunity.

DATED, SIGNED and DELIVERED at KISUMU This 26th day of November 2019.

FRED A. OCHIENG

JUDGE