



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 20 OF 2018

ANN WAMBUI GITONGA a.k.a

ANN WAMBUI MAINA.....APPELLANT/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING OF THE COURT

1. The Appellant/Applicant filed a Notice of Motion dated 19/2/2018 pursuant to the Provisions of Section 357 of the Criminal Procedure Code seeking for the following prayers namely:-

i. That pending interparte hearing of this Application, the Appellant/Applicant be admitted to bail/bond on such terms and conditions as the court may deem fit and just.

ii. That pending the hearing and determination of this Application, the Appellant/Applicant be admitted to bail/bond on such terms as the Honourable court may deem fit and appropriate.

iii. That pending the sentencing of the Appellant/Applicant on 1/3/2018 the Appellant/Applicant be admitted to bail/bond on such terms as the Honourable court may deem fit and just.

iv. That pending the hearing and determination of the Appeal herein the Appellant/Applicant be admitted to bail/bond.

2. The Application is supported by the Affidavit of Leonard Nzioka Ngolya Advocate for the Appellant/Applicant sworn on 20th February, 2018 and further on the following grounds namely:-

a. The Appellant/Applicant has lodged an Appeal against her conviction.

b. The Appellant/Applicants appeal has overwhelming chances of success in that she has set forth substantial points of law.

c. The Appellant/Applicants will abide by any bond/bail conditions that the court shall impose.

d. The Appellant/Applicant is married with children who entirely depend on her for upkeep.

e. The Appellant/Applicant is currently expectant and her life together with that of her unborn child will be comprised if she remains in remand any longer.

f. The Appellant/Applicant's blood group is "O" Rhesus Negative and if she is not properly managed, her life and that of her unborn child will be in grave danger.

3. When this matter came up for hearing, learned counsel for the Appellant/Applicant indicated that they wished to abandon the other prayers and remain with the last one seeking for bail/bond pending the hearing and determination of the Appeal. It was indicated for the Applicant that she is currently six (6) months expectant and that she will abide by the terms of the bond. It was also submitted for the Applicant that proceedings of the lower court records are pending typing and might take time to be ready.

4. Learned Counsel for the Respondent submitted that they do not oppose the Application on the basis that a sentence of six (6) months has been imposed upon the Applicant and which is likely to be served before the Appeal is heard and further that there is also the issue of prison remission on sentence.

5. I have considered the Appellant's Application dated 20/02/2018 and the affidavit and grounds in support thereof as well as the oral submissions of the learned Counsels. I have also perused the petition of appeal filed herein. The record of the lower court namely **Machakos Chief Magistrate Criminal Case Number 149 of 2016** indicates that the Appellant had been charged with three (3) offences namely:-

i. Forgery contrary to Section 345 as read with Section 349 of the Penal Code.

ii. Uttering false document contrary to Section 353 of the Penal Code.

iii. Obtaining money by false pretence contrary to section 313 of the Penal Code.

The Appellant after a full trial was found guilty and convicted on all the three (3) counts and sentenced to serve six months imprisonment on each count and which were to run consecutively. Hence the sentence imposed by the trial is eighteen (18) months imprisonment and not six (6) months imprisonment as suggested by both Learned Counsels herein and which runs counter to their suggestion that the Applicant will serve sentence before Appeal is heard and determined. Again it is noted that the Appellant had been charged with three counts each of which attracts a maximum of three (3) years imprisonment. The said sentences may or may not be enhanced depending on the outcome of the Appeal that is yet to be heard.

6. The Appellant/Applicant herein has already been convicted by a court of competent jurisdiction and a sentence has already been imposed. That being the position the guiding principles for consideration on whether or not to grant bail pending appeal are firstly, whether the appeal is arguable and has a chance to succeed. Secondly, whether there is an anticipation of delay in hearing of the appeal and thirdly, whether there exists exceptional and unusual factors. These principles were laid down in the cases of **CHIMAMBAI =VS= REPUBLIC [1971] EA 343 and DOMINIC KARANJA =VS= REPUBLIC [1986] KLR 612**. In the case of **Chimambai =Vs= Republic (supra)** the court held as follows:-

“Anticipated delay in hearing of the appeal together with other factors constitute good grounds for granting bail pending appeal.”

In the case of **Dominic Karanja =Vs= Republic (supra)** the court of Appeal held as follows:-

“(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 consideration 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 no 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) Upon considering the relevant material in this case, there were no overwhelming chances of the appeal being successful.”

7. The Appellant herein has beseeched this court to grant her bail pending Appeal. Guided by the above authorities, I note that bail is a Constitutional right but then the Appellant herein is now a person who has been convicted and sentenced by a court of competent jurisdiction in accordance with the law. She no longer enjoys a presumption of innocence and thus her rights and freedoms are significantly circumscribed by her conviction unlike persons facing trial at the first instance. Indeed the threshold for bail pending appeal is rather higher for the Appellant to convince this court to release her on bond pending the determination of the appeal herein. The Appellant in addition to claiming that her Appeal has high chances of success has stated that she has a young family which depend on her for their necessities and further that she is presently expectant and finally that the prison conditions are not conducive for her situation. I have noted the fact that prison facilities are always equipped with the necessary medical facilities. In fact in each prison there is a medical officer whose duty is to take care of the medical needs of all prisoners be they male or female. In the female section one finds female prisoners some with even young children. Again the prison authorities at times escort prisoners to health facilities should the circumstances warrant. Hence the claim by the Appellant that the conditions in prisons are not conducive to her appear not convincing since there are several of her kind being catered for in prison. If every prisoner were to be allowed to choose whether or not to remain in prison custody, there would be no persons opting to stay in prison. I find there are no exceptional or unusual circumstances only peculiar to the Appellant which cannot be attended to by the medical officers attached at the prison facility.

8. Turning to the Appellant's Appeal, I note that the Appellant in her petition of Appeal challenged only her conviction and left out the issue of sentence. No reasons were given for that omission yet the sentence is tied to the conviction. Upon perusal of the petition of appeal as well as the proceedings and judgement of the trial court and without pre-empting the outcome of the Appeal, I find that there may not be an absolute success in the appeal.

9. As regards the likelihood of an anticipated delay in the hearing of the appeal, I find that the same might not be the case in the sense that most of the appeals once admitted are always disposed of by way of written submissions and that the appeal is likely to be wrapped up or determined within the shortest time possible. This then militates against the urgent need for bail pending Appeal.

10. In the result it is the finding of this court that the Appellant has not convinced this court that an order for bail pending appeal is merited. The Application is dismissed. The Appellant shall remain in custody until the appeal is heard and determined. The parties are directed to set

down the appeal for hearing on priority basis.

Orders accordingly.

Dated, signed and delivered at Machakos this 8th day of March 2018.

.....

D.K. KEMEI

JUDGE

In the presence of:-

Ngolya - for the Appellant/applicant

Machogu - for the Respondent

Kituva - Court Assistant