



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL NO 39 OF 2018

BETWEEN

BRIAN OCHIENG ODUNGI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

[Appeal from original conviction and sentence from Kisumu CM'S Criminal Case No. 466 of 2015].

RULING

1. This is an application for Bond or Bail pending the hearing and determination of the appellant's appeal.
2. The appellant, **BRIAN OTIENO ODUNGI**, was convicted for the offence of Defilement of a minor aged 4 ½ years.
3. He was then sentenced to life imprisonment, with effect from 4th April 2018.
4. On 26th April 2018, the applicant filed a Petition of Appeal, challenging both the conviction and the sentence.
5. Simultaneously with the Petition of Appeal, the applicant brought this application, with a view to being granted Bond pending the hearing and determination of his appeal.
6. He expressed the view that the appeal has high chances of success.
7. He also made reference to exceptional and unusual circumstances, based on his ill health. He was of the view that the said exceptional and unusual circumstances would warrant the grant of an order for his release on bond.
8. The applicant also pointed out that he was a first offender and that he had always been of good character.
9. The applicant's grandfather, **ODUNGI RANDA**, swore an affidavit to support the application. He told the court that he was the applicant's guardian.
10. According to Odungi Randa, the applicant was a young man of poor health, who suffers recurrent attacks that require constant medication. His view was that if the applicant continued to stay in prison, his health condition would definitely worsen.
11. In the assessment of the applicant's grandfather, the said applicant was not a flight risk. Due to the confidence which the grandfather had, he expressed readiness to stand surety for the applicant.
12. A medical note was exhibited by the applicant's grandfather, to support his statement concerning the health of the applicant.
13. The medical note was dated 16th April 2018, and was signed by Dr. D.O. OLIMA, a consultant surgeon based in Kisumu.
14. The doctor said that he had attended to the applicant for 15 years, and that the applicant suffers from recurrent attacks of wheezing bronchitis, especially in cold weather and in damp and dusty conditions.
15. As the applicant was said to be 24 years old, that means that Dr. Olima had been attending to him from when he was 9 years old.

16. Mr. Achura was so confident of his client's willingness to attend court, even if he was out on bond, that he was ready to give his professional undertaking, that the applicant would attend court whenever he was required to do so.
17. The advocate's confidence about his client's character appeared to stem from the fact that the applicant never missed any court sessions before the trial court.
18. Mr. Muya, the learned state counsel for the state, opposed the application.
19. He pointed out that the trial court had held that the offence of defilement was rampant in Kisumu.
20. In my considered view, whether or not the offence for which an appellant was convicted was rampant, should not, of itself, stand in the way of an application for bail pending appeal.
21. In a case where the state had confirmed that the appellant was a first offender, the court determining an application for bail pending appeal should not burden the appellant by the sins which other persons in the community may have committed.
22. Justice demands that the case of each appellant ought to be determined on its own merits.
23. The respondent also faulted the applicant for failing to swear an affidavit to support his application.
24. Ordinarily, an applicant would swear an affidavit to support his case. However, there is no bar to having another person swearing an affidavit to support the application.
25. In this case the affidavit was sworn by the applicant's grandfather, who was also his guardian.
26. As the deponent was aware of the applicant's health status, and because he even produced a medical note from the doctor who had been attending to the applicant, I find that his affidavit cannot be disregarded.
27. However, I found it noteworthy that whilst the doctor stated that the applicant suffered from recurrent attacks of wheezing bronchitis, especially in cold weather and in damp and dusty conditions, the applicant had actually testified that he used to work as a mason, at Ahero, from 8.00 a.m to 6 p.m.
28. Although I do not purport to have any expertise in the area of masonry, my understanding was that a substantial amount of dust is ordinarily generated when a person was undertaking masonry work.
29. If the applicant was able to undertake such work for a whole day, on a regular basis, it would appear that his ill health may not be as bad as was being portrayed by his grandfather.
30. In any event, the fact that an appellant was suffering from an ailment cannot be deemed to be either exceptional or unusual.
31. I have no doubt that within the prison walls, there were many persons who suffer from various ailments.
32. In any event, the Prison Authorities have an obligation to ensure that inmates receive appropriate medical attention whenever such need arises.
33. Therefore, unless it was demonstrated that the medical facilities available either within the prisons or to which prisoners are sometimes referred, I find that the applicant's condition was neither exceptional nor unusual.
34. Contrary to the applicant's contention that he was still a person of good standing, I find that when a person had been convicted for an offence such as defilement, and if such conviction was made by a court of competent jurisdiction, the presumption of guilt was no longer available to him.
35. A convicted person was deemed to be guilty until and unless his said conviction was set aside. Therefore, provided that the finding of guilt still hung over his head, he cannot reason that he was a person of good standing.
36. The applicant herein did not make any attempt to demonstrate why he held the view that his appeal had overwhelming or high chances of success.
37. And his sentence is one of life imprisonment. Therefore, provided that the hearing and determination of the appeal was handled expeditiously, I find that the applicant will not have served a sizeable portion of the sentence before the appeal was determined.
38. In the circumstances, although I appreciate that the appellant never failed to attend any proceedings during his trial, the prospect of a life behind bars is definitely a daunting one. There is no knowing how the applicant might react in the face of his current reality, which he could have to live with for the rest of his life.
39. Accordingly, I find myself unable to exercise my discretion in favour of the applicant. I therefore dismiss the application for bail pending appeal.

DATED, SIGNED and DELIVERED at KISUMU, this 29th day of June 2018.

FRED A. OCHIENG'

J U D G E