



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CRIMINAL APPEAL NO. 28 OF 2018 CONSOLIDATED WITH
CRIMINAL APPEAL NO. 29 OF 2018
ROBINSON KIPRONO YATOR.....1ST APPLICANT
GILBERT KIPTOO KIPROP.....2ND APPLICANT
VERSUS
REPUBLIC.....RESPONDENT
RULING

[1] The two Applicants herein, **Robinson Kiprono Yator** and **Gilbert Kiptoo Kiprop**, were jointly charged with three others before Iten Senior Principal Magistrates Court with the offence of **Stealing** contrary to **Section 275** of the **Penal Code, Chapter 63** of the Laws of Kenya. In the alternative, they were charged with **Handling Stolen Goods**, contrary to **Section 322(1)** of the **Penal Code**. They were the 4th and 5th Accused Persons before the lower court. The record of the lower court shows that they pleaded guilty to the Main Charge and were, on the **20 April 2018**, sentenced to two years' imprisonment.

[2] Being aggrieved by the outcome, the 1st Applicant filed **Eldoret High Court Criminal Appeal No. 28 of 2018**, while the 2nd Applicant filed **Eldoret High Court Criminal Appeal No. 29 of 2018**, praying that the entire Judgment of the lower court be set aside, the conviction quashed and sentence set aside. Their appeals were filed by the same firm of Advocates, namely: **M/s Kamau Lagat & Company Advocates** and are therefore based, more or less, on the same grounds. They similarly pray, vide similar applications filed in the Appeals on **8 May 2010** under Certificate of Urgency, that they be admitted to bail pending appeal. The two applications, which were consolidated on **5 July 2018** for purposes of hearing, were filed pursuant to **Section 357** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya**. The Applicants also relied on **Article 49(h), 50(2)(b), (g), (h), (q)** of the **Constitution** of Kenya.

[3] The applications were supported by the respective affidavits annexed thereto, sworn by the Applicants. In his Supporting Affidavit, the 1st Applicant, **Robinson Kiprono Yator**, averred that he is the sole bread winner of his young family; that he is a person of good character and will suffer great mental anguish if the orders sought are not granted by the Court. He further averred that his appeal has high chances of success as the alleged offence was never proved beyond reasonable doubt; and that it is a constitutional right for an accused person to be granted bond.

[4] On his part, the 2nd Applicant, **Gilbert Kiptoo Kiprop**, deposed that he is ailing and needs constant specialized medical attention; and therefore that his continued incarceration will greatly affect his health. He averred that he is a person of good character and committed himself to attending court as and whenever required to do so. He added that his appeal has high chances of success as the alleged offence was never proved beyond reasonable doubt; and that he will suffer great mental anguish if the orders sought are not granted by the Court.

[5] In urging the two applications, **Ms. Chesoo** relied on the grounds set forth in the Notices of Motion, and the Supporting Affidavits as well as the List and Bundle of Authorities filed herein on **7 June 2018**. It was her submission that the Applicants have met the conditions for grant of bail pending appeal, namely:

- [a] That they are first offenders and innocent purchasers for value; and that they acted in good faith.
- [b] That their appeals have overwhelming chances of success as they raise substantive legal issues such as defectiveness of the Charge Sheet.
- [c] That there is a likelihood that by the time their appeals are heard, they will have served the two year jail term imposed on them by the lower court.

[d] That the offence with which they were convicted does not involve violence.

[e] That they have young families who are exposed to extreme hardship and prejudice by their incarceration.

[6] **Ms. Kegehi**, Learned Counsel for the State opposed the applications. He argument was that the Applicants pleaded guilty to the charge of Stealing contrary to **Section 275** of the **Penal Code**; and therefore it cannot be said that their appeals have overwhelming chances of success. She submitted that all the requirements laid down in the case of **Adan vs. Republic** were met in the plea-taking process and that the Applicant's pleas were therefore unequivocal. It was further the submission of **Ms. Kegehi** that the sentence of two years imposed on the Applicants was lawful, and if anything lenient; and that no exceptional circumstances have been shown, such as sickness, to warrant the release of the Applicants who, being convicts now, are not entitled to bond as a matter of right. She accordingly urged for the dismissal of the two applications.

[7] Whereas the applications are expressed to have been filed under **Articles 49(h), and 50(2)(b), (g), (h), (q)** of the **Constitution**, it is instructive that **Article 49(1)(h)** is explicit that it is in respect of "**an arrested person.**" It provides that:

"An arrested person has the right ... to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released."

[8] Having admitted the charge upon his arraignment before the lower court, and been convicted on own guilty pleas, the Appellants are now convicts and therefore do not fall within the category of "**arrested persons.**". Accordingly, in my view, **Article 49** does not avail the Applicants. The Applicants also cited **Article 50** of the **Constitution**; and in particular **Sub-Article (2) (b), (g), (h), (q)** which provide for the right of an accused person to a fair trial. **Sub-Article (2)(b)** requires that an accused person be informed of the charge, with sufficient detail to answer it; while **Sub-Article (2)(g)** provides that an accused person has a right to choose, and be represented by, an advocate, and to be informed of this right promptly.

[9] Similarly, **Sub-Article (2)(h)** provides that an accused person has a right to have an advocate assigned to him by the State at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly; while **Sub-Article 2(q)** is to the effect that, if convicted, an accused person has a right to appeal, or apply for review by a higher court as prescribed by law. Again, it is manifest that these constitutional provisions are not directly pertinent to the bail application. Needless to say that the Applicants have already exercised their right to appeal by lodging these two appeals; and that they have exercised their right to retain a firm of advocates of their choice to urge the appeals. As to whether these rights were infringed during the plea-taking process is a matter that would fall for determination in the appeals; and whereas they could be among the factors to consider when determining whether an appeal has high chances of success, no specific mention was made, in the grounds raised in support of the applications to that effect.

[10] Accordingly, it is trite that after conviction, it becomes a discretionary issue as to whether or not an applicant is to be admitted to bail pending appeal; and therefore such an applicant cannot rightfully contend that release on bail is a constitutional right. Hence, in **Chimanbhai vs. Republic (No. 2) [1971] EA 343**, this view was expressed thus:

"The case of an appellant under sentence of imprisonment seeking bail lacks one of the strongest elements normally available to an accused person seeking bail before trial, namely, the presumption of innocence..."

[11] Hence, whereas **Section 357** of the Criminal Procedure Code recognizes that the High Court or subordinate court may order that an appellant be released on bail with or without sureties; or suspend the sentence altogether pending appeal, an applicant is under obligation to prove that the application is warranted and that plausible grounds exist in support of the application. Authorities abound to show that these considerations are largely settled. For instance in **Jivraj Shah vs. Republic** and **Peter Hinga Ngatho vs. Republic [2015] eKLR**, the following grounds were recommended:

[a] whether from the totality of the circumstances, the appeal is likely to be successful on account of some substantial point of law; and that the sentence or a substantial part of it will have been served by the time the appeal is heard.

[b] Whether there exist exceptional or unusual circumstances upon which the appellate court can fairly conclude that it is in the interests of justice to grant bail.

[c] The likelihood that the appellant due to delay in determining the appeal, may have served a substantial part of sentence by the time his appeal is heard.

[12] With the foregoing in mind, I have given due consideration to the grounds set out on the face of the two applications and the averments in the Supporting Affidavits and would classify them under the following categories:

[a] That the appeals have overwhelming chances of success;

[b] There are exceptional circumstances to warrant the applicant's release on bond pending appeal.

[c] That the Applicants might serve their sentence before the appeal is heard and determined; and that

[a] **On the appeals having overwhelming chances of Success:**

[13] Counsel for the Applicants posited that the two appeals have overwhelming chances of success because they raises substantive legal

issues, such as the defectiveness of the Charge in respect of which the Applicants were convicted. She also pointed out that the appeals were filed in time and that the Records of Appeal have already been filed and served in both matters. While the Court is not required to delve deeply into the merits of the Grounds of Appeal, there is no denying that the record does show that the Applicants admitted the Main Charge of Stealing and were convicted on their own pleas of guilt. The argument that the language used was not stated appears not to be supported by the record; and therefore, I would agree with the submissions of Counsel for the State that the plea cannot be faulted solely on that account. It is further manifest that the sentence of two years imposed by the lower court was lawful, granted the penalty provided for in **Section 275** of the Penal Code. Consequently, not much turns on that first ground.

[b] Whether there are exceptional circumstances to warrant the applicant's release on bond pending appeal.

[14] In terms of exceptional circumstances, it was submitted and the Court was urged to consider that the Applicants are first offenders and that they bought the Motor Cycle in good faith. It was further pointed out that the offence they were convicted of does not involve violence. In addition, it was the averment of the 1st Applicant that he is the sole bread winner for his young family; while the 2nd Applicant averred that he is ailing and requires specialized medical attention; and that his continued incarceration will exacerbate his health situation. It is noted however that there was no proof of these allegations. No medical documents were exhibited to the 2nd Applicant's affidavit to support his allegations of ill-health.

[c] The likelihood of delay in the hearing of the Appeal

[16] The Applicants have already served three months of their two year sentence. They are apprehensive that they might end up serving their entire sentence by the time their appeals are heard. Their Counsel pointed out that, with the backlog in the High Court, there are many pending appeals which were filed between **1998 and 2000**; and therefore that the possibility of these two appeals being rendered nugatory is real. Counsel for the State did not refute that submission because it is a matter of notoriety, of which the Court is entitled to take judicial notice. I therefore find merit in the argument and would, on the basis thereof, and for the reason that the Applicants are first offenders, find that a good cause has been shown for their admission to bail pending appeal.

[17] In the result, it is hereby ordered that pending the hearing and determination of the two appeals:

[a] The two applicants be released on a bond of **Kshs. 150,000/=** with one surety each, standing for them in like sum, to be approved by the Deputy Registrar;

[b] The Applicants shall attend Court for mention before the Deputy Registrar once every month or as otherwise ordered by the Court.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 1ST DAY OF AUGUST, 2018

OLGA SEWE

JUDGE