



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 110 OF 2018

RUTH ANYANGO OWUOR.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. On 11th December, 2018; the Applicant/Appellant was convicted on her own plea of guilty for the offence of obtaining money by false pretenses contrary to section 313 of the Penal Code Cap 63 Laws of Kenya and was sentenced to serve one (1) year imprisonment.

2. By a Notice of Motion dated 14th December, 2018 brought under Section 357(1) the Criminal Procedure Code the Applicant/Appellant has moved the court praying for orders that:-

This Honourable Court be pleased to admit the applicant to bail pending the hearing and determination of this appeal against her conviction and sentence

3. The application is based on the grounds that:

- a. The applicant has already filed a memorandum of appeal***
- b. The appeal is strong and has high chances of success***
- c. Applicant is a widow with 2 young children and she is the sole breadwinner***
- d. The applicant is diabetic and hypertensive***
- e. Application is made in good faith and is deserving in equity***

4. The application is supported by the Applicant/Appellant's affidavit sworn on 14.12.18 by in which she reiterates the grounds on the face of the application. Attached to the affidavit are proceedings in **WINAM PMCR.CASE NO. 864 OF 2018 REPUBLIC VERSUS RUTH ANYANGO OWUOR** and copy of Memorandum of Appeal marked RAO 1 and 2 respectively. At the hearing, Ms. Otieno advocate for the Applicant/Appellant submitted a letter dated 26th June, 2018 from Jaramogi Oginga Odinga Teaching and Referral Hospital to the effect that Applicant/Appellant has been receiving treatment for diabetes, hypertension and cataract.

5. Mr. Muia, learned counsel for the state stated that the Applicant/Appellant's appeal can only be on sentence since she was convicted on her own plea of guilty. He submitted that Applicant/Appellant's sickness was an exceptional circumstance.

6. I have carefully considered the application and submissions. Section 357 of the Criminal Procedure Code provides:-

(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

7. This court is thus clothed with the power to grant bail/bond with or without sureties, or to suspend execution of any sentence imposed by the subordinate court pending the hearing of the appeal. In granting bail pending appeal, the court is obliged to consider the circumstances of each case so that the discretion is exercised judiciously and not capriciously. In the case of **Jivraj Shah -vs- Republic [1980] KLR 605**, the Court of Appeal set out the parameters to be considered by an appellate court in applications for bail pending appeal:-

a. 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

b. 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.

c. 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.

8. In Mutua v R, [1988] KLR 497 the Court of Appeal stated thus:

“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.”

9. In view of the foregoing, the onus is always on the appellant to demonstrate to the court that there are good reasons why he/she should not be allowed to continue serving sentence but should be allowed to enjoy his/her liberty pending the hearing and determination of his or her appeal.

10. The Applicant/Appellant herein has not demonstrated to the court, through affidavit that there exist a set of circumstances which disclose substantial merit in the appeal bearing in mind that she was convicted on own plea of guilt and the plea taking *per se* is not being challenged on appeal. The letter dated 26th June, 2018 from Jaramogi Oginga Odinga Teaching and Referral Hospital to the effect that Applicant/Appellant has been receiving treatment for diabetes, hypertension and cataract is not supported by medical records as prove of what is stated therein. The Applicant/Appellant has similarly not demonstrated that whatever medical conditions that she may have cannot be attended to while she is serving sentence. Further to the foregoing, I have personal knowledge of the fact that dates for hearing of appeals are available and that this appeal is likely to be heard and concluded within one year.

11. Regarding compelling reasons provided for under the provisions of Article 49(1) (h) of the Constitution, the Applicant/Appellant herein cannot benefit from the said right which guarantees an accused the right to be released on bond or bail, on reasonable conditions, pending a charge and trial, unless there are compelling reasons not to be released, since she is not an accused but a convict. (*Emphasis mine*)

Disposition

12. For all the foregoing reasons, I have come to the conclusion that the Applicant/Appellant has not passed the test for grant of bond pending appeal. The Notice of Motion dated 14th December, 2018 is not merited and it is accordingly dismissed.

SIGNED AND DELIVERED IN KISUMU THIS 20TH DAY OF DECEMBER 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Appellant - N/A

Counsel for the appellant - Ms Otieno

Counsel for the State - Mr Muia