



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAJIADO
CRIMINAL MISC. APPLICATION NO. 20 OF 2016

WILSON SITOYA

NCHARO OLE NEMENTARI.....APPLICANTS

VERSUS

REPUBLIC.....RESPONDENT

(This appeal arises from Principal Magistrate's Court Criminal Case No. 23 of 2015 in which the applicants were convicted and sentenced on varies counts as charged:

RULING

WILSON SITOYA and **NCHARO OLE NEMENTARI** hereinafter referred as the applicants through Mr. Ochieng advocate jointly filed a notice of motion pursuant to Article 50 (2) (a) and 51 of the Constitution and section 356 (1) of the Criminal Procedure Code (Cap 75 of the Laws of Kenya) seeking the following orders:

1. That the applicants be admitted to bail pending the hearing and determination of the appeal.
2. That the execution of sentence be stayed pending the outcome of the appeal.
3. The costs of the application be in the cause.

BACKGROUND:

The applicants were charged before the Chief Magistrate's Court Kajiado presided over by Hon. Mbungi with four counts namely;

COUNT I

The offence of gang rape contrary to section 10 of the Sexual Offences Act No. 3 of 2006.

It is stated that on 21/4/2015 at 19.00 hours in Isinya District at Kajiado County the applicants intentionally and unlawfully caused their penis to penetrate the vagina of G M P without her consent.

COUNT II

Causing an indecent act contrary to section 6 (a) of the Sexual Offences Act No. 3 of 2006.

The particulars were also in respect on material content as to the date and complaint the same as count

save that in this one the criminal act was as to the indecency on the part of the applicants using their penis against the body of the complainant.

COUNT III

Assault causing actual bodily harm contrary to section 251 of the Penal Code.

The particulars of the indictment were that the applicants jointly assaulted G M P thereby occasioning her actual bodily harm.

COUNT IV

Assault causing actual bodily harm contrary to section 251 of the Penal Code.

Under this count it is alleged that the applicants on 21/4/2015 at 19.00 hrs in Isinya District within Kajiado County jointly assaulted Caleb Ombasa thereby causing him actual bodily harm. Each of the applicants denied the charges as framed and read at the time of plea. The matter proceeded to full hearing with the prosecution calling six witnesses and subsequently the applicants were placed on their defence. The learned trial magistrate convicted each of the applicants as follows:

COUNT I – To serve twenty years imprisonment

COUNT III & IV – Two years imprisonment.

The applicants have filed a notice of appeal on both conviction and sentence to the High Court. Learned counsel Mr. Ochieng appeared for the applicants to argue the notice of motion while Mr. Akula, the senior prosecution counsel appeared for the state.

The applicants in their notice of motion and affidavit put forward a number of grounds seeking the order of this court to have them being released on bail pending appeal crafted as follows:

- 1. That the applicants intended appeal against the whole judgement and sentence issued on 14/10/2016.**
- 2. That fourteen days right of appeal is soon lapsing.**
- 3. That the applicants have applied for typed proceedings and judgement.**
- 4. That the applicants were never represented by counsel at the trial but have now appointed counsel to represent them on appeal.**
- 5. That the appointed counsel has not been able to comprehend the proceedings and judgement as they are not yet typed.**
- 6. That the foregoing grounds are exceptional.**
- 7. That the respondent will suffer no prejudice if this application is allowed.**
- 8. That this application is in the interest of justice.**

The respondent vehemently opposed the application for bail on the ground that the applicants have not established any exceptional circumstances to warrant them being released on bail. The respondent in addition caused the complainants in Count I – IV to file replying affidavits to the notice of motion by the applicants. The disposition deduced from the replying affidavit from both key witnesses to the respondent case at the trial was that the applicants have not demonstrated existence of exceptional circumstances for this court to release them on bail. It is further the respondent averment that the applicants were convicted

by the learned trial magistrate after full trial where their respective defences were considered and factored in the decision. The respondent further deposed that the applicants should take into account that the conditions for release on bail at the pretrial stage are different from those to be considered after a competent court has convicted and meted out respective sentences.

The gist of the respondent's affidavit was to urge this court to dismiss the notice of motion on bail pending appeal for lack of merit.

I have considered the application, the affidavit in support, the replying affidavits and submissions by both learned counsels. The material on record has also been perused. This application on bail falls under section 356 (1) and 357 (1) of the Criminal Procedure Code which touches on post conviction and sentence stage where presumption of innocence under Article 50 (2) (1) of the Constitution is not applicable. The principles for grant of bail at pretrial stage are therefore different compared to the ones to be applied after an accused person has been convicted and sentenced upon going through a full hearing.

Reference is made to the decisions of the court in this subject on bail pending appeal. In the case of *Jivraj Shal v Republic [1986] KLR 605* the Court of Appeal held:

“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. If it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on accurate 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.”

In *Dominic Karanja v Republic [1986] KLR 612* the Court of Appeal set out the conditions which must exist before exercising discretion in favour of an applicant and have him or her released on bail pending appeal. The court held thus:

“(1) 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.

The previous good character of the applicant and the hardship, if any facing his family were not exceptional or unusual factors. ill person would also not constitute an exceptional circumstances where there existed medical facilities for prisoners.

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.

Upon considering the relevant material in this case, there was no overwhelming chances of the appeal being successful.”

These principles are applicable in this application. On consideration of the mater and perusal of the record of the trial court I am of the following conceded view:

It is settled law that the legal threshold on pretrial bail is conversely different with bail pending appeal once the accused person has been found guilty, convicted and sentenced to imprisonment. The temptation to abscond and take flight from the jurisdiction of the appeal court are overwhelmingly high.

It is not in dispute that some Kenyans have no ascertainable physical address of their fixed abode. The reference of their residence is usually referenced in general terms covering a district or a village. That situation does make traceability of a resident of Kenya an uphill task let alone someone who has been a subject of the criminal justice as an offender duly convicted and sentenced by a competent court.

The Court of Appeal in the case of *Jivraj Shal (Supra) and Dominic Karanja (Supra)* has spoken clearly

that bail pending appeal should be granted only in exceptional circumstances where the learned Judges of Appeal itemized conditions such as likelihood or reasonable prospect of the appeal succeeding. In regard to sentence where there might be considerable delay to occasion the appeal not heard expeditiously which might result on the applicant serving substantial term of sentence imposed by the trial court.

In construing these conditions with the facts of this case the applicants talk of not being represented at the trial by counsel that the proceedings and judgement of the trial court are not comprehensive enough to be internalized by them and that the record of the lower court is yet to be typed and served as required by law.

These conditions upon which the applicants anchored the notice of motion on bail pending appeal consists no special circumstances to warrant me to grant the application.

I therefore decline to grant the two applicants bail pending appeal however direct that the lower court record be served upon the applicants.

As this court has no backlog in respect of queuing matters on appeal calendar, the same can be processed on a timely manner to enable the applicants have an opportunity to ventilate the issues of concern to them on merit. Costs of this application be in the cause.

Dated, read and signed in open court at Kajiado on 30/1/2017.

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R. NYAKUNDI

JUDGE

In the presence of:

The accused

Mr. Ochieng for the accused

Mr. Akula for the Director of Public Prosecutions

Mr. Mateli Court Assistant