



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
CRIMINAL MISC. APPLICATION NO. 13 OF 2017

SAMUEL OKOTH OLUOCH.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

On 20th January 2017; the applicant was convicted for the offence of obtaining registration by false pretences contrary to section 320 of the Penal Code. The applicant has by a notice of motion dated 3.3.17 brought under Section 357(1) of the Criminal Procedure Code, moved the court praying for orders that:-

a. The appellant be admitted to bail pending the hearing and determination of Kisumu HCCR. A 1 of 2017

b. Such other or further order as this Honourable court shall deem just and expedient

The application is based on the grounds that:

- a. The appellant has filed **Kisumu HCCR. A 1 of 2017** which has overwhelming chances of success
- b. The appellant may end up serving a substantial part of the sentence imposed upon him before the appeal is heard and finalized
- c. The appellant has serious medical conditions and requires constant attention and his health may deteriorate should he continue staying in prison
- d. The applicant is ready, able and willing to adhere to and abide by any such reasonable terms and conditions as the court shall impose

The application is supported by an affidavit sworn on 3.3.17 by Gilbert Obure Oguso, advocate for the applicant, who reiterates the grounds on the face of the application. Attached to the affidavit is the Memorandum of Appeal in **Kisumu HCCR. A 1 of 2017** and an uncertified copy of judgment in Kisumu Anti-Corruption case No. 2 of 2014 which does not have the sentence part of the judgment.

Ms. Wafula, learned counsel for the state, opposed the application on the ground that the applicant had not attached any supporting documents to prove that he has serious medical conditions and requires constant attention. She also submitted that the applicant had not shown why his appeal should be given preference.

In reply, Mr. Oguso submitted that the applicant had not been able to get his medical records from prison

and that he was seeking bail pending appeal and not preference in the disposal of his appeal.

I have carefully considered the application and submissions. Section 357 of the Criminal Procedure Code which provides for admission to bail or suspension of sentence pending appeal provides that:-

(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:

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.

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 or 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.”

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

The applicant herein has not demonstrated to the court, through the grounds of appeal set out in his petition of appeal that the appeal has overwhelming chances of success. He has similarly not demonstrated that he has any serious medical conditions that cannot be attended to while he is in prison. The applicant did not annex the sentence portion of the judgment to this application and has therefore denied court the material upon which it would have determined his contention that he is likely to serve a substantial part of his sentence before the appeal is heard and determined. Further to the foregoing, I also have personal knowledge of the fact that dates for hearing of appeals are open and I am aware that this appeal is likely to be heard within one year.

For all the foregoing reasons, I have come to the conclusion that the appellant has not passed the test for grant of bond pending appeal. The notice of motion dated 3.3.17 is not merited and it is accordingly dismissed.

DATED, SIGNED AND DELIVERED THIS 28TH DAY OF APRIL 2017

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Clerk Felix

Appellant Present

For the appellant Mr. Oguso

For the State Wafula