



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO. 15 OF 2017

CONSOLIDATED WITH CRIMINAL APPEAL NOS. 16, 17, 18 AND 19 OF 2017

BERNARD KIPNGENO KIRUI.....1ST APPELLANT/APPLICANT

ALFRED KIPRUTO CHERUIYOT.....2ND APPELLANT/APPLICANT

KENNETH KIPNGETICH CHERUIYOT....3RD APPELLANT/APPLICANT

HARON KIPROTICH CHERUIYOT.....4TH APPELLANT/APPLICANT

JULIUS CHERUIYOT.....5TH APPELLANT/APPLICANT

VRS

REPUBLIC.....RESPONDENT

(Appeal arising from the Judgment in Kericho CM Cr. No.2896 of 2014)

RULING

1. The applicants were charged in Kericho Resident Magistrate's Court Criminal Case No.2896 of 2014 with the offence of malicious damage to property contrary to section 339 of the Penal Code. They pleaded not guilty to the offence and after a full trial, were found guilty as charged, convicted and sentenced to serve two years' imprisonment.

2. Dissatisfied with both their conviction and sentence, they have filed High Court Criminal Appeals Nos.15-19 of 2017. They also filed the application dated 31st March 2017 in which they seek to be released on bail pending appeal against their conviction and sentence in the judgment of the court dated 21st March 2017. The appeals were consolidated on 3rd April 2017, and the application was canvassed on 7th April 2017.

3. In the affidavits sworn in support of the applications, it is deposed that the applicants, who are brothers and who were co-accused in the criminal trial, were charged with the offence of malicious damage to property contrary to section 339 (1) of the Penal Code. They were tried and convicted, and were each sentenced to serve 2 years' imprisonment. They term their sentence traumatizing and oppressive to them and their families, and plead with the court to release them on bail pending appeal.

4. They aver further that they have filed appeals which are pending hearing and determination, but by the time the appeals are heard and determined, they will have served a good portion of the sentence. As a result, a subsequent reversal of the decision of the trial court on appeal will not undo the damage they will have suffered as a result of their incarceration. They assert that they had been on bond throughout their trial and they fully complied with the terms of their bond.

5. The 5th applicant, Mr. Julius Cheruiyot, avers that he is 40 years old, of very poor health, suffering from ulcers and that his condition has deteriorated and taken a turn for the worse due to incarceration. He is also a family man with a wife and young children all below the age of 15 years, with a well-known home in which he has lived for several years, and is therefore not a flight risk. Similar averments are made by the other applicants in their respective affidavits, with each highlighting their peculiar circumstances.

6. They all state that the trial court convicted them erroneously and in reliance on contradictory prosecution evidence, and their appeal has overwhelming chances of success. They term their sentence manifestly excessive in the circumstances of the case, given that they are all first offenders, have hitherto been of good conduct, and are but victims of unfortunate circumstances.

7. Prior to the hearing of the application, the court requested the Probation Office, Kericho, to investigate and file a social inquiry report on the applicants. The report bears out the applicants' averment that they are brothers, each with a family and young children dependent on them. They are first offenders, and have never been in conflict with the law before this incident. The offence they were charged with arose in connection with a piece of land which their deceased uncle had sold to the complainant in the trial court. The land is the subject of a case before the Environment and Land Court.

8. In his submissions for the applicants, Mr. Mwitia stated that the application is brought under section 357 (1) of the Criminal Procedure Code and Article 50 (2) (q) and 51 (1) of the Constitution. That bail pending trial is a constitutional right, but bond pending appeal is within the discretion of the court and is granted on certain set principles. One such principle is that the appeal has overwhelming chances of success, and in the applicants' view, this appeal has overwhelming chances of success as the sentence was manifestly excessive. He submitted that section 339 (1) of the Penal Code under which the applicants were convicted does not provide fully for a custodial sentence.

9. The applicants argue further that in passing sentence, the trial court did not take into considerations any social inquiry report. In their view, had this been done, given the offence with which the applicants were convicted, there are high chances that they would have been given a non-custodial sentence.

10. It is also their submission that they were all first offenders, and so they meet the second criteria for grant of bail, the character and antecedents of the applicants. They contend that they have been on bond throughout their trial, and they did not fail to attend court except once, in the case of the first applicant, when there was some confusion on the court where the case was to be heard.

11. Finally, they argue that due to the case load of the court, it may take time for the appeal to be heard, by which time they would have served a considerable part of their sentence. They therefore urge the court to grant them bail pending appeal, and ask the court to be guided by the decision in **Christopher Kaburu vs R – Meru High Court Crim. Appl. No.3 of 2016** whose facts were similar to the present case. They submitted that in that case, the court granted bail pending appeal on the basis that given the court's case load, the appellant may have served a considerable part of his sentence by the time his appeal was heard and determined.

12. The state opposed the application. Learned Counsel, Ms. Keli, submitted that the applicants had not demonstrated that their appeal has high chances of success, which is the most important ground for bail pending appeal. The contention by the applicants that their sentence was excessive was not a strong ground of appeal as section 339 (1) of the Penal Code under which they were convicted provides for a term of imprisonment for 5 years. The sentence that the applicants had been given was a legal sentence as it was not the maximum sentence.

13. With regard to the submission that there was no social inquiry report prior to sentencing, the position of the state is that such a report is only guiding, not binding. It is therefore within the discretion of the court to determine whether to ask for one or not.

14. Counsel also discounted the applicants' contention that there were glaring inconsistencies in the prosecution case. In her view, this was an argument that went to the question of conviction, not sentencing.

15. With regard to the fact that the applicants were first offenders, her submission was that the applicants were given a term of two years, not the maximum term. In her view, the applicants' character had no bearing on an application for bail pending appeal; that bail pending trial under Article 49 and bail pending appeal ought to be considered differently as bail pending appeal is discretionary. In the latter case, the only consideration is whether unusual circumstances exist which justify the grant of bail. Her submission was that such unusual circumstances exist where an appeal has overwhelming chances of success.

16. To the argument that the applicants might serve the sentence before the appeal is heard, the state's response is that given that the proceedings are ready, the appeal can be heard in the course of this year, the only thing required being the preparation of the record. Consequently, the applicants' apprehensions that they would serve their term before the appeal is heard are without basis. Counsel therefore distinguished the case of **Christopher Kaburu vs R (supra)** from the present case. Her submission was that the court in that case considered the volume of work at the station and the fact that the applicant had been sentenced to a term of one year.

17. With respect to the applicants' submission that they are family members with young families dependent on them, the submission by the state is that the law is applicable to all, irrespective of their status. The fact that they are family members does not exclude them from having the law apply to them where they have committed an offence. The state's view is that having families dependent on the applicants is not an exceptional circumstance on the basis of which they should be given bail pending appeal as they were properly sentenced.

18. The state relied on the decision in **Meru High Court Criminal Appeal No.100 of 2013- Munjia Michubu vs R Criminal Appeal No. 100 of 2013** with regard to the need for exceptional circumstances to exist which would in the interests of justice require that bail pending appeal is granted. The fact that the applicants were brothers or that their families would suffer hardship is not such an exceptional circumstance. She prayed that the application be dismissed.

Determination

19. I have before me a quintet of maybe not so wise brothers who have been sentenced to serve two years' imprisonment for malicious damage to property. They are alleged to have damaged the fence of a primary school build on land which they apparently believe is their father's. They are first offenders, with young families, all dependent on them. The social inquiry report dated 30th March 2017 filed by the Probation Office indicates that their father is willing to stand surety for them.

20. The core of their case is that their sentence is excessive in the circumstances of this case. Further, that the trial court relied on a prosecution case that was full of contradictions.

21. I will start with what is not in contention. First, bail pending appeal is not a constitutional right. As both Mr. Mwita and Ms. Keli submitted, it is dependent on the discretion of the court, and is granted on certain set principles. These principles include that the appeal has overwhelming chances of success. The second is that there are exceptional circumstances that would, in the interests of justice, justify the grant of bail pending appeal.

22. It cannot also be disputed that the law must apply to all, regardless of their circumstances. However, the court must also take into account the circumstances before it, and the seriousness of the charges that the applicants faced, in making its determination whether there are circumstances that would justify the

grant of bail pending appeal, in this case an appeal that is on both conviction and sentence.

23. This case arises out of that blessing and curse of our lives: land, that moves us to folly, sometimes to fratricidal blood-letting, and sometimes, as in this case, leads us to prison. These five young men, brothers, are accused and convicted of deciding to take the law into their own hands, and damaging a fence worth kshs.20,000 erected by the purchaser of the land which they claim belongs to their father.

24. The questions that arise are: was the sentence of two years for each of the five brothers merited? Was it excessive in the circumstances? Should the trial court have requested for and taken into account the contents of a social inquiry report on the offenders in this case? Ms. Keli submits that such a report is discretionary, since it is only intended to guide the court, and is not binding.

25. While I agree with Ms. Keli on this point I think such a report is essential in informing the decision of the court in a matter such as this. We do not apply the law, or seek to dispense justice, in a vacuum. While everyone, including members of one family, if found culpable, must pay their debt to society, we must consider the circumstances of each case, and we can only do this if we get the sort of information that only a social inquiry report can give us. To apply the law blindly is quite invariably likely to lead to injustice.

26. In a case such as this, I would say that the circumstances are exceptional, and justify the grant of bail pending appeal. Five young men, brothers, ranging in age from 23 to 40, have been sentenced to prison for two years for the offence of malicious damage of property. It may turn out that upon consideration of the appeal on its merits, the sentence was too severe, and the conviction unsafe. Or it may turn out that the conviction was safe, the sentence severe.

27. It has been argued by the state, correctly, that this appeal may not take long to hear as the proceedings are ready and all that is required is for the record to be prepared. That is true.

28. However, in the present case, it would work greater injustice to five entire families within one larger family and cause suffering to innocent members of the families of the applicants, if the applicants were to serve even six months of the two year term they were sentenced to, and then it turns out that their appeal was merited.

29. I am therefore satisfied that in this case, it is in order to grant the applicants bail pending appeal. I therefore direct that the applicants/ appellants be released on a bond of Kshs 50,000 each, with one surety of the same amount.

Dated, Delivered and Signed at Kericho this 12th day of April 2017.

MUMBI NGUGI

JUDGE