



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISC. CRIMINAL APPLICATION NO. 14 OF 2017

ISAACK ODUOR ABIERO ..... APPELLANT/APPLICANT

VERSUS

REPUBLIC ..... RESPONDENT

[An appeal from the judgment – conviction and sentence dated and delivered on the 9th February 2017 by the Hon. E. N. Maina – J in the High Court of Kenya, Criminal Case no. 48 of 2014]

RULING

The applicant herein was found guilty, convicted and sentenced to death by this Court for Murder Contrary to Section 204 of the Penal Code. By the Notice of Motion dated 7th March 2017 the applicant seeks bail pending appeal on the following grounds -

- “1. THAT the Applicant was on 9th February, 2017 convicted of the offence of murder by the High Court at Kisumu Law Courts, Hon. Maina in Criminal Case No. 48 of 2014 and sentenced to death.**
- 2. THAT the Applicant has herewith filed notice of appeal and his yet to file a petition of appeal and it will take some time before the original court record, and typed proceedings are forwarded to the court of appeal; and the appeal heard and determined.**
- 3. THAT by the time the appeal is prepared for hearing and actually heard and decided the Applicant will have served a good portion of his sentence and a subsequent reversal of the decision sought to be appealed will not undo the damage he will have suffered as a result of his incarceration.**
- 4. THAT the Applicant was out on bail throughout the duration of his trial in the High Court and he complied fully with the bond terms until the matter was finalized. He never missed a single mention or hearing.**
- 5. THAT the applicant's appeal has overwhelming chances of success.**
- 6. THAT the appellant is a public servant (police officer) and has always been a law abiding citizen.**
- 7. THAT the applicant is a family man with a wife and young children who solely depend on him as he is the sole bread winner.**
- 8. THAT the applicant is ready and willing to abide by any terms as the security that this**

**Honourable Court may impose as a pre-condition for his release on bail pending appeal.**

**9. THAT it is in the interest of justice this application be allowed.”**

The application is supported by the affidavit of the applicant sworn on 7th March 2017 in which he reiterates the grounds set out above.

The application was canvassed before this Court on 21st March 2017. Mr. Sala, Advocate, for the applicant relied on the grounds on the face of the application and supporting affidavit and only added that the delay in bringing this application ought not to be visited on the applicant. He submitted that the applicant has satisfied the conditions for grant of bail pending appeal and urged the Court to grant reasonable bond.

The application was opposed. Mr. Muia Prosecution Counsel, submitted that bail pending appeal starts from the premise that the applicant is guilty; that the grounds are exceptional circumstances and high chances of success. He submitted that no exceptional circumstances have been demonstrated and that what makes the appeal have high chances of success has not been pointed out.

The factors to be taken into account when considering an application for bail pending appeal are summarized in **Mundia V. Republic [1986]KLR** at Page 623 -

- “1. The Criminal Procedure Code (cap 75) section 356 permits admission to bail pending appeal.**
- 2. Admission to bail pending appeal is a discretionary power which the court must exercise judicially in accordance with laid down principles.**
- 3. Once a person has been convicted and sentenced, his application for bail pending appeal will be granted only in exceptional circumstances.**
- 4. There is a presumption that once a person is convicted he was properly convicted.**
- 5. The chances of the appeal succeeding is a factor for consideration in arriving at a decision in an application for bail pending appeal.**
- 6. Bail pending appeal may be granted where there is a risk that the sentence will have been served by the time the appeal will be heard but there must exist the major issue of overwhelming chances of the appeal in the first instance.”**

In **Dominic Karanja V. Republic [1986]KLR 612** the Court of Appeal in considering a similar appeal held as follows -

- “1. The most important issue was that if the appeal had such overwhelming chances of success, there was no justification for depriving the applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances.**
- 2. The previous good character of the applicant and the hardships, if any, facing his family were not exceptional or unusual factors. Ill health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners.**
- 3. 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.”**

In **Jivraj Shah V. Republic [1986]KLR 605** it was held that the principal consideration was the existence of exceptional or unusual circumstances and **“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”.**

The gist of the application before this Court is that it will take time before the proceedings of this Court are typed and forwarded to the Court of Appeal hence the applicant will have served a substantial part of the sentence. Secondly that the applicant was on bond throughout the trial and did not abscond. Thirdly that he is a police officer, a law abiding citizen, sole bread winner of his young family and is willing to abide by any terms imposed by this Court. Fourthly that his appeal has high chances of success and lastly that it is in the interest of justice that the application be allowed.

The grounds of the previous good character of the applicant, the hardships, if any, facing his family and his assertion that he will not abscond if released were tested in **Dominic Karanja V. Republic** (Suppra) and were found not to be sufficient for releasing a convicted person. Indeed the court found the first two did not constitute exceptional or unusual circumstances. We are therefore only left with the ground that the appeal has high chances of trial. This Court having tried the applicant is not in a position to determine whether his appeal has overwhelming chances of success. That is for the Court of Appeal to determine. As for delay in forwarding the proceedings of this Court to the Court of Appeal that should not worry the applicant as there now exists timelines within which that should be done so as not to occasion delay. Accordingly this Court finds no merit in the application and it is dismissed.

**Signed, dated and delivered at Kisumu this 31st day of May 2017**

**E. N. MAINA**

**JUDGE**

**In the presence of:-**

Mr. Muia for the State

Ms. Kagoya for the Applicant

Court Assistant – Serah Sidera

The Applicant