



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 33 OF 2017

GORDON OWITI NYAWANDA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

This is an application for bond/bail pending appeal. The same is premised on grounds that -

- 1. The applicant who is in custody has a family.**
- 2. The applicant is the sole breadwinner.**
- 3. The applicant has a medical condition that requires specialized care and treatment.**
- 4. The applicants are willing to abide by any conditions this court will impose upon them in bail.**
- 5. That bail/bond is a constitutional right available to everybody.**
- 6. That the security of the accused is not at risk if released on bond.**
- 7. That the applicant would be greatly prejudiced should they be remanded throughout the trial and he is acquitted.**
- 8. That this application is made in good faith.**

The application is supported by an affidavit sworn by the applicant on 18th July 2017 in which he deposes that he was charged and convicted of the offence of indecent act with a minor and sentenced to serve ten years imprisonment. That he has appealed and his appeal has high chances of success. He also deposes that he has a medical condition that requires specialized treatment – a broken pelvic bone which makes it difficult to travel and carryout duties and which cannot be properly managed in prison. He further deposes that he is the sole breadwinner of his family which is likely to suffer should he continue to be incarcerated. He also deposes that he shall not abscond from the jurisdiction of this court. At paragraph 5 of the affidavit he has attached a copy of the petition of appeal and at paragraph 6 he purports to attach copies of the treatment notes.

The conditions for grant of bail pending appeal were discussed in **Dominic Karanja V. Republic [1986]KLR 612** where the Court of Appeal held -

“(a) 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 considerations would be whether there were exceptional or unusual circumstances.

(b) The previous good character of the applicant and the hardships, if any facing his family were not exceptional circumstances. Ill health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners.

(c) 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.”

Holdings number (b) and (c) knock out grounds 1, 2, 3, 4, 6 of the application. In those grounds the applicant is merely stating that he has a family for which he is the sole breadwinner and which is certain to suffer should bond be refused. He also alludes to his ill health and the need for specialized treatment, his good conduct at the time of trial and makes an undertaking not to abscond. In holding (b) and (c) above those grounds were found not sufficient. In regard to his ill health, the applicant purports to attach a medical report but what he has attached are the treatment notes for the victim of the offence in the case. There is therefore no proof of his ill health. In any event where medical facilities exist in prison or for prisoners ill health would not be a good ground.

In his grounds he does not raise the ground of his appeal having overwhelming chances of success but he does so at paragraph 5 of the supporting affidavit. I have perused the Petition of Appeal and the proceedings and judgment of the lower court. The judgment itself is incomplete but from the proceedings I am not persuaded that the appeal has such high chances of success that would warrant this court to grant the applicant bond at this stage. That an application is brought in good faith is not in itself ground for grant of bail pending appeal and I agree with Miss Chelengat's submission that at this stage bond is not a constitutional right as it is for an accused person. At this stage the applicant is already a convict and the presumption of innocence no longer exists.

In the upshot my finding is that the applicant has not fulfilled the conditions for grant of bond and his application is dismissed. All is not lost however as the appeals are currently being expedited and it will not be long before his appeal is heard.

E. N. MAINA

JUDGE

Signed, dated and delivered this 3rd day of August 2017

In presence of:-

Mr. Nyanga Advocate for Applicant

Miss Kimani Counsel for DPP

Evon – Interpreter