



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CRIMINAL MISC. APPLICATION NO.22 OF 2017

CALVINS OWINO OCHIENG.....APPOLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. CALVINS OWINO OCHIENG (Applicant) was convicted on 11/07/2014 and sentenced to serve 4 years imprisonment on two counts of stealing a motor vehicle contrary to **Section 278 A** of the **Penal Code** in **Homa Bay Criminal Case No.260 of 2017**.

He has applied to be granted bail pending appeal on grounds that the trial court in sentencing him failed to consider that he had already spent 4 years in remand and his appeal is bound to be allowed on account of that.

2. The appellant also claims to suffer from asthma; pneumonia and high blood pressure which conditions are worsening due to poor medication on account of Doctors' strike and lack of drugs at the prison, so he urges the court to grant bail to enable him seek medical attention as he awaits the hearing and determination of his appeal.

3. He further states that Count 2 (which was Stealing a motor vehicle contrary to **Section 278(A) Penal Code**) was instituted in the wrong jurisdiction as the offence occurred in **MIGORI** County yet he was tried in **HOMA BAY** County, so there is no need for him to serve an illegal sentence.

4. He is also apprehensive that due to the period it takes to hear and determine appeals, and also the fact that this is the general elections period in the Country, there will be delay in hearing and determining the appeal. He says the evidence did not support the verdict.

5. The applicant avers that he has already filed an appeal and been assigned a file number - oddly enough this is happening before the appeal is even admitted to hearing. The least I can say is that such a scenario is either mischievous or erroneous.

6. The application is opposed, and **MISS ONGETI** on behalf of the State argues that the applicant has not adduced any unusual or special circumstances to warrant his prayer being granted. She points out that being unwell is not an unusual condition as there is a medical facility at the prison and public hospitals are also operating. She further points out that the applicant has not presented any medical records to confirm that his conditions cannot be treated at the prison where he is serving sentence.

7. Counsel submits that the appeal can be heard as early as September, and the appellant is unlikely to serve his sentence before the appeal is heard.

Further that from the memo of appeal, the appeal does not stand a real likelihood of success and in any event the appellant has only filed the petition of appeal and not copies of proceedings from the lower court to enable one comprehend the crux of his contention about the success of the appeal.

8. Section 357 of the Criminal Procedure Code provides that the High Court or subordinate court which convicted and/or sentenced the accused person may order the release on bond, with or without sureties. Further the convicted individual may also request for an order suspending the execution of the sentences pending the appeal where bail is denied.

9. It must be borne in mind that unlike bail pending trial where there is a presumption of innocence, in bail pending appeal, it is presumed that:-

1. The applicant was properly convicted until the appellate court determines otherwise;

2. The applicant has been properly sentenced, unless the sentence is demonstrably illegal.

10. The principle to be used in such an application is whether the appeal has likelihood of success (see **SOME –VS- R. 1972 EA 426**).

11. The other consideration is whether there exists exceptional circumstances that would justify the applicant being granted bail pending appeal. Also to be taken into consideration is whether there is a likelihood of delay in the hearing of the appeal.

In the case of **JIVRAJ SHAH –VS- R [1986] KLR 605** the Court of Appeal held *inter alia*:-

1. The principal consideration is the existence of exceptional or unusual circumstances upon which the court can full conclude that it is in the interest of justice to grant bail.

2. It appears **prima facie** from the totality of the circumstances that the appeal is likely to be successful on account of some substantial part of the law to be argued and the sentence or a substantial part of it will have been served by the time the appeal is heard.

12. I have not had the benefit of perusing the trial court's proceedings to establish whether the applicant has established an arguable appeal with high chances of success as the same were not attached. The petition of appeal on its own cannot help the court to determine what chances the appeal stands.

13. The appellant alludes to his ill health but he has not attached or presented to court a single document on his health status to confirm his claims.

14. Secondly, as pointed out by **MISS ONGETI**, there is nothing to suggest that the conditions he suffers from cannot be adequately handled by the medical facilities either at the prison or the public hospitals where he can be referred to even while serving sentence.

15. There is even nothing to confirm that whatever conditions ail him are getting worse. I am persuaded that his lament about ill health has nothing to support it and does not by itself constitute exceptional circumstances.

16. The other ground raised by the appellant is the period it is likely to take before his appeal is heard. It is within my knowledge that the dates for hearing appeals once it is admitted is within two months from today and he could get a date as early as October 2017 once the appeal is admitted. This means he will hardly have served the ¼ of his sentence before the appeal is heard and determined.

17. Consequently the application lacks merit and is dismissed.

Delivered and dated this day of 21st September, 2017 at Homa Bay

H.A. OMONDI

JUDGE