



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
CRIMINAL APPEAL NO. 41 OF 2017

JOEL OMINO ODODA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

On 31st July 2017; the appellant was convicted for the offence of uttering a false document contrary to section 353 as read with section 349 of the Penal Code Cap 63 Laws of Kenya and was sentenced to serve 2 years imprisonment.

By a chamber summons dated 31.7.17 brought under Section 356(1) and 359 of the Criminal Procedure Code and Articles 49(h) and 50(1)(q) moved the court praying for orders that:-

a. The Hon. Court be pleased to admit and grant the appellant bail pending the hearing and determination of this appeal on such terms as the Honourable Court shall deem fit, appropriate and expedient in the circumstances

b. Costs be in the cause

The application is based on the grounds that:

a. The appellant has is dissatisfied with the judgment, conviction and sentence and has lodged an appeal with overwhelming chances of success filed Kisumu HCCR. A 1 of 2017 which has overwhelming chances of success

b. The suffering that the appellant is undergoing in custody will not be undone if his appeal succeeds and the appeal may eb rendered nugatory

c. The appellant is likely to suffer substantial part of the sentence before the appeal is heard and determined

d. The appellant requires urgent and frequent medical attention and he is not in good health and his condition is bound to deteriorate as a result of incarceration

e. There are no compelling reasons for the appellant to be denied bond within the meaning of Article 49(1)(h) of the Constitution

f. The appellant will abide by any terms as to security that the Honourable Court may impose as a pre-condition for his release on bail

The application is supported by the appellant's affidavit sworn on 31.7.17 by in which he reiterates the grounds on the face of the application. Attached to the affidavit is a copy of the charge sheet **JOO 1**, a copy of medical certificate issued on 24.6.17 **JOO 2**, the Petition of Appeal **JOO 3** and letter dated 31.7.17 to the effect that appellant suffers from diabetes and peptic ulcers **JOO 4**.

Ms. Wafula, learned counsel for the state, conceded to the application on the grounds that the appellant had proved his medical condition.

I have carefully considered the application and submissions. Section 356 of the Criminal Procedure Code which provides

(1) The High Court, or the subordinate court which has convicted or sentenced a person, may grant bail or may stay execution on a sentence or order pending the entering of an appeal, on such terms as to security for the payment of money or the performance or non- performance of any act or the suffering of any punishment ordered by or in the sentence or order as may seem reasonable to the High Court or the subordinate court.

On the other hand, Section 357 of the Criminal Procedure Code provides:-

(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 affidavit that there exist a set of circumstances which disclose substantial merit in the appeal. He has similarly not demonstrated that he has any serious medical conditions that cannot be attended to while he is in prison. 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.

Further to the foregoing; the appellant herein cannot benefit from the provisions of Article 49(1) (h) which guarantees an accused the right to be released on bond or bail, on reasonable conditions, pending a charge and trial, unless there are compelling reasons not to be released, since he is not an accused but a convict.

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 31st July 2017 is not merited and it is accordingly dismissed.

DATED, SIGNED AND DELIVERED THIS 21st DAY OF September 2017

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant	- Felix
Appellant	- Present
Counsel for the appellant	- Mr Odeny
Counsel for the State	- Ms Wafula