



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 86 OF 2015

A H H.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

Before me is a Notice of Motion dated 22nd October 2015 brought under section 357 (1) of the Criminal Procedure Code Cap. 75 and Article 49 and 159 of the Constitution. It was filed by Kakai Mugalo & Co. Advocates on behalf of the appellant/applicant A H H. The prayers in the application are as follows:-

1. That the application be certified as urgent and be heard *ex parte* in the first instance.
2. That the Hon. Court be pleased to admit and or grant the accused/appellant bail pending hearing and determination of the appeal Garissa High Court Criminal Appeal No. 86 of 2015 on such terms as the Honourable court shall deem fit, appropriate and expedient in the circumstances.
3. In the alternative and without prejudice to the foregoing the Honourable court be pleased to certify the appeal Garissa High Court Criminal Appeal No. 86 of 2015, as urgent and therefore requiring to be heard and disposed off on priority basis.
4. That costs be in the cause.

When the matter was placed before me, I certified the application as urgent and ordered that it be served on the office of the Director of Public Prosecutions at Garissa for interpartes hearing. That order disposed off prayer 1 in this application. Thus only prayer 2, 3, and 4 are still alive.

The application has grounds on the Notice of Motion. The grounds are that the accused was a minor who suffered from Schizophrenia and had been on treatment since the year 2012. That he was 16 years old and sentenced to serve of 10 years imprisonment, which contravened the provisions of section 191 and 192 of the Children Act. That in sentencing, the court did not take into consideration the mental condition of the accused person. That the sentence was harsh and excessive and contravened Article 53 (1) (f) of the Constitution. It was also a ground that the accused was a minor and not a flight risk and needed care and attention in order to take medication, and that the parents had undertaken to make sure that he would not abscond and would abide by the terms set by the court if released on bond.

The application was supported by an affidavit sworn by the father of the applicant A H A. He stated that the applicant suffered from Schizophrenia and had been on medication. He annexed copy of a document from the Mandera District Hospital to support this. He also stated that the applicant was a student at [particulars withheld] Primary School Admission No. [particulars withheld], but due to his condition and occasional black outs he was not able to progress in his education. He annexed a copy of a letter from the head teacher of the school. It was deponed also that the sentence was contrary to the provisions of Section 191 and 192 of the Children's Act as the appellant was a minor and was also mentally ill.

At the hearing of the application, Mr. Seda who appeared for the appellant submitted that since the State did not file a reply to the application it was presumed that they were not opposing the same. Counsel emphasized that the appellant suffered from a mental illness and had been on medication since 2012 which explained the reason why he laughed during the proceedings as he did not understand the gravity of the case. Counsel submitted that though the appellant was 16 years of age the magistrate did not order a probation report before sentencing which was wrong. According to counsel, the sentence of 10 years imprisonment contravened the provisions of Sections 191 and 192 of the Children's Act. Counsel emphasized that the appellant was a primary school student and that he was not a flight risk and his parents had undertaken to comply with the court orders.

In response, learned Prosecuting Counsel Mr. Orwa submitted that it was wrong to think that the State needed to reply in writing to such an application as the Criminal Procedure Code (Cap. 75) did not impose such a requirement. Counsel also contended that counsel for the appellant appeared to be arguing the appeal rather than addressing the application for bail.

Counsel noted that the affidavit in support of the application was sworn by the father of the appellant and that they could give benefit of doubt in the application, but argue the appeal in full. Counsel acknowledged the contention that the appellant was a primary school pupil and as such counsel left the matter to court.

This is an application for bail pending appeal. I have seen a petition of appeal herein. I have noted that Appeal No. 86 of 2015 at Garissa High Court has already been filed. I have seen and perused the typed record from the Mandera Magistrate's Court in Criminal Case No. 498 of 2015 between the Republic and the appellant herein.

In an application for a bail pending appeal, the presumption of innocence does not apply as the appellant is presumed to have been properly convicted until the appellate court determines otherwise. It is also presumed that the appellant has been properly sentenced. The considerations in an application for bail pending appeal are thus different from those applicable to an application for bail pending trial. Several cases have dealt with this matter. I rely on the case of **Somo Vs. Republic [1972] EA.**

In short the court has to determine is whether the appeal has overwhelming chances of success. The court has also to determine whether there are exceptional circumstances warranting the release of the appellant on bail pending the appeal.

The Learned Prosecuting Counsel has left this matter for the decision of the court. In effect he has not proposed the application. Counsel for the appellant said that the appellant was mentally sick at the time of trial, that he was a minor aged 16 and attending primary school, and that should not have been sentenced to imprisonment contrary to the provisions of the Children's Act, and that his parents undertook to comply with any conditions that will be set by this court.

As to whether the appellant has suffered mental illness, there is a letter from Mandera District Hospital 'AHA2' annexed to the affidavit to the application which is undated but stamped 21st September, stating he suffered from mental illness and was under treatment since the year 2012 to date.

Annexed to that letter is a hand written history and examination at Mandera District Hospital for Abdullahi Hussein a patient said to be aged 13 years on 6th November 2012. The hand written notes on medical treatment show that he was treated for confusion and bizarre behaviour. From the Primary School there was a hand written letter dated 21st September 2015 signed by Mohamed Gaiya Adan, Senior Head teacher stating that the appellant he had attended school having been admitted in January 2010 and left the same year and was treated as a special child.

Having considered all the surrounding circumstances of this matter, and the fact that the prosecution or State does not oppose the application, I am of the view that due to the contention of the age of the appellant being less than 18 years, it is not proper to keep him in prison with other criminals or convicts. This is a special circumstance.

I observe however that the fact that the appellant was below 18, that he was mentally ill or that he was a primary school pupil was not put before the magistrate, and therefore the magistrate was not in a position to consider the same. However, because he is said to have pleaded guilty, it was perhaps not possible to bring all these facts before the trial court.

For my part and in the interest of justice and for the protection of the interests of the child as envisaged in the Constitution of Kenya 2010 Article 53 and the Children's Act, I allow the application for bail pending appeal. The appellant will thus be released on bail pending appeal on signing his own bond on the following terms:-

1. His father who swore the affidavit in support of the application will sign surety bond of Kshs. 100,000/=
2. The appellant will attend the hearing of the appeal and in default the bail herein granted will be liable for cancellation.
3. The father of the appellant will ensure that the appellant is of good conduct in the society during the currency of this appeal.
4. The appeal will be fast tracked for determination at an early date.
5. No order as to costs, as this is a criminal matter.

Dated and delivered at Garissa this 21st day of January, 2016

GEORGE DULU

JUDGE