



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

HIGH COURT CRIMINAL MISC. APPLICATION NO. 31 OF 2016

(CORAM: J. A. MAKAU – J.)

ELIUD OUMA AGWARA APPLICANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal against both the conviction and the sentence delivered on 26.2.2016 in Criminal Case No. 210 of 2014 in Bondo Law Court before Hon. M.O. Obiero – P.M.)

RULING

1. The Applicant **Eliud Ouma Agwara** was on 26th February 2016, convicted with an offence of **Defilement Contrary to Section 8(1) (4) of the Sexual Offences Act** and sentenced to serve 15 years imprisonment. The Applicant being aggrieved by both conviction and sentence preferred an appeal being Siaya High Court Criminal Appeal No. 16 of 2016 setting out 14 grounds of appeal and filed on 14.3.2016.

2. The Applicant subsequently filed Notice of Motion dated 3rd March, 2016. That before the application could be heard the Applicant filed an amended Notice of Motion under Certificate of Urgency dated 11th March 2016 seeking the following orders:

a) This application be certified urgent and the same be heard on priority basis.

b) This Honourable Court be pleased to admit and/or grant the Appellant/Applicant herein Bond/Bail pending the hearing and determination of the Appeal against his conviction and sentence delivered on 26.2.2016 in Bondo Principal Magistrate's Court Criminal Case No. 210 of 2014.

3. The Notice of Motion was premised on the following grounds; that the applicant was convicted on 26th February, 2016, with an offence of defilement and sentenced to serve 15 years imprisonment, that the applicant has filed an appeal before Criminal Court record was forwarded to the High Court and appeal heard and determined, that by the time appeal is heard and actually determined and decided the appellant will have served a good portion of the sentence and subsequent reversal of the decision sought to be appealed will not undo the damage he will have suffered as a result of his incarceration, that the applicant is in poor health and his condition is already deteriorating as a result of his incarceration, that the Applicant was out on bond throughout the duration of the trial in the subordinate Court and he fully complied with the bond terms until the matter was finalized, without missing a single mention or hearing,

that the applicant is a business person running a Hardware Shop at Usenge Town, within Siaya County and only bread winner of his family comprising of secondary school and college going students, that the trial Court erroneously convicted the Applicant relying on contradictory pieces of evidence by the prosecution and which created great doubt, which would have been analyzed to the benefit of the applicant, that the appeal has overwhelming chance of success thus in finding that the prosecution had proved its case beyond reasonable doubt when the evidence produced did not support the charge as itemized, that the result of the DNA test on paternity of the complainant's child which was a material issue before Court as child was alleged to be the result of the act of defilement for which Applicant was charged was not considered, that the Court did not make a finding as to defilement of the complainant on the date, time and place indicated in the charge sheet, that the Applicant's defence contravening the evidence of the prosecution especially the DNA evidence which absolved the Applicant from being the biological father of the complainant's child who was alleged to be a result of the alleged defilement was not considered, that the trial magistrate erred in law and fact in failing to consider the glaring inconsistencies in the prosecution's evidence and in failing to assess the evidence as a whole and especially the defence and lastly the applicant is ready and willing to abide by any terms as to security, that the honourable Court may impose as pre-condition for his release on bail pending appeal.

4. In the affidavit in Support by the applicant dated 4th March, 2016 he has reiterated the grounds on the face of the application for bond pending appeal, adding that he is of very poor health suffering from ulcers, high blood pressure and asthmatic and that his condition has deteriorated and taken a turn for the worse, in particular asthma taking a heavy toll on him due to heavily congested prison conditions in which he currently is. He emphasized that he has a good appeal which will be rendered nugatory by his continued incarceration as damage done will be undone by a judgment allowing the appeal. He stated that he is 56 years old family man, with a wife, children and well known homestead in Yimbo where he has lived all his life and therefore not a flight risk.

5. At the hearing of the application Mr. Sala Learned Advocate appeared for the applicant while Mr. Mr. Ombati learned Prosecution Counsel appeared for the State. Mr. Sala prosecuted the application basing the same on the grounds on the face of the application, prosecuted applicant's affidavit and went into great depth to point out that the applicant has overwhelming chance of success in his appeal pointing out the inconsistencies in the proceedings and prosecutions failure to prove the charge beyond reasonable doubts while Mr. Ombati learned State Counsel on his part stated the prosecution's case was proved to the required standards.

6. **Section 357(1) 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."

7. We have in Kenya myriads of authorities which have enunciated the principles that the Court should consider when faced with an application for bail pending trial or appeal. Amongst the Principles can be found in the case of **Somo V. R [1972] E.A.** Where the Court held:-

"the most important ground is that the appeal has an overwhelming chance of being successful . In that case there is no justification for depriving the applicant of his freedom."

8. In the case of **Mwaura V. R. (1986) KLR 600** the learned Judge summarized the Principles to be considered in considering application for bail to include the following:-

(a) Strength of the evidence.

(b) Character and behaviour of the accused and punishment to be meted if convicted.

(c) Whether the accused will turn up in Court at the appointed time for trial.

(d) Any exceptional circumstances and whether accused will interfere with witnesses if released on bond.

The above principles can be applied even in bail pending appeal.

9. I have very carefully considered the applicant's application and numerous grounds on the face of the application, the affidavit in support, the lower Court proceedings and judgment. I have also considered the offence is serious and sentence imposed is long. I have also considered various arguments by the appellant's counsel that the appeal has overwhelming chance of success and if bail is not granted the applicant will serve a good portion of the sentence and subsequent reversal of the decision sought to be appealed will not undo the damage he will have suffered as a result of his incarceration.

10. The Applicant's counsel challenged the amendment of the date in the, charge sheet after the close of defence case and without both prosecution and defence being afforded an opportunity to respond and dealt at great length on the result of DNA which showed that the Applicant had nothing to do with the victim's child and stated the evidence on record did not support the charge. He further urged that the Applicant's health was drastically deteriorating in prison and relied on the medical documents, one produced by the Applicant and another made after the Court made an order for further medical document. As to whether the appeal has high chances of success and upon considering the record and submissions by both counsel, I am persuaded that the appeal is not vexatious or frivolous and the chance of success is not remote and if the applicant is denied bail and his appeal succeeds he would have served big part of the sentence and subsequent reversal of the sentence would not undo the damage that he will have suffered as a result of his incarceration. The Applicant was on bond at the time of the trial and he never failed to attend mentions and hearings, therefore the chance of his absconding in view of his previous character is minimal. The Applicant has a family, a business and a fixed abode and in view of that he may not abscond. The petition of appeal on the other hand has raised several grounds which could result to Court overturning the trial Court's judgment.

11. The applicant's fear that the appeal may pend hearing for long is far fetched as this Court was even ready to hear the appeal instead of the application but both Counsel insisted on hearing of the application first. This Court would remind both Counsel that the main appeal may be set down for hearing immediately after delivery of this ruling on a suitable date which should not be more than 60 days from the date of this ruling. The Applicant's Application is allowed. The applicant shall be released on the following terms:-

(a) Deposit his passport with Court promptly (if any).

(b) He executes a bond of Kshs.1,000,000/= with one surety of similar sum or pays cash bail of Ksh.300,000/=.

(c) Deputy Registrar to approve the surety.

(d) That the appeal has been admitted to hearing date be fixed within 60 days from today in view of the age of the Applicant and his poor health.

(e) That in default or non-compliance with any one of the above, terms, this bond shall be cancelled.

(f) On release the appellant shall attend the mentions of the appeal before Deputy Registrar every 30 days until the appeal is heard and determined in case of any default the bond shall be cancelled the first mention shall be on 15th April 2016.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 31ST DAY OF

MARCH, 2016.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT THIS 31ST DAY OF MARCH, 2016.

In the presence of:

Mr. Sala for Appellant

Mr. Omboh for Respondent

Court Clerk – Kevin Odhiambo

Court Clerk – Mohammed Akideh

J. A. MAKAU

JUDGE