



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL APPEAL NO. 102 OF 2015

JANE JELIMO KOSGEI APPELLANT

VERSUS

REPUBLIC RESPONDENT

RULING

1. The appellant was tried and convicted in four counts with three offences.

In count 1 and count 4, she was convicted of the offence of obtaining goods by false pretences contrary to **Section 313** of the **Penal Code**. In Count 2, she was convicted of the offence of making a document without authority Contrary to **Section 357(a)** of the **Penal Code** while in Count 3 she was convicted of the offence of uttering a document with intent to defraud Contrary to **Section 357(b)** of the **penal code**.

Upon conviction, she was sentenced to serve three years imprisonment in each count. The sentences were ordered to run concurrently.

2. The appellant was dissatisfied with her conviction and sentence. She lodged an appeal to the High Court through her advocates *Ms Rioba Omboto & Company Advocates* vide a petition of Appeal dated 30th July, 2015. While waiting for the hearing of the appeal, the appellant presented a Notice of Motion dated 1st September, 2015 seeking that she be admitted to bond on terms the court deemed just pending the hearing and determination of her appeal. She also prayed that if her application was successful, the bond terms granted in this case be made applicable to HCRA No. 103 of 2015.
3. In the grounds supporting the motion and in her deposition dated 1st September, 2015, the appellant contended that she was convicted in four criminal cases by different courts in the Chief Magistrate's court at Eldoret and was sentenced to serve a total of 11 ½ years imprisonment in all the cases; that she had already served a total of 6 ½ years imprisonment; that her appeal has overwhelming chances of success; that it is her constitutional right to be released on bond pending appeal; that she suffers from Fistula disease and lastly that she is a single parent with young children who need her care and attention as their grandmother who was taking care of them passed away on 23rd July, 2015.
4. During the hearing of the application, learned Counsel *Mr. Omboto* represented the appellant while learned prosecuting counsel *Ms Oduor* appeared for the Republic.

In his submissions, *Mr. Omboto* re-iterated the depositions in the appellants supporting affidavit. He in addition urged the court to allow the application on grounds that the appeal had high chances of success as in his view, the offence of forgery was not proved to the required legal standard; that

the appellant has completed her sentence in the other three cases namely criminal case No. 305 of 2008; No. 4952 of 2009 and No. 4995 of 2005 after serving a term of 6 ½ years; that the instant appeal arises from criminal case No. 327 of 2010 and that the appellant is due to start serving the sentence imposed therein on 29th March, 2016.

5. The application is contested by the state. In her opposition to the motion, learned counsel *Ms Oduor* submitted that the appeal does not have any chance of success as the prosecution had proved each of the four counts in which the appellant was convicted beyond any reasonable doubt; that the appellant has not substantiated her claim that she suffers from Fistula disease and that the claim is an afterthought; that even if she suffers from such a disease, there are adequate medical facilities in prison and at the Moi Teaching and Referral Hospital which can comfortably deal with such a condition.
6. I have considered the application, the rival submissions made by counsel for the appellant and the state as well as the grounds of appeal. I have also read the proceedings in the lower court.
7. At the outset, it is pertinent to note that the court under **Section 357** of the **Criminal Procedure Code** has wide discretion in deciding whether or not to release a convict on bond or bail pending the determination of an appeal but that discretion must be exercised judiciously in accordance with the law.
8. There are two main legal principles that guide the court in determining an application for bond pending appeal. First, the applicant must prove that the appeal has high or overwhelming chances of success and second, that exceptional or unusual circumstances exist that entitle him or her to be released on bail pending appeal.
9. These legal principles were well captured by the Court of Appeal in ***Dominic Karanja V Republic (1986) KLR 612*** where the court held as follows;

“The most important issue was that if the appeal had such overwhelming chances of success, there is no justification for depriving the applicant his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances.

The previous good character of the applicant and the hardships, if any facing his family were not exceptional or unusual factors. His health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners.

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.....”.

See also: ***Somo V Republic (1972) EA 476; Jivraj Shah V Republic (1986) KLR 605.***

10. The above two principles are informed by the fact that unlike an accused person, an appellant does not enjoy the presumption of innocence which is only guaranteed to accused persons by the Constitution. The presumption of innocence is immediately extinguished once an accused person is convicted of a criminal offence. This is further grounded on another presumption that an accused person is deemed to have been properly convicted by the lower court until his conviction is overturned on appeal.
11. The appellant has contended that she has a constitutional right to bond pending appeal under **Article 49 (h)** and **Article 50(q)** of the **Constitution**. I am unable to agree with the appellant on this proposition. A reading of **Article 49(i) (h)** of the **constitution** leaves no doubt that it only protects the right to bond or bail of arrested persons who are either waiting to be charged with a criminal offence or those who have already been charged and are awaiting the conclusion of their trial. **Article 49** does not apply to persons who have already been convicted. It does not therefore give appellants the right to bond pending appeal. **Article 50(q)** does not also guarantee an appellant the right to bond pending an appeal. It only safeguards the right of a convicted person to appeal or to apply for review to a higher court as prescribed by the law.
12. The other ground anchoring the instant application is that the appeal has high chances of success. The appellant has complained in her grounds of appeal that the learned trial magistrate erred by failing to independently and properly analyse the evidence placed before him before convicting

her.

I have carefully evaluated the evidence before the trial court and the judgment of the learned trial magistrate.

For obvious reasons, I cannot comment at this stage on the veracity or otherwise of the evidence tendered by the prosecution before the trial court as doing so might prejudice the hearing of the appeal. But I can say for now that on the evidence on record and the appellant's own admission in the course of the proceedings that the allegations leveled against her by the prosecution were true, I am not persuaded that the appeal has overwhelming chances of success.

There is however one disturbing aspect about the manner in which the presentation of evidence was concluded in this case. The proceedings show that immediately after the prosecution closed its case, the learned trial magistrate reserved his judgment. He does not appear to have given the appellant an opportunity to present her defence.

However, the appellant has not put forward as one of her grounds of appeal a complaint that she was denied an opportunity to tender her defence. In view of the provisions of **Section 350 (2)** of the **Criminal Procedure Code** which provides that an appellant is not permitted to rely on grounds other than those set out in the petition of appeal, I am unable to make any finding at this stage on that apparent anomaly in the proceedings. However, all is not lost for the appellant as she still has an opportunity to amend her grounds of appeal if she is so minded and in any event, it will be open to the appellate court to evaluate all the evidence and any matters that may have arisen in the course of the proceedings in the lower court and arrive at its independent determination on whether or not the appellants conviction should stand. In an application of the nature before the court, it would be imprudent to delve into matters that touch on the merits or otherwise of the appeal.

13. Regarding the claim that the appellant suffers from a certain health condition which she has described as the "Fistula disease", I find that the appellant has not availed any evidence to substantiate the said claim. And even if it was true that the appellant suffers from such a condition, there is no evidence or suggestion that such an ailment cannot be treated in the medical facilities available in prison. The appellant has stated that she had been serving sentence in other cases for the last 6 ½ years. If indeed the appellant suffers from any health condition including the fistula disease, her long stay in prison is proof that the same has been properly managed in the prison's health facilities.
14. The appellant has also urged the court to allow the application to give her an opportunity to go and take care of her three children who have allegedly been thrown out of school. She has also pledged not to abscond if granted bond.

I sympathize with the situation the appellant finds herself in especially because she has been incarcerated for a long time. Regrettably, the sad truth is that the fact that she has been in prison serving sentences imposed in other criminal cases is irrelevant in this matter since those other criminal cases have no bearing on the instant appeal. It is also significant to note that as was held in the case of ***Dominic Karanja V Republic (Supra)***, the hardships facing an appellant's family do not qualify to be exceptional or unusual circumstances that would entitle an appellant to be granted bond pending appeal. A pledge that if granted bond an appellant will not abscond is also not a sufficient ground to justify grant of bond pending appeal.

15. Given my foregoing findings, it is quite obvious that the appellant has failed to meet the legal threshold for grant of bail pending appeal. Fortunately, the court diary for criminal appeals is quite flexible and given the appellants peculiar circumstances, it is possible to have hearing of her appeal fast-tracked. It is unlikely that she will serve any substantial part of her sentence before her appeal is heard and determined.
16. In the end, I find that the appellant's notice of motion dated 1st September, 2015 is not merited. It is accordingly dismissed.

C.W GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 20th day of April, 2016

In the presence of:

The Appellant

Mr. Omboto for the Applicant

No appearance for the state

Naomi Chonde – Court Assistant