REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 53 OF 2016

(CORAM: J. A. MAKAU – J.)

GEORGE ONYANGO ANYANGO .....1ST APPELLANT/APPLICANT

DENNIS ODUOL OGONJO …..... 2ND APELLANT/APPLICANT

VERSUS

REPUBLIC …..... RESPONDENT

(Being an appeal against both the conviction and the sentence DATED 17.5.2016 in Criminal Case No. 310 of 2013 in UKWALA Law Court before Hon G. ADHIAMBO – S.R.M.)

RULING

1. The two Applicants **GEORGE ONYANGO ANYANGO** and **DENNIS ODUOR OGONJO** were the 1st and the 2nd Accused at the trial Court. They faced a charge of manslaughter contrary to **Section 202 as read with Section 203 of the Penal Code**. The particulars of the offence are that on the 8th day of November 2012 at Jera Secondary School, Ugenya District within Siaya County jointly, unlawfully killed **MERCY ANYANGO OPUOT**.

2. After full trial the Applicants were found guilty, convicted and sentenced to serve 20 years imprisonment.

3. Aggrieved by both the conviction and sentence the two Applicants preferred the appeal through their petition of appeal dated 18th May, 2016 setting out the following grounds of appeal:

> ***(a) The Learned trial Magistrate misdirected himself in fact and law by not appreciating that evidence adduced by the prosecution exonerated the appellants from the offence charged.***
>
> ***(b) The learned Magistrate erred in law and fact when she called for but totally failed to consider the probation officers report and its recommendations.***
>
> ***(c) The learned magistrate erred in law and fact when she failed to consider and/or appreciate the defence of the appellant's which was weighty.***
>
> ***(d) The sentence imposed on the appellant's was harsh in the circumstances taking into account the mitigation of the appellants.***
>
> ***(e)The sentence imposed by the trial magistrate was excessive and unwarranted bearing in mind that she did not have the opportunity to hear both the prosecution and defence cases and observe***

the demeanour of the witnesses.

4. The Applicants simultaneously at the same time of filing the petition of Appeal filed Application pursuant to **Section 357 of the Criminal Procedure Code, Cap 75 of the Laws of Kenya** seeking the following orders:

> ***(a) That the Applicants, George Onyango Anyango and Dennis Oduol Ogonjo be released on bail, pending the hearing and determination of Siaya High Court Criminal Appeal No. 53 of 2016.***
>
> ***(b) That in the alternative to prayer 2 above, the execution of the Judgment and Conviction of the Honourable Oanda SRM and the Sentence of the Honourable G. Adhiambo SRM be stayed pending the hearing and determination of Siaya High Court Criminal Appeal No.53 of 2016.***
>
> ***(c) That this Honourable court do make any other order it deems fit in the circumstances.***

5. M/s. Kibet learned Advocate for the Applicant in support of the application relied on the supporting affidavit dated 2nd June 2016 in which it is urged, that the appeal has a high probability of success and likelihood that this court may quash the conviction and set aside the sentence, that if the applicants are not granted bail pending appeal the appeal may be rendered nugatory should they succeed given then they may have served most of the sentence by the time the appeal is heard and determined, that the Applicant's as employees of T.S.C. are apprehensive that if they are not admitted to bail, they will be absent from the employment with the result that their employer may terminate their employment with the resultant loss of their source of livelihood and employment benefits, that the Applicants have families which depend on them as the breadwinners of their families who are likely to suffer due to continued incarceration, that the Applicants have a fixed abode with established homes, that the trial court had admitted Applicants to bail and they faithfully attended all court hearings and that they undertake to attend court mentions and hearings if required to do so.

6. Mr. Ngetich Learned State Counsel in his submission did not oppose the application, however when Mr. E. Ombati Learned State Counsel appeared he opposed the application urging that the appeal has no overwhelming chances of success in view of evidence on record from PW3 and PW8, that the postmortem Report confirmed the cause of death was due to hemorrhage secondary to raptured spleen. He urged the evidence of PW1 and PW8 was corroborated by evidence of PW10.

7.M/s. Kibet urged the prosecution case is dented with material contradictions as regards the cause of death as per evidence of PW1, 6, and 10 in that the cause of death was not clearly brought out but PW10 only stated the cause of death was due to hemorrhage owing to the raptured spleen without stating what caused the spleen to be raptured. That PW6 she submitted attended to the deceased on 9.11.2012 who was sick and she never mentioned of any beatings or having fallen down. Similarly she submitted PW7 testified the deceased was sickly and always had malaria. The Applicant's Counsel urged it is not clear what caused the rapture of the spleen and and pointed out apart from the alleged beatings of the deceased as alleged by PW3 and PW8 the raptured spleen could have been caused by other causes.

8. The Applicant's application is premised under Section 357 of the Criminal Procedure Code which 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: Admission to bail or suspension of sentence pending appeal. Provided that, where an application for bail is made to the subordinate court and is refused by that court, no further application for bail shall lie to the High Court, but a person so refused bail by a subordinate court may appeal against refusal to the High Court and, notwithstanding anything to the contrary in sections 352 and 359, the appeal shall not be summarily rejected and shall be***

heard, in accordance with such procedure as may be prescribed, before one judge of the High Court sitting in chambers.

(2) If the appeal is ultimately dismissed and the original sentence confirmed, or some other sentence of imprisonment substituted therefor, the time during which the appellant has been released on bail or during which the sentence has been suspended shall be excluded in computing the term of imprisonment to which he is finally sentenced.

(3) The Chief Justice may make rules of court to regulate the procedure in cases under this section"

9. The High Court is in view of **Section 357 of CPC** is clothed with powers to hear an application for bail/bond and grant or refuse to grant bail/bond with or without sureties or to suspend the execution of any sentence meted by the subordinate court pending the hearing and determination of the appeal lodged before it. The admission to bail/bond pending appeal is a discretionary power which the court must exercise judiciously in accordance with the laid down principles. The court in granting bail pending appeal is obliged to consider the circumstances of each case so that the discretion is exercised judiciously and not capriciously. There is in considering such an application a presumption that once a a person is convicted was properly convicted and the factors to be considered are totally different from the ones to be considered in dealing with an application by an accused person before conviction.

10. It is therefore of paramount importance in dealing with an application for bail/bond pending hearing and determination of an appeal to bear in mind that there are set out parameters to be considered by the appellate court in dealing with application for bail pending appeal. In the case of **Jivraj Shah V Republic (1980) KLR 605** The Court of Appeal stated that:-

(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 interest 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."

11. In the case of **Ademba V Republic (1983) KLR 442** the court of Appeal as regards the parameters to be considered by an appellate court in an application for bail pending appeal held thus:-

(a) Bail pending appeal may only be granted if there are exceptional or unusual circumstances.

(b)The likelihood of success in the appeal is a factor to be taken into consideration in granting bail pending appeal. Even though the appellant showed serious family and personal difficulties in view of the unlikelihood of success in this appeal, the application could not succeed."

12. I am alive of the fact that there are myriads of authorities which have enunciated the principles that the court should consider when faced with an application for bail/bond pending appeal. In the Case of **David V R (1972) EA the Court of Appeal** stated:-

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

13. In an application for bail/bond pending hearing and determination of appeal the burden of demonstrating to the appellate court that the grounds of appeal set out in the respective petitions of appeal have overwhelming chances of success lies with the applicants and therefore that factor, taken either within the contention that the sentence or substantial part of it will have been served by the time the appeal is heard, the condition for granting bail will exist. That bail/bond may further be granted if there are exceptional or unusual circumstances, however matters relating to size of Applicant's family, or Applicant being a breadwinner of the family or having fixed abode or having at the trial Court of having been granted bail/bond would not normally be the reasons for granting bail pending appeal nor is the previous good character of the applicant nor applicant's assertion that he will faithfully abide by whatsoever bond terms the court may impose or threat of loosing of employment if bail/bond is not granted or sentence being harsh and excessive (*unless the sentence is illegal*) be taken as exceptional circumstances or as reasons for releasing the Applicant on bail/bond pending appeal (See **HCCRA No. 56 and 57 of 2014 Dennis Yobesh Ombogo & Another V R (2014) eKLR**)

14. I have very carefully perused the trial court's proceedings, judgment, and have carefully considered the petitions of appeal and grounds set out thereto by the appellants. I have also considered the submissions by both counsel. There is issue as to whether the prosecution case is riddled with contradictions and inconsistencies regarding the cause of death of the deceased. The Appellants Counsel attacked the evidence of PW6, PW7 which she submitted contradicted the evidence of PW1, PW8 and PW10 as to the cause of death of the deceased, urging that the prosecution case was unclear as to what caused the death of the deceased. The applicants' counsel urged spleen rapture could have been caused by something else other than the alleged beatings. On evidence of PW10 the Medical Officer, the Applicants urged the doctor did not state what caused the rapture of spleen as the postmortem indicated the cause of death was a result of hemorrhage secondary to rapture spleen but did not indicate it was due to what nor did he exclude any other causes nor did he specifically state what caused it. There is in view of that a lacuna and a question that begs for answers as to what could be the truth and who is telling the truth between PW3 and PW8, who testified that the deceased was beaten by the Applicants on one side and the other witnesses PW6 and PW7 amongst others who asserted the deceased was sickly and she was not beaten. The issue can be answered at the hearing of the appeal since the determination at this stage would definitely prejudice the case of the prosecution. There is also the questions as to whether the principle of burden of proof was properly applied during the trial. Further whether the ingredients of the offence of manslaughter were proved to the required standard and whether the evidence adduced by the prosecution witnesses exonerated the Applicants from the offence charged and whether the Applicants defence was ignored and whether it was weighty.

15. I have in light of the matters raised noted that there are serious matters of law, which when considered along the evidence tendered by the prosecution are likely to sway the scales in favour of the Applicants. I have further perused the petition of appeal and I am persuaded that this appeal is not vexatious or frivolous and the chances of success is not remote and if the applicants are denied bail and their appeal succeed they would have served substantial part of their term and subsequent reversal of the sentence would in my view not undo the damage that they would have suffered as an result of their incarceration and that being the case and considering the workload of the station, it would not be far fetched to state that the applicants might serve a substantial part of their prison term before the appeal is heard and determined and denying them bail/bond may prejudice them in view of the likelihood of success in their appeal.

16. The upshot is that I am satisfied that this is a proper case for which this court can exercise the court's descretion in favour of the Applicants. I accordingly grant the application on the following terms:-

(a) Each of the Applicant may be released on his own bond of Kshs.500,000/= (Five Hundred Thousand Only) with one (1) surety of like amount.

(b) The surety to be approved by the Deputy Registrar of this Honourable Court.

(c) In the alternative each Applicant may be released on cash bail of Ksh.200,000/= (Two Hundred Thousand only) with one surety of Ksh.50,000/=.

(d) Once the Applicants are released, the applicants shall attend court once every 30 days for mentions of their case before Deputy Registrar until their appeal is heard and determined or until further orders of this Honourable Court.

(e) In default of (d) above the bond shall be cancelled forthwith and surety called upon to account or cash bail shall be forfeited to the State.

(f) Mention on 14.7.2016.

DATED AT SIAYA THIS 23RD DAY OF JUNE, 2016

J. A. MAKAU

JUDGE

Delivered in Open Court in the Presence of:

M/S Kibet for Appllicant.

Mr. Elphas Ombati for State.

C.C. 1. Kevin Odhiambo.

2. Mohammed Akideh.

J. A. MAKAU

JUDGE