



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 57 OF 2016

(CORAM: J. A. MAKAU – J.)

MAURINE AWINO ODUOR APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an appeal against both the conviction and the sentence Dated 13.5.2016 in Criminal Case No. 279 of 2016 in Ukwala Law Court before Hon. G. Adhiambo – S.R.M.)

RULING

1. The Appellant/Applicant **MAURINE AWINO ODUOR** was charged with an offence of Manufacturing and Packaging Alcohol drinks in unapproved container contrary to **Section 32 (1) (b) as read with subsection 8 of the Alcoholic Drinks Act No. 4 of 2010**. The Particulars of the offence are that on the 13th day of May, 2016 at Rang'ala, in Ugunja sub-County within Siaya County, the appellant was found having manufactured and packed 150 litres of illicit brew Kangara in unapproved containers.

2. After plea taking the appellant/Applicant admitted the charge and a plea of guilty entered. The prosecution gave facts which appellant/Applicant admitted as correct and consequently was convicted on her own plea of guilty. The trial court after considering the Appellant/Applicant mitigation sentenced the Appellant/Applicant to pay a fine of Kshs.150,000/= in default to serve 12 months imprisonment.

3. Aggrieved by both the conviction and sentence the Appellant/Applicant preferred an appeal setting out the following grounds of appeal:-

(a) The learned trial Magistrate erred in law in convicting the appellant on the basis of a defective charge sheet.

(b) The learned trial Magistrate erred in not finding that the particulars of the charge are totally at variance with the specific charge preferred against the appellant.

(c) The Learned trial Magistrate erred in not finding that the facts of the case as presented by the prosecutor did not disclose the offence charged.

(d) The learned trial Magistrate erred in law in convicting the appellant in the absence of any scientific finding that the substance that the appellant was found in possession of, namely "Kangara" was an "alcoholic drink" in terms of section 2 of the Alcoholic Drinks Act No. 4 of 2010.

(e) The learned trial Magistrate erred in law in convicting the Appellant with the offence of “importing an alcoholic drink” in the absence of any proof of the fact of “importation.”

(f) The sentence passed against the Appellant was manifestly excess, harsh and unreasonable in all the circumstances of the case.

4. That at the same time the Appellant/Applicant by her application dated **23rd May 2016 pursuant to Section 357 of the Criminal Procedure code** sought that she be released on bond pending the hearing and determination of the appeal and the court do issue any further orders that it may deem fit and just in the circumstances.

5. The Appellant/Applicant's application is based on the affidavit by her counsel Mr. J.O. Manwari who avers that the Applicant has filed an appeal against the conviction and sentence, that on perusal of both the charge sheet and the court record, he has formed an opinion that the appellant's Appeal which he filed has overwhelming chances of success. He has deposed for example that the Appellant is charged with an offence of **“importing an alcoholic drink contrary to section 32 (1) (b) as read with Section 8 of the Alcoholic Act No. 4 of 2010**, that neither the particulars of the charge nor the facts given by the prosecution made any reference to the allegation of importation and as such both the conviction and the sentence are faulty, erroneous and misplaced and should not be allowed to stand.

6. At the hearing of the application Mr. J. O. Manwari, learned Counsel for the Appellant/Applicant submitted the appeal has overwhelming chance of success, referring to the particulars in support of the charge which gave the particulars of the drink as **“Kangara”** which he submitted as per definition of **Alcoholic drinks under Section 2 of the Alcoholic drinks Control Act No. 4 of 2010** is not an alcoholic drink. He further urged the facts as given did not support the charge of importation but of being in possession. He urged further the sentence was harsh and excessive.

7. Mr. E. Ombati learned State Counsel opposed the application urging the applicant was charged with an offence of manufacturing and packing and not of importation or of being in possession as urged by the Applicant's Counsel, that the applicant pleaded guilty to the offence and the exhibit produced before court and fined Kshs.150,000/= . He urged the offence was proved. He referred the issue as to whether **“Kangara”** is an alcoholic drink or not is a matter to be dealt with at the time of hearing of the appeal. He concluded by submitting that the applicant's counsel has not demonstrated if the appeal has any chance of success.

8. Section 357 of the Criminal Procedure Code permits admission of the appellant to bail pending appeal. This court has discretion to grant or not to grant bail, which discretion must be exercised judiciously on facts of each case and as per laid down principles.

9. Section 357 of Criminal Procedure Code which the Applicants has invoked in support of the application provides as follows:-

Section 357(1) (a), (b) & (c):-

(a) 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;

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.

(b) 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.

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

10. From the aforementioned Section it is evidently clear that an appellate court is clothed with power to grant bail/bond with or without sureties or to suspend of any sentence imposed by the trial court pending the hearing of the appeal. In deciding to grant bail or reject application for bond, the appellate court is under obligation to consider the contents of each case so as to exercise the discretions judiciously and not capriciously. In the case of **Mundia V Republic (1986) KLR 629**, the Court set out parameters to be considered by appellate court in considering an application for bail pending appeal, thus:

(a) There is a presumption that once a person is convicted he was properly convicted.

(b) The chances of the appeal succeeding is a factor for consideration in arriving at a decision in an application for bail pending appeal.

(c) Bail pending appeal may be granted where there is a risk that the sentence will have been served by the time the appeal will be heard but there must exist the major issue of overwhelming chances of the appeal in the first instance.

11. In the case of **Jivral Shah V. Republic (1980) KLR 605** the Court of Appeal addressed itself on parameters to be considered by appellate Court in an application for bail pending appeal 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 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.”

12. Further in the case of **Ademba V. R (1983) KLR 442** the Court of Appeal held as follows:

(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.

13. In application for bail pending appeal the burden weighing against the Applicant is to demonstrate to the court through the grounds of appeal set by the petition of the appeal has overwhelming chances of success and not to state the usual grounds of granting bail and bail being a constitutional right and that there are no compelling reasons not to grant bail/bond. The major ground for consideration is overwhelming chance of success, taken together with contention that there is a risk that sentence will be served by the time the appeal will be heard or a substantial part of the sentence before the appeal is heard and determined.

14. I have very carefully considered the submission for and against the application for bail pending appeal as well as the petition and the proceedings before the trial court as well as the charge sheet and particulars in support and I am satisfied that there is an issue as to whether the particulars support the

charge or discloses the offence as charged, thus importation of the “*kangara*,” there is further issue as to whether “*Kangara*” is an alcoholic drink as defined under **Section 2 of the Alcoholic Drinks Control Act No. 4 of 2010**, and lastly the issue as to whether there is Alcoholic Drinks Acts No. 4 of of 2010, in my considered view there are serious matters of law which, when considered along the particulars tendered by the prosecution are likely to swing the scales in favour of the applicant. This being the case, and considering the workload at the station, it would not be far fetched to say that the applicant might serve a substantial part of her prison term before the appeal is heard and determined and denying her bail and upon being successful on appeal she would have been prejudiced in that the served period would be irreversible injury.

15.I have further to add that I have very carefully examined the grounds of appeal as set out in the petition and in my considered view they are not vexatious and/or frivolous. The Applicant has arguable case with likelihood of success. I have considered the grounds of petition and I note the Applicant has satisfied the parameters set in the cases cited herein above.The applicant has demonstrated that the appeal has overwhelming chances of success and if not allowed the Applicant by the time the appeal is heard and determined will have served substantial part of the term of sentence which may be irreversible and a great punishment, should the Applicant be successful in her appeal.

16. For the above reasons, I am satisfied that this is a proper case in which to exercise the courts discretion in favour of the applicant and I proceed to allow the application for bail pending appeal on the following terms:-

(a) Applicant may be released on her own bond of Kshs.100,000/= (one hundred thousand) with one surety of the like amount. The surety to be approved by the the Deputy Registrar of this Court and the Applicant upon release to be attending mentions and hearing pending hearing and determination of the appeal as shall be set by court.

(b)In the alternative to (a) above the Applicant may be released on cash bail of Ksh.40,000/= (Kenya Shillings Forty Thousand) with one surety of Kshs.20,000/ (Twenty thousand)

(c) In default of (a) above the bond shall be cancelled immediately and surety be called to account and/or cash bail if paid under (b) above be forfeited to state.

(d) Mention on 7.7.2016 orders accordingly.

DATED AT SIAYA THIS 16TH DAY OF JUNE, 2016.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT THIS 16TH DAY OF JUNE, 2016.

In the presence of:

Mr. J. O. Manwari for the Appellant

Mr. E. Ombati for State

Appellant - Present

Court Clerk – Kevin Odhiambo

Court Clerk – Mohammed Akideh

J. A. MAKAU

JUDGE