



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
CRIMINAL APPEAL NO. 22 OF 2015

PATRICK CHOMBA NJOKA..... APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

1. PATRICK CHOMBA NJOKA, the appellant herein was charged with Grievous Harm contrary to **Section 234** of the **Penal Code** vide Wanguru Principal Magistrate's Court Criminal Case No. 268 of 2013. After trial he was convicted and sentenced to serve four (4) imprisonment on 5th June, 2015. He was however, aggrieved by that decision and preferred an appeal that is now pending for hearing in this Court. The applicant has now moved this Court vide a Notice of Motion dated 2nd October, 2015 for bail pending appeal basing his application on the following grounds namely:-

(a) That he has a good appeal and possibility of being acquitted.

(b) That unless he is admitted to bail, he will suffer a substantial part of his sentence in jail.

(c) That he is willing to abide by any term or condition set for his release.

2. The application is supported by the affidavit of his counsel Mr. Momanyi Gichuki sworn on 2nd October, 2015 which basically supports the grounds stated above with the additional ground that the applicant did comply with bond terms in the court below. It has been submitted that the prosecution did not prove its case beyond reasonable doubt and that the evidence adduced was not sufficient to sustain a conviction. The Appellant has pointed out that the complainant did not see who stabbed him and that the prosecution did not establish the motive of the assault.

3. The Respondent opposed the application through a replying affidavit sworn by E. P. O. Omayo, learned counsel from the Office of the Director of Public Prosecutions in opposition to the application. The State contended that the appeal stands no chance pointing out that the evidence adduced at the trial Court was overwhelming. Mr. Omayo while conceding that the complainant did not see who stabbed him, submitted that other witnesses called saw the Appellant and identified him. He further contended that the nature of the injuries inflicted on the complainant were serious and life threatening as demonstrated by the medical evidence adduced.

4. I have considered this application and submissions made by both counsels. This is an application that has been brought under **Section 357 (1)** of the **Criminal Procedure Code** and although the applicant has also invoked **Articles 49 (1)** and **Article 53 (1)** of the **Constitution**, the cited Constitutional provisions are not applicable here. This is because the latter provision relates to Children's rights which I find

irrelevant to the application before Court. The former provision relates to rights of arrested persons or persons charged before courts of law. **Article 49 (1)** of the **Constitution** does not extend to the rights of convicted persons. The cited provisions of **Section 357 (1)** of the **Criminal Procedure Code** is the relevant provision in the Statute giving this Court power and discretion to admit a convicted person to bail pending appeal. This discretion is exercised only in exceptional circumstances. This is because a convicted person has lost the presumption of innocence conferred to him by the Constitution and at the hearing of the appeal, he carries the burden to prove that his conviction was wrong or erroneous.

5. In the case of **Simon Mwangi Kirika -Vs- R [2006] eKLR** the Court of Appeal in quoting the case of **JIVRAJ -VS- R [1986] KLR 605** made the following observations:

“(i) 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.

“(ii) 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.

“(iii) The main criteria is that there is no difference between overwhelming chances of success and 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.”

Going by the above principles the Applicant in this application has not cited any exceptional or unusual circumstances in his trial or finding by the trial court to warrant this Court to grant him bail pending hearing and determination of his appeal. The Appellant was sentenced to serve 4 years imprisonment and although I agree that substantial part of the sentence will be served by the time the appeal is heard and determined, the Appellant has not in my view pointed or argued out a substantial point of law or fact that *prima facie* points that the appeal is likely to be successful. This is because the only point raised by the Appellant that the complainant did not see who stabbed him has been countered by the Respondent’s arguments that other witnesses who saw or witnessed the incident. This Court finds that it is safe to leave the issue for more interrogation at the hearing of the appeal itself.

6. This Court also has considered the ground that the Appellant would abide by the terms of bond if released on bond but though this is not a factor to be considered at this stage on whether or not to admit the Appellant to bail, this Court finds it inadvisable for a counsel to swear an affidavit on behalf of his client on matters that are clearly beyond his knowledge or control. The Applicant’s counsel is not in a position to positively depose that the Applicant will faithfully avail himself for hearing and determination of his appeal. Those facts are within the knowledge of the Applicant himself. Nonetheless as I have stated above this is not a factor to be considered and therefore the issue has not swayed the decision of this Court either way.

In the premises I find no merit in the application dated 2nd October, 2015. This appeal was admitted on 22nd July, 2015 and the record is complete. I do not see why the Appellant has not fixed the appeal for directions with a view to its disposal. The application is disallowed and the Appellant is directed to expedite his appeal by taking a date for directions.

Dated and delivered at Kerugoya this 20th day of July, 2016.

R. K. LIMO

JUDGE

20.7.2016

Before Hon. Justice R. Limo J.,

State Counsel Omayo

Court Assistant Willy Mwangi

Appellant present

Interpretation English-Kikuyu

Omayo for Respondent present

Momanyi for appellant absent

COURT: The ruling is signed, dated and delivered in the open court in the presence of Patrick Chomba Njoka and Omayo for the Respondent.

R. K. LIMO

JUDGE

20.7.2016