



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
MISC CRIMINAL APPLICATION NO. 72 OF 2016

N C V alias S

K J K alias T.....APPLICANTS

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

By a Notice of Motion application dated 28th July, 2016 brought under Section 349 of the Criminal Procedure Code, the Applicant seeks to be admitted to bail pending the hearing and determination of their appeal against conviction and sentence in Principal magistrate's Criminal Case No. 119 of 2015 at Kaloleni.

The grounds of the application are that;

(a) there are serious errors on the face of the record of the lower court and the appeal has overwhelming chances of success;

the applicants had been granted bail in the lower court and they complied with the terms thereof;

(b) the applicants were youthful persons aged 18 and 19 years and were minors at the time when the alleged offence was committed and that their future is likely to be severely affected given that age vis a viz the sentence of 15 years imprisonment;

(c) it is likely to take time before the appeal is heard and determined hence the possibility that the appellants will have served the sentence by then;

The applicants advocate, Mr Fredrick Mawasi swore an affidavit in which he deposed all these grounds which were highlighted by Mr Njenga during the hearing of the application in court.

The application was opposed by the state through M/s Mutua, learned state counsel. She argued that the applicants were charged with a sexual offence and sentenced to serve fifteen (15) years imprisonment which does not provide a guarantee that they will not abscond.

The paramount principle that is considered in determining whether or not to grant bail pending appeal was set out in the case of SOMO VRS REPUBLIC (1972) EA 476. It was held;

“it is that a trial which, to all outward appearances, has been properly conducted, results in valid

determination of the standing of the accused in criminal proceedings, and where such a trial ends in a committal of the accused to jail, it may be considered the right position in law, unless and until the judgment is set aside on appeal. Therefore, the applicant ought to be in a position to persuade the court that his appeal is so strong, so meritorious that at the end, the probabilities will favour acquittal. The applicant, to discharge that burden, will need to raise some critical issue of law, or an issue as to the mode of application of the evidence. Although it is recognized that a particular case may have special circumstances that could weigh in the court's mind, the basic consideration remains whether or not the appeal stands clear chances of success”.

And in the case of DOMINIC KARANJA V REPUBLIC, NAIROBI CRIMINAL APPLICATION NO. 14 OF 1986, it was held that;

“The most important issue here is if the appeal has such overwhelming chances of success, that there is no justification for depriving the applicant of his liberty. The minor relevant considerations would be whether there are exceptional or unusual circumstances. The previous character of the applicant and the hardship if any, facing the wife and children of the applicant are not exceptional or unusual factors. A solemn assertion by an applicant that he will not abscond if he is released is not sufficient ground even with the support of sureties, for releasing a convicted person on bail pending appeal.....ill health per se would not constitute an exceptional or unusual circumstance in every case. There exist medical facilities for prisoners in the country”

I have perused the record of proceedings and judgment of the lower court case in consideration of the prayers and arguments by counsel in this case. I am satisfied that this is a good case for grant of bail pending the hearing and determination of the applicants appeal.

It is accordingly ordered that each applicant do post a bond of Ksh 100,000 with one surety of a similar amount each pending appeal.

Ruling signed, dated and delivered this 27th day of October 2016.

D. O .CHEPKWONY

JUDGE

In the presence of:

M/s Ayodo for the state

Mr Asige for the applicant

C/clerk- Kiarie

Court –

(A) I direct the Deputy Registrar to call for record of proceedings of from the lower court.

(B) Mention on 8.12.2016, 24.11.2016 to confirm record of appeal.

D. O. CHEPKWONY

JUDGE