



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CRIMINAL APPEAL NO 117 OF 2016

LUCAS CLINTON OGINDIAPPELLANT

VERSUS

REPUBLICRESPONDENT

RULING

This is the applicants application by Notice of Motion dated 29th September, 2016 and brought under section 356 and 357 (1) (2) of the Criminal Procedure code, laws of Kenya, Article 49 (1) (h) ,10,20,21,22,259 of the Constitution of Kenya, 2010 and all other enabling International conventions and enabling provisions of the law.

1. the main prayer in the application is that;

(i) the Honourable court be pleased to admit the applicant on bond /bail or be released on bail pending the hearing and determination of the appeal filed herein;

2. the Honourable court be pleased to release the applicant on bond/or bail on reasonable conditions and or as previous conditions imposed by the honourable subordinate court;

The grounds founding the application are as follows;

1. that the subordinate court misapprehended the facts and misdirected itself on the major legal principles to the prejudice of the applicant thereby raising substantial issues of law;

2. it is for the interest of justice that the applicant is released on bond pending the hearing and determination of the appeal;

3. that bail is a constitutional right, the offence is bailable by dint of Article 49 (1) (h) of the Constitution;

4. there are no sufficient and compelling reasons why the applicant cannot be released on bail pending the hearing and determination of the Appeal; the accused has ever since he was charged been complying with terms of bond and has never breached any;

5. the applicant is ready and willing to abide by the terms/or conditions of bail if the same is granted until the end of the appeal and prays the same as previously granted by the subordinate court do continue;

6. under Article 27 (1) of the Constitution accords equal protection and benefits of the law to all persons;
7. the accused continue to undergo inhuman and degrading treatment contrary to Article 29 (d) (f) hence preferring this appeal with good chances of success;
8. the appellant's right to fair trial as contemplated by Article 50 (2) (a) (c) and (e) will be infringed if not granted reasonable bond;
9. the case is likely to take long before it is concluded hence it is in the best interest of justice that his application be allowed; considering that the accused is of advanced age and suffers from diabetes;

The applicant's advocate, VINCENT MOGAKA swore an affidavit in support of the application. He deponed that;

1. the applicant was charged with the offence of defilement contrary to section 8 (c) (2) of the Sexual offences Act, No 3 of 2006, which was allegedly committed on 7th October, 2013, to which he pleaded not guilty;
2. that upon taking plea of not guilty, the Hon trial court granted the applicant bond/bail pending the hearing of their case, and has since complied with the said terms and conditions without fail.
3. the applicant has a large family which entirely depends on him and are likely to lose, suffer socially and economically and will irreparably hamper applicant's health and social life unless he is released on a bail/bond pending the hearing of the appeal herein.
4. the subordinate court misapprehended the facts and misdirected itself on the major legal principles to the prejudice of the Applicant thereby raising substantial points of law with overwhelming chances of success.

He has also deponed what he has outlined in the grounds on which the application is premised.

Mr Mogaka, counsel for the applicant submitted to court that he was relying on the grounds on the face of the application, his supporting affidavit dated 20.9.2016, the authorities cited and the Constitution of Kenya. He submitted that during the trial, the Honourable court or prosecution failed to avail one crucial witness by the name Mariam who in effect was with the complainant when the alleged offence was about to be committed. That this omission grants the appellant high chances of success.

On the issue of the prosecution having failed to call a witness by the name Mariam, Mr Ayodo submitted that Section 143 of the Criminal Procedure Code does not specify the number of witnesses to be called in a case.

As for being required to adhere to the provision of Article 50 of the Constitution, Mr Ayodo submitted that the Applicant was accorded fair trial and his rights have not been violated.

He submitted that the prosecutor proved their case against the applicant beyond reasonable doubt.

I have considered the application before me with regard to the grounds upon which it is presented.

I wish to point out that the applicant having been found guilty and convicted, he is not entitled to the benefit of the provisions under Article 49 (1) (h) of the Constitution of Kenya, 2010 which relate to the rights of arrested person, who are presumed innocent until proven guilty.

The relevant provision which clothes this court with the power to grant bail or bond pending the hearing of the appeal is section 357 of the Criminal Procedure Code which provides;

“I After 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;

While it is the discretion of considering the circumstances of each case, in granting bail pending appeal, the same is expected to be exercised judiciously and not capriciously.

The main principle to be considered in determining whether or not to grant bail pending appeal is clearly set out in SOMO V REPUBLIC (1972) E A 476; where it was held;

“it is that a trial which, to all outward appearances, has been properly conducted, results in value determination of the standing of the accused in the 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 the 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 recognised 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” (see John Bosco Saria vrs R, Miscellaneous Application No 702 of 2007, High Court, Mombasa).

The principle has been enunciated in numerous cases in this country such as ADEMBA Vs REPUBLIC (1983) KLR 442 and DOMINIC KARANJA Vs REPUBLIC (1986) KLR 613, where it was further held that the previous good 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, where there exist medical facilities for prisoners”

The burden of demonstrating this to court is upon the applicant through his grounds of appeal.

I have carefully considered the application of bail pending appeal by the applicant by reading through the grounds set out in the petition of appeal vis a vis the proceedings and judgment of the trial court.

At this stage, I find nothing that would predispose the applicants appeal to a successful outcome.

I am also seized of the court diary and work load coupled with the fact that the proceedings and judgment of the lower court’s appear to have been typed, it is unlikely that the appellant might serve a substantial part of his sentence before the appeal is heard and determined.

For these reasons. I am not satisfied that this is a proper case to grant the applicant’s prayers.

I proceed to dismiss the applicant’s application.

Ruling signed and dated this 13th day of October, 2016.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/s Muta for state

Mr Mugaka for Applicant/appellant

C/clerk- Kiarie