

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

HCCR MISC NO. 16 OF 2016

ANTHONY ODHIAMBO OJWANGAPPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The applicant **ANTHONY ODHIAMBO OJWANG** filed this application under Section 357 Criminal Procedure Code seeking that the 20 years sentence passed on 10th December 2010 be suspended, and he be admitted to bail pending the hearing of his appeal which has been filed in the Court of Appeal at Kisumu. He states that his appeal has good chances of success.

The applicant explains that he delayed in filing his appeal due to communication breakdown between him, his family members and his advocate. After his initial appeal was dismissed by the High Court sitting at Kisii, he then petitioned for a retrial before the High Court at Migori, but this too was dismissed out of the 20 years sentence, he says he now has a balance of 8 years have begun his term on 10/12/10. He fears that the hearing of his appeal is likely to take so long, that by the time it is heard, he may have completed his term and the appeal would rendered nugatory – he is due for a normal release in 2024.

At the hearing of this application the appellant submitted that he is hypertensive and diabetic and is not able to access some of the medicaments he requires to manage his condition.

In opposing the application, Miss Owenga on behalf of the DPP submitted that the appeal by the applicant has already been admitted and is due for hearing in Kisumu.

In his written submissions the applicant argues that he is of good character and is willing to observe any conditions the court may attach to his release on bail. It is his contention that he is not a flight risk and his release will not undermine or disturb public order or security in any way. Further that in any event the period, left for him to complete sentence is shorter than the period he has served.

The case of **JIVRAJ SHAH Vs REPUBLIC [1986] KLR page 605** discussed in detail factors which a court should consider when dealing with the issue of bond pending appeal and stated as follows:-

The principle consideration in an application for bond pending appeal is the existence of exceptional or unusual circumstances upon which the court can fairly conclude that it is in the interest of justice to grant bond.

“If it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of some substantial, court of law to be urged and that the sentence or substantial part of it will be served by the time the appeal is heard, conditions of granting bail will exist.”

I have not seen any memorandum of appeal annexed by the applicant first to demonstrate that he has an arguable appeal. Certainly it is not expected of this court at this part to determine into the merits of each ground of appeal but at least there must be a demonstration that prima facie the prospects of success of the appeal are high [See page 27 paragraph 4.3 on Bail and Bond Policy conditions.

Secondly, is the issue as to whether the applicant has demonstrated that there are exceptional circumstances – he endeavoured to do so by producing medical records showing he is diabetic and hypertensive. However, there is nothing to suggest that the condition cannot be adequately attended to by medical personnel while he is serving imprisonment, in fact the records show he has been receiving medical attention and medication has been prescribed for him. There is nothing exceptional demonstrated.

Lastly is the question as to whether the applicant will have served a substantial part of the sentence on account of a busy court of Appeal diary. The applicant was sentenced to serve 20 years imprisonment. He has so far served eight years, and according to his computation he has another eight (8) years to complete so as to have a normal release in 2024. That balance would not easily persuade him to attend court and there would be every temptation to flee the jurisdiction of the court. My own assessment is that the balance of sentence to be served and the history of losing his case at two different levels i.e at the magistrates court and before the Court of Appeal, predisposes him to being a flight risk, I therefore find no basis upon which to grant his application and the same is dismissed.

DATED, SIGNED and DELIVERED at MIGORI this 25th day of November, 2016.

H. OMONDI

JUDGE