



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL APPEAL NO. 66 OF 2016

BETWEEN

PETER MBUGUA MIRINGU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an Appeal from original conviction and sentence by D. Ogal RM in Hamisi Principal Magistrate's Court Criminal Case No. 282 of 2015 delivered on 22.07.2016)

RULING

Introduction

1. The appellant herein was arraigned before the Principal Magistrate's Court at Hamisi on one count of Sexual assault contrary to Section 5(1)(a)(i)(2) of the Sexual Offences Act No. 3 of 2006. It was alleged he committed the offence on 1st day of March, 2015 in Hamisi District within Vihiga County by unlawfully using his finger to penetrate the vagina of I A, a child aged 8 years.

2. The appellant was charged in the alternative with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The offence was allegedly committed in the same place on the same date against I A. when he touched I A's vagina with his finger. The appellant pleaded not guilty, thereby forcing the prosecution to call 4 witnesses in support of its claims. The appellant testified and called one witness who testified as DW2.

3. At the conclusion of the hearing, the appellant was found guilty of the alternative count, convicted of the same and sentenced to 10 years imprisonment. The appellant appealed the entire judgment vide the Petition of Appeal dated 01.08.2016 and filed in Court on the same day. The appeal is yet to be admitted for hearing.

The Application for Bond

4. The notice of motion was filed contemporaneously with the Petition of Appeal on 16.08.2016. The appellant prays to be admitted to bail pending hearing and final disposal of this appeal. The application is premised on seven grounds set out on the face of the application and is also supported by the appellant's affidavit of even date. The appellant gives two main reasons for seeking to be released on bond;- one is that during trial, he was on bond and never absconded and two that he is sick and needs medical attention which he cannot access from the prison.

Hearing of the Application

5. The application was canvassed before me on 28.10.2016. Mr. Shivega Advocate appeared for the appellant while the state was represented by Mr. Oroni, Principal Prosecution Counsel. Mr. Shivega submitted that a medical report annexed to the appellant's affidavit – annexure COS 1 – shows that the appellant suffers from hypertension and heart ailment for which he was treated some two years prior to 05.08.2016 when Dr. Jacob Sitefano Maleche of Kakamega High -way Nursing Home visited him at Kodiaga G.K. prison. According to Dr. Maleche, the appellant “is very ill” and “needs urgent medical attention from specialist doctors.” Counsel placed reliance on the case of **Peter Hinga Ngatho – vs – Republic [2015] eKLR (Nyeri Criminal Appeal No. 2 of 2016)**

6. The application was opposed on grounds that the appellant's constitutional right to be accorded bail has been taken away by due process of the law; that the medical documents attached to the appellant's affidavit are from a private medical practitioner and further that the medical report reveals the appellant was seen by the doctor some two years before the appellant was seen at Kodiaga Prison on 05.08.2016 and that no notes were attached to the affidavit to show the history of the appellant's treatment. Counsel urged that this application is a gimmick by the appellant to walk out of prison without due process.

The Law, Analysis and Determination

7. The guidelines for the granting of bond were published by the Judiciary in 2015 and the same are now widely applied by the courts. Under paragraph 4.30 thereof the burden is on the appellant to prove that there is an overwhelming probability that his or her appeal will succeed. There is also decided case law which buttresses the provisions of Section 357(1) of the Criminal Procedure Code which provides that;-

“357(1) 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.”

8. It is clear from the above provisions that the granting of bail to a convict is a matter for the discretion of the court before which an application for bond has been placed for determination. In this regard therefore, it is necessary to look at previously decided cases on the matter with a view to determining the factors that courts have taken into account in determining similar issues. In the **Peter Hinga Ngatho Case (above) Mativo Judge sitting in Nyeri** referred to a number of earlier decided cases, and in particular the case of **Jivraj Shah – vs – Republic[1986]KLR 605** in which the principles under which a court may grant bail pending appeal were stated to be the following.

“The principal consideration 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.”

9. The learned Judgment on, nevertheless, to illustrate what he considered would be circumstances justifying the granting of bail to such an applicant, pointing out that the mere fact of anticipated delay in hearing an appeal, was not of itself exceptional circumstance, but might become one when coupled with other facts, and added that the good character of the appellant together with an anticipated delay might constitute an exceptional circumstance.

10. It is to be noted that the chumambhai case was decided long before the promulgation of the constitution of Kenya 2010 which provides at Article 49(1) (h) that it is the right of every arrested person “to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.” In my considered view, trial includes appeal. Again, the discretion of the court in determining whether or not to grant bail is preserved. It is the court to determine what may be termed “compelling reasons.” From the numerous decisions both before and after the promulgation of the Constitution of Kenya 2010, the following matters are to be taken into account by the court in determining whether or not to grant bail;-

- a) Bail is granted at the discretion of the court
- b) The court must be satisfied that there are exceptional circumstances that are disclosed in the application
- c) The fact that the appellant, due to delay in determining the appeal may have served a substantial part of his sentence by the time the appeal is heard, is one such exceptional circumstance.

The Court of Appeal also held in the Jivraj Shah case that

“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 argued and that the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail exist the Court further held that

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

11. Reference was also made to the case of Chimanbhai – vs – Republic,(No.2)[1971]EA 343 where Harris Judge, in discussing the issue of bail pending appeal stated thus in part of his judgment:

“ The case of an appellant under sentence of imprisonment seeking bail lacks one of the strongest elements normally available to an accused person seeking bail before trial, namely, the presumption of innocence, but nevertheless the law of today frankly recognizes to an extent at one time unknown the possibility of the conviction being erroneous or the punishment excessive, a recognition which is implicitly in the legislation creating the right of appeal in criminal cases. As to the measure of that recognition, the decision in **Kanji’s case** is directly on the pointAlthough in his judgment the judge said it was not the practice to grant bail to an appellant after he had been convicted and sentenced to imprisonment except in very exceptional circumstances, each case is considered on its merits, depending on what may be presented as exceptional circumstance.”

12. It is important to bear in mind that in an application for bail pending appeal the court is dealing with a convict and sufficient reasons must therefore exist before such a convict can be released on bail pending appeal. It is not for the court to delve into the merits of each ground. But it suffices that all the grounds are examined, and a conclusion is made that prima facie the prospects of success of the appeal are dim. It is further to be noted that the fact that the applicant did not breach the bail conditions in the court below, is not an exceptional circumstance which can warrant to admit an applicant to bail pending appeal. Generally see the Indian **Case of Krishnan – vs – The People. (SCZ 19 of 2011)[2011] ZMSC 17** . In brief therefore, the principles outlined above are to be applied by this court in determining the instant application. First of all, it is acknowledged that the granting of bail, whether before trial or before appeal is at the discretion of the court only that the discretion must be exercised judiciously and not capriciously. Having thus settled the issue of discretion, the next issue for determination is whether there are exceptional circumstances that are disclosed in the application. In my considered view, there are no such circumstances. The two reasons given by the appellant in this case for seeking bail pending appeal are that he did not breach the terms of the bond during the trial and secondly that his health is at risk because he cannot access good medical attention if he remains in prison. Regarding the contention that he did not breach the bond terms during the trial, it has been held and I fully agree that the fact that the appellant did not breach the bail conditions in the court below is not an exceptional circumstance which can form the basis for the granting of bail pending appeal. It is my considered view that the appellant was under a duty to comply with bail conditions once granted bail. It was not a favour he was doing to the State by obeying the bond terms.

13. Secondly, the appellant contended that his application ought to be allowed because his health is very

bad and that he may not live for long unless he is admitted to bail so that he seeks specialized treatment outside prison pending hearing and determination for his appeal. It is instructive to note that the appellant has carefully steered clear of whether or not he has sought any medical treatment while in prison. As rightly submitted by counsel for the respondent, the appellant did not attach any treatment notes, either by Dr. Maleche who saw him some two years prior to the report dated 05.08.2016 or by the prison medical personnel confirming that the appellant's condition is dire and that he requires medical treatment that cannot be given to him while he is in prison. Dr. Maleche's letter is not an affidavit. There is no affidavit by any of the warders Dr. Maleche is said to have talked to the appellant at Kodiaga prison to verify the allegations that the appellant's state of health is pathetic. It is not lost to the court that even prisoners who have genuine medical complaints are escorted to hospitals such as Kenyatta National Hospital (KNH) and other referral hospitals for treatment. The absence of detailed information concerning the appellant's state of health has led this court to infer that Dr. Maleche's letter of 05.08.2016 is not supported by hospital records. In any event, it is not clear from the said letter whether the condition for which the appellant was treated more than two years ago is the same condition afflicting him today. The fact that the appellant is a convict means that he had the onerous task of convincing this court beyond peradventure that his health situation is dire. The appellant failed to do so.

14. The other ground for consideration is whether appellant's appeal has overwhelming chances of success. This court has carefully read through the 8 grounds of appeal which broadly are premised on the following areas;

Lack of adequate evidence

Uncorroborated evidence of a minor

Contradictory medical evidence

Failure to consider the appellant's alibi defence

A defective charge sheet

15. Upon a careful perusal of the evidence on record, including the appellant's own unsworn testimony, I am of the considered view that the appellant's appeal does not fall in that category of appeals where on glance will show overwhelming chances of success.

Conclusion

16. In conclusion and for all the reasons stated hereinabove, I find and hold that the applicant's Notice of Motion dated 15.08.2016 and filed in court on the same day lacks merit and the same is hereby dismissed in its entirety.

17. In order to expedite the hearing of the appeal, I direct appellant's counsel to prepare the record of appeal and serve the same upon the respondent within seven (7) days from the date of this ruling.

18. The appeal shall be mentioned on 14.12.2016 for purposes of taking directions as to the hearing of the appeal.

Orders accordingly,

Ruling delivered, dated and signed in open court at Kakamega this 17th day of November 2016

RUTH N. SITATI

JUDGE

In the presence of;

.....Mr. Shivega(present).....for Appellant/Applicant

.....Mr. Oroni (present).....for Respondent

.....M/S Polycarp and Erick.....Court Assistant