



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISC CRIMINAL APPLICATION 40 OF 2013

PETER ONYANGO OCHIENGAPPELLANT

VERSUS

REPUBLICRESPONDENT

RULING

1. The applicant has by the Notice of Motion dated 26th November, 2013 sought first, to be released on bail pending the hearing and determination of his intended appeal in the Court of Appeal and second that he be supplied with uncertified proceedings and judgment in Kisumu HCCC Appeal No. 32 of 2002 within fourteen days or such other time as the court may order.
2. The grounds for the application are that the intended appeal has overwhelming chances of success yet a Notice of Appeal filed in 2002 is yet to be attended to more than ten years later; that he shall attend court as and when required to do so and that he undertakes to provide substantial sureties who shall ensure his compliance with the terms imposed by the court.
3. In an affidavit sworn on 26th November, 2013 he depones that sometimes in the year 2001 he was charged with and subsequently convicted for Robbery with violence in Kisumu CMCR 187 of 2001. Thereafter he filed an appeal – HCCRA No. 32 of 2002, and the appeal was heard by a two judge bench which dismissed it. Being aggrieved and intending to appeal the judgment of the High Court he Appealed but to date he has never been notified of the appeal number nor has he been furnished with the Record of Appeal. He depones that the appeal raises several arguable issues among them identification, lack of evidence, the rank of the prosecutor, failure to give reasons by the first appellate court as well as the sentence. He further depones that he is a pious man who has undergone vigorous Christian teaching while in prison and that he has kin who are willing to stand surety for him and who shall ensure that he turns up for his appeal. He has to his affidavit annexed affidavits sworn by the said kin.
4. The application was canvassed by way of written submissions with Mr. H. M. Wasilwa, Advocate, then appearing for the applicant submitting that this court has jurisdiction to allow this application first, under Article 165 (3) (a) of the Constitution which gives it unlimited jurisdiction and also under Article 49 (1) (h) which he urged the court to hold that the word trial includes the process of charge, trial and resultant appeal, process. He then argues that Section 357 (1) of the Criminal procedure Code provides the procedural provision by which this court can grant bail pending appeal. He submits that a liberal and purposive interpretation of the provision means that the power to grant bail includes and is not limited to a 1st appeal only but during the pendency of a 2nd appeal. He also submits that the conditions for granting bail pending appeal are the same

as those for bail pending appeal to the High Court and that those are prospects of success and unusual and exceptional circumstances. He contends that the dock identification in this case was unsafe and that there was no identification parade; that neither the trial court nor the first appellate court warned itself of the dangers of mistaken identity and that therefore the intended appeal has high chances of success.

5. On exceptional circumstances he submits that the intended appeal was not documented by the criminal registry and has not been heard since 2002. Secondly that there is a likelihood of substantial sentence being secured before conclusion of the appeal as the applicant who death sentence was committed to life imprisonment has already served twelve years.
6. In submissions filed by the State on 3rd February, 2014 the State has on its part submitted that it has not been demonstrated that the appeal has high chances of successes and that the application having been made in a vacuum is incapable of being granted. In the Supplementary Submission filed on 10th November, 2014 the prosecuting Counsel submits that Article 49 (h) limits the grant of bail to arrested persons but not to convicted persons but that Section 357 (1) of the Criminal Procedure Code gives this court power to grant bail pending appeal. Prosecuting Counsel submitted that the court must balance the rights of the accused person and the overall interest of justice. He submitted that an offence was proved against the applicant beyond reasonable doubt and so the sword of Damocles hangs on the head of the applicant and the interest of the complainant must also be taken into consideration. He urged that the most important consideration in an application such as this is the likelihood of the appeal succeeding and that this is not the case here. He like counsel for the applicant cited several authorities in support of his submissions.
7. We have painstakingly considered the submissions and authorities cited by both sides and in our view the issues that arise for consideration are:-

(a) Whether this court has jurisdiction to grant bail to the applicant pending hearing and determination of his appeal at the Court of Appeal, and

(b) whether the applicant meets the conditions for grant of bail pending appeal.

8. A lot has been said by both sides concerning the jurisdiction of this court to grant bail pending appeal to the appellate court with Counsel for the applicant arguing that it does and prosecuting counsel saying it does not expressly have such jurisdiction but that such jurisdiction can only be deduced from Section 357 (1) of the Criminal Procedure Code. In our view however this court's jurisdiction in this matter is derived from Section 6 of the Appellate Jurisdiction Act which provides as follows:-

“The High Court, may if it thinks fit, pending the determination of an appeal from the High Court to the Court of Appeal-

(a) Admit the appellant to bail; or

(b) postpone the payment of a fine.”

9. There however appears to be a contradiction between this and Section 379 (4) of the CPC which provides that the High Court and the Court of Appeal can only grant bail where the sentence meted is not death. **“Save in a case where the appellant has been sentenced to death, a judge of the High Court of Appeal, may, where an appeal to the Court of Appeal has been lodged under this section, grant bail pending the hearing and determination of the appeal.”**

Our interpretation of the latter Section is that it applies only where the High Court has sentenced an accused person to death pursuant to exercise of its original criminal jurisdiction. In the instant case the High Court merely confirmed the sentence in its appellate jurisdiction and Section 6 of the Appellate Court Act therefore applies

10. A reading of Section 6 shows that it is left to the Court's discretion to grant or not to grant bail.

The discretion of the Court must however, as always, be exercised judiciously. Both the appellant and the state conceded that the principles for grant of bail pending appeal are settled. These are the existence of exceptional or unusual circumstances upon which the appellate court can fairly conclude that it is in the interest of justice to grant bail and secondly the court must be satisfied that the appeal has high chances of success and the sentence or substantial part of it will have been served by the time the appeal is heard.

11. In the instant application it is alleged that the applicant filed his Notice of Appeal ten years ago but no action has been taken yet it is the duty of the Court to prepare the record of appeal. The applicant has however not demonstrated that he has made any effort to inquire into the record. Looking at his own affidavit he does not allege loss of this file and neither does his Advocate. It is only the State that alludes to the loss of the file. There is however no confirmation from the Deputy Registrar that the file containing the proceedings and judgment of the High Court could not be traced. Indeed his sister Josephine Atogo Mudhuongo has deponed that she was able to find the proceedings and judgment of the lower court and has annexed the same to the affidavit. From where we stand it is difficult to make a conclusion as to whether the appeal has high chances of success. Indeed the applicant has not even demonstrated that he filed a notice of appeal. If he had he would have annexed a copy to his affidavit. He has not also annexed copies of the reminders he alleges to have sent to the Deputy Registrar concerning the appeal.

12. The upshots is that we find that the applicant has not met the conditions for grant of bail pending appeal and his application is dismissed.

Dated, signed and delivered at Kisumu this 17th of February, 2015

H. K. CHEMITEI

E. N. MAINA

JUDGE

JUDGE

In the presence of:

..... for State Counsel

..... for Appellant

.....Court Clerk