



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 164 OF 2013

(From original conviction and sentence in Criminal Case No. 137 of 2009 of the Chief Magistrate's Court at Nakuru, F. Kombo, SPM)

CHARLES OWANGA ALUOCH.....APPELLANT/APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

RULING

1. The Applicant Charles Owaga Aluoch was on the 23rd July 2013 convicted and sentenced to serve fifteen years in jail by the Hon. S. Kombo Ag. SPM in Criminal Case No. 137 of 2009 at the Chief Magistrates Court at Nakuru for an offence under the Sexual Offences Act No. 3 of 2006. Being dissatisfied with the conviction and sentence, he lodged an appeal to this court by his Petition of Appeal and Supplementary Grounds of Appeal.

2. Pending the hearing and determination of the said appeal, the Appellant has come to court vide his application dated 26th June 2014 seeking to be released on bail. He also seeks that the Supplementary Petition of Appeal dated 26th June 2014 filed by his Advocates be deemed as properly filed on the ground that the earlier Petition of Appeal was drafted by the Appellant without assistance of an advocate.

I find no reason for not admitting the Supplementary Petition of Appeal, and the same is hereby admitted, and deemed as properly filed and served upon the Director of Public Prosecutions Office.

3. The Appellants application for bail is supported by his advocates affidavit sworn on the 26th June, 2014. It is deponed that the Appellant had been charged with the offence of defilement contrary to Section 9(1) of the Sexual Offences Act on Count 1 and indecent act with a child contrary to Section 11(1) of the said Act, but the trial court found him guilty convicted him and sentenced him under Section 8(1)(3) of the said Act, an offence he was not charged with, and thus states that the appeal has very high chances of success in view of the exceptional circumstances stated above.

4. The Appellant, to demonstrate the high chances of success, stated that the prosecution evidence was full of contradictions and inconsistencies as the complainant stated different facts to different parties, and that she had been raped not once, but twice, and that the Appellant did not attempt to defile her, yet again that she was defiled on the 15th June 2013, but gave no particulars of the rapist.

It is further contended that the appeal may take a long time to be determined which will prejudice

the Appellant who has been in prison since 2013.

5. The application is opposed by the Learned State Counsel Mr. Maroro. He stated that the offence is serious and that the prosecution sought to substitute the charges mid way the hearing, and therefore the Appellant was properly convicted under the substituted offence of defilement contrary to Section 8(1)(3) of the Sexual Offences Act. It is the States submission that the appeal has no chances of success and objected to the Appellants prayer for suspension of the sentence pending hearing of the appeal. It was further submitted for the State that the sentence meted upon the Appellant of fifteen years imprisonment was illegal as it was less than the minimum of 20 years as provided under the Act. He therefore was of the view that the appeal was weak. He further stated that bail pending appeal is not a constitutional right and that prison facilities have adequate medical facilities to take care of the prisoners health concerns. He urged the court to dismiss the application.

6. The right to bail is provided under Article 49(1) of the Constitution but is at the discretion of the court, and is not absolute. Bail is a constitutional right where one is awaiting trial. After conviction that right is at the court's discretion and upon considering the circumstances of the application.

7. The courts have over the years formulated several principles and guidelines upon which bail pending appeal is granted. In the case **Jiv raji Shah -vs- R (1986) KLR 605**, the principal considerations for granting bail pending appeal were stated as follows:

- (1) existence of exceptional or unusual circumstances upon which the court can fairly conclude that it is in the interest of justice to grant bail.
- (2) it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of a substantial point of law to be urged and that the sentence or substantial part of it will have been served by the time the appeal is heard, then, a condition of granting bail will exist.
- (3) main criteria is that there is no difference between overwhelming chances of success and set of circumstances which disclose substantial merit in the appeal – being allowed, the particular circumstances and weight and relevance of the points to be argued.

8. These principles were simplified by Justice Bosire J., in the case **Mwaura -vs- R (1986) KLR 600**, that is -

- (1) the strength of the evidence.
- (2) character and behaviour of the accused and punishment to be meted if convicted.
- (3) whether the accused will turn up in court at the appointed time for trial.
- (4) any exceptional circumstances and whether accused will interfere with witnesses if released on bond.

The above principles apply to both bail pending trial and bail pending appeal.

9. The Appellant hereof lost the presumption of innocence when he was convicted, and in effect lost the constitutional right to bail provided under Article 49(1)(h) of the Constitution.

10. I have perused and considered the record of proceedings and the judgment of the trial court. The Appellant had been admitted to bail during the trial and he dutifully complied with all the terms and conditions imposed by the court. He was however found guilty, convicted and sentenced to serve 15 years in jail. Indeed this is a very severe punishment that would ordinarily tempt any convict to abscond if released on bail.

Are there then exceptional and unusual circumstances that the court may infer to conclude that it is in the interest of justice to grant bail to the Applicant?

11. The Appellants health was said to be deteriorating in prison. No medical documents were availed to the court in support of this allegation; and no serious argument was tendered. This could have constituted a special circumstance. As to whether the appeal has high chances of success, and having considered the record, I am persuaded that there are chances, that the appeal may be successful – without going into the merits or demerits of the said appeal. Several flaws are apparent on the record, which I find if taken up may result in a variation of the trial courts judgment.

12. The Appellant has served only a small portion of the sentence. Though the appeal may take some time to be heard and determined, it may not be too long as to cause injustice to the Appellant. However, the most important aspect of this application, in my opinion, is whether there are overwhelming chances of success and whether the appeal raises substantial points of law to be urged. As appears on the face of the supplementary Petition of Appeal, it is evident that several points of law have been raised and that could result to the court varying the trial courts judgment.

13. I am therefore persuaded that the appeal discloses substantial merit. The State in opposing the application opined that in view of the seriousness of the sentence imposed upon the Appellant, there are high chances that he may be tempted to abscond. This is a genuine concern. However, during the trial, the Appellant complied with all the terms imposed by the court. He was aware of the sentence that he would be meted to him if convicted. This did not tempt him to abscond. Though chances are higher now that he has been convicted, taking all the circumstances in their totality, I shall exercise my discretion and give him the benefit of doubt.

14. Having made the above observations I shall allow the Appellants application subject to the following conditions:

- (1) That the Applicant shall be released on his personal bond of Kshs 350,000/= with two sureties of similar amount.
- (2) That the Deputy Registrar shall approve the said sureties.
- (3) That the Appellant shall attend court for mention of the appeal once every month until the appeal is heard and determined.
- (4) That in default or non compliance with any one of the above terms, the bond shall be cancelled.
- (5) That the matter shall be mentioned on the 17th April, 2015.

Orders accordingly.

Delivered, dated and signed at Nakuru this 27th day of March 2015

JANET MULWA

JUDGE

In the presence of:

Aim holding brief Gathoni for Appellant

Rugut for Respondent

Omondi - Court clerk