



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL APPEAL NO. 62 OF 2015

KENNEDY NYANDIKA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

1. The appellant was tried and convicted in two counts with the offence of obtaining money by false pretences contrary to **Section 313** of the **Penal Code**. He was sentenced to five months imprisonment in Count I and to twelve months imprisonment in Count 2. The terms of imprisonment were ordered to run consecutively.

2. The appellant was aggrieved by his conviction and sentence. He lodged an appeal to the High Court challenging his conviction and sentence. Whilst awaiting the hearing and determination of his appeal, the appellant through a notice of motion dated 17th June, 2015 has requested this court to admit him to bond pending the conclusion of his appeal.

3. The application is premised on nine grounds stated on the face of the application which have also been replicated in the supporting affidavit sworn by the appellant (applicant) on 17th June 2015.

In his affidavit and in the grounds supporting the application, the applicant contends that he is a suitable candidate for the grant of bond pending appeal since he is 46 years old and a family man with 7 children and that he needs to be granted an opportunity to continue providing for their needs; that he had a constitutional right to bond pending appeal; that he suffers from a medical condition, a paralysis which was diagnosed in the year 2012 which causes him a lot of pain and needs constant medical check-up; that if he is not released on bond he is likely to succumb to the ailment.

The applicant also deposed that he was out on bond during the trial and that if granted bond pending appeal he will not abscond or interfere with the appeal process; that the respondent will not suffer any prejudice if his application was allowed.

4. The application was argued before me on 16th July, 2015. Learned counsel **Ms Mwagoni** appeared for the applicant while **Ms. Mwaniki** represented the Republic.

In her submissions, **Ms. Mwagoni** besides relying on the grounds supporting the application emphasized that as the applicant was out on bond during the trial and he never absconded, this was proof that if granted bond pending appeal he will not abscond and secondly, that unusual and exceptional circumstances exist in this case as the appellant suffers from paralysis and that if denied bond, he may succumb to the disease.

Lastly, learned counsel submitted that this court does not need to consider whether or not the appellants appeal has any chances of success in determining the instant application as in her view, this ought to be considered when the appeal was being heard on its merits.

5. The state opposed the application on several grounds. Learned prosecuting counsel **Ms. Mwaniki** in her submissions urged the court to dismiss the application for want of merit. She contended that no evidence had been availed to the court to prove that the applicant suffers from paralysis. She invited the court to note that the only evidence produced by the applicant shows that he suffers from back pains which can be treated using the facilities available in prison. Counsel also submitted that bond pending appeal was a privilege and not a constitutional right as contended by the applicant. She in addition faulted the defence counsel's submission that whether or not the appeal had chances of success was not a factor for consideration in determining an application such as the instant one and submitted that this was in fact the most important consideration the court ought to bear in mind in deciding whether or not to grant bail pending appeal. In her view, the applicants appeal had no chances of success.

6. I have considered the application, the rival submissions made by both learned counsels and the evidence adduced before the trial court. I wish to state at the outset that this court has wide discretion in deciding whether or not to admit an appellant on bond pending appeal –See **Section 357** of the **Criminal Procedure Code**.

This discretion must however be exercised judiciously in accordance with the law taking into account the particular circumstances of each case.

7. Having said that, I wish to deal first with the applicant's submission that the application ought to be allowed as bail pending appeal was a constitutional right. I am unable to agree with the applicant on this point because in my understanding, there is no provision in our constitution which provides for bond pending appeal. The only provision in the Constitution which guarantees the right to bail or bond is found in **Article 49**.

A reading of this Article leaves no doubt that it only protects the right to bail of arrested persons who are either waiting to be charged with a criminal offence or have already been charged and are awaiting trial. The Constitution therefore only safeguards the right to bond or bail pending trial. **Article 49** does not apply to persons who have already been convicted. It does not consequently give appellants the right to bond pending appeal. In order to properly demonstrate the true import of this Article, I think it is important to reproduce its relevant provisions which are in the following terms;

“An arrested person has the right ;

(a)

(b)

(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released ”.

The applicant's claim that he has a constitutional right to bond pending appeal is therefore unfounded and cannot avail him in this application.

8. That said, I now wish to turn to the principles which guide the court in the exercise of its discretion in determining an application for bond pending appeal. These principles have been established in a long line of authorities both in the High Court and in the Court of Appeal. The said authorities have established that there are two main principles which the court must bear in mind in deciding an application for bond pending appeal.

The court must consider whether the applicant has demonstrated that his appeal has high or overwhelming chances of success and secondly, whether he has shown that exceptional or special

circumstances exist to warrant the grant of bail pending appeal.

See: *Dominic Karanja V Republic (1986 KLR 612); Ragbir Singh Lamba V Republic (1958) EA 337 and Jivraj Shah V Republic (1986) KLR 605*, among others.

These principles are predicated on the fact that once an accused person has been convicted of an offence by a court of competent jurisdiction, his constitutional right to the presumption of innocence is extinguished and he is deemed to have been lawfully convicted unless and until his conviction is overturned on appeal.

Taking into account the above principles, it is obvious that *Ms Mwagoni's* submission that the court did not need to consider whether or not the applicants appeal had any chances of success was to say the least incorrect.

9. In order to ascertain whether the applicant's appeal has chances of success, I have gone through the entire evidence adduced before the trial court and the judgment delivered by the learned trial magistrate. Having done so, without going into any detail in order not to prejudice the court which will eventually hear the appeal, I am not satisfied that the appellants appeal has high chances of success.

10. Regarding the claim that the appellant suffers from paralysis which requires constant medical attention, I have perused the annexure to the supporting affidavit marked as "KN2". The annexure contains copies of an undated discharge summary from Kapsabet District Hospital and copies of prescriptions issued as recently as early this year (2015). As correctly submitted by *Ms. Mwaniki*, these documents only show that the applicant was treated in January and March 2015 for back pains. The documents do not therefore support the applicant's claim that he suffers from any kind of paralysis. In the premises, I find no evidence to demonstrate that exceptional or special circumstances exist in the applicant's case to justify his admission to bond pending appeal.

11. For all the foregoing reasons, I am persuaded to find that the instant application is not merited and is destined to fail. The application is accordingly dismissed.

C.W. GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 29th day of July 2015

In the presence of :-

The appellant,

Miss Mwagoni for the appellant

Miss Mwaniki for the Republic