



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 170 OF 2015

SHEIKH ALI SAMOJA ACCUSED

VERSUS

REPUBLIC PROSECUTOR

RULING

Before court is the Notice of motion dated 15th July 2015 wherein the Applicant **SHEIKH ALI SAMOJA** seeks the following orders:-

THAT this honorable court be pleased to grant bail to the appellant herein pending the hearing and determination of the appeal.

THAT the sentence be suspended pending the hearing and determination of this appeal.

Learned counsel **MR. KARANJA** and **MR. MONGERI** argue the application on behalf of the Applicant **MS NGOVI** learned state counsel who appeared for the respondent state opposed the application.

The application arises from the proceedings **in CMCC 6 of 2013 REPUBLIC –VS- SHEIKH ALI SAMOJA** where the applicant had been arraigned before the Hon. Senior Resident Magistrate, Nakuru on a charge of **CHILD SEX TOURISM CONTARY TO SECTION 14(a) as read with 14(c) of the SEXUAL OFFENCES ACT, 2006**. The Applicant entered a plea of ‘Not Guilty’ to the charge and the matter proceeded to a full hearing. On 6/7/2015 the learned Senior Resident Magistrate delivered a judgment in which she convicted the Applicant of the Offence of Child Sex Tourism and thereafter sentenced him to serve a term of ten (10) years imprisonment with no option of a fine. Being aggrieved by both his conviction and sentence the Applicant has filed an appeal challenging the same. In the meantime the Applicant has approached the High Court seeking to be released on bail/bond during the pendency of his appeal and seeking the suspension of his ten (10) year jail term.

Counsel for the Applicant relied on Articles 50(a) and 51 of the Constitution of Kenya as a basis for the application. Counsel further submits that the only test for release of a convict on bail pending appeal would be the demonstration that the applicant has an arguable appeal. They submit that the appellant cannot be said to be a flight risk as he was out on bond for the duration of his trial and faithfully attended all court sessions. They further argue that the applicant is a family man and that he will adhere to any bond conditions imposed by the court.

Ms Ngovi for the state strenuously opposed the application for release of the applicant on bond. She relied upon the affidavit dated 13/7/2015 sworn by the Investigating Officer **No. 86392 PC NYATETE**

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It is submitted for the state that the applicant can no longer as a convict claim that he has a fundamental right to bail. It is further submitted that the applicants place of residence is not known making him a flight risk and it is submitted that an accomplice of the applicant has absconded and is yet to be arrested.

I have given careful consideration to the submissions made before me. I have also perused the cited authorities. Article 51(a) of the Constitution provides for the presumption of innocence in respect of all suspects facing trial. The applicant having been tried and convicted of a serious offence by a court of competent jurisdiction can no longer rely upon this presumption of innocence. Granted, the applicant has appealed against the decision of the trial court and granted his appeal may eventually succeed. However as things now stand the applicant is no longer a mere suspect but is now a convict. He can therefore not claim the right to liberty in the same manner as a suspect awaiting trial would do. Article 51(1) of the Constitution provides:

“A person who is detained held in custody or imprisoned under the law retains all the rights and fundamental freedoms in the Bill of Rights except to the extent that any particular right or fundamental freedom is clearly incompatible with the fact that the person is detained held in custody or imprisoned”

The applicant relies on this provision to claim that even as a convict he is still entitled to the fundamental rights enshrined in our Constitution including the right to liberty. With respects I do not agree. Once a person has been tried and convicted in an open fair and transparent process before a court of competent jurisdiction then his/her right to liberty will have to be subject to the nature of the sentence imposed. In this case a custodial sentence was imposed. Whilst I note that in the appeal, the nature of sentence imposed is being challenged, again I find that the applicant cannot be entitled to his liberty in the same way that an un-convicted suspect would be.

I am fully aware that in certain cases court can and do grant to convicted person bond during the pending of their appeals. The grant or denial of bond pending appeal is at the discretion of the High court. As a general rule the High Court would in making such decision take into account various factors including but not limited to;

- Mature/seriousness of the offence
- Whether the appeal is arguable
- Whether the applicant poses a flight risk
- How soon the appeal can be heard and determined.
- Health of Applicant

At this point it is not my duty to delve into the merits or demerits of the intended appeal neither am I being asked to make a determination as to whether the appeal will be successful or not. It is indeed a fine balancing act.

The applicant has submitted that he suffers ill health and requires medical attention. This in an of itself is not a grounds for release on bail pending appeal.

The applicant can be availed of medications and of medical attention even by a doctor/health facility of his choice whilst in custody. I have perused the record of the trial and I have also perused the intended grounds of appeal.

I also take note of the fact that with a Judge now ready to hear and dispose of appeals on full time basis at the Nakuru High Court, this appeal is certain to be heard and determined within the next twelve (12) months or sooner. There can be no fear that the applicant will have served a substantial portion of his sentence before his appeal is disposed of.

Taking into account the serious nature of the offence I find that this is not a case in which I would be

inclined to exercise my discretion to grant bail pending appeal in favour of the applicant. By so saying I am not in any way pre-judging the appeal.

Based therefore on the foregoing I decline to allow this application for release of the applicant during the pendency of his appeal. Since proceedings are typed and ready the appeal may be listed for hearing in accordance with the current court diary.

Dated in Nakuru this 16th day of September, 2015.

MAUREEN A. ODERO

JUDGE