REPUBLIC OF KENYA

IN THE HIGH COURT OFV KENYA AT NYERI

CRIMINAL APPEAL NUMBER 2 OF 2015

PETER HINGA NGATHO ……………………………………….…………….….………APPELLANT

VERSUS

REPUBLIC ….. …………………….…………….………………………………...........…RESPONDENT

RULING

On 15.1.2015 **Peter Hinga Ngatho** (hereinafter referred to as the appellant) was convicted of the offence of incest contrary to Section **20 (1)** of the Sexual Offences Act and sentenced to serve life imprisonment in Criminal Case number **26** of **2012-** Nyeri. Aggrieved by the said finding, the appellant appealed to this court on 29.1.2015 citing the following grounds:-

i. *That conviction was based on insufficient evidence, hence erroneous.*
ii. *The evidence relied upon was contradictory.*
iii. *That the evidence did not support the charge.*
iv. *His defence was disregarded.*
v. *That the learned Magistrate relied on biased investigative evidence*

On 18th August 2015, the Appellant moved this court by way of a chamber summons expressed under Section **357 (1)** of the Criminal Procedure Code seeking orders that he be released on bail pending the hearing of his aforesaid appeal. The application is supported by the annexed affidavit of his counsel **Mr. Njuguna Kimani** which affidavit states *inter alia* that the appellants appeal has high chances of success. The Respondent did not file replying affidavit.

Section **357 (1)** of the Criminal Procedure Code which provides for admission to bail or suspension of sentence pending appeal 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:*

At the hearing of the application, Learned Counsel for the appellant/Applicant **Mr. Njuguna Kimani** strongly argued that the Appellants' appeal has over whelming chances of success and specifically pointed out that the proceedings are flawed because the trial Magistrate never complied with the provisions of Section **200** of the Criminal Procedure Code. He referred the court to the proceedings and correctly pointed out that initially the case was handled by **Hon. W. Juma** Chief Magistrate who disqualified herself on 20.11.2012. Hearing commenced before **Hon. Okato S.P.M.** on 23.1.2013 and the

said Magistrate heard three witnesses, but unfortunately the said Magistrate passed on.

On 30.05.2013, the file was placed before **Hon. Wekesa Ag SRM** and counsel for the accused sought directions since the matter was part heard before the deceased Magistrate. The record clearly shows that the magistrate recorded the following:-

Court- *Provisions of section 200 are hereby complied with and the accused on being asked as to whether he would wish for his case to start afresh or proceed from where it had reached replies:*

Accused- *I wish that the matter to proceed from where it had reached.*

Counsel- *This is the Position. I had instructions to this effect.*

Court- *Hearing on 27.07.13*

It is important to point out that on the above date and as the record correctly shows, no directions were given by the court as to whether the case was to proceed afresh, because no order to that effect was made. Hence it can correctly be said that no directions were given on the said date under Section 200 of the Criminal Procedure Code as required.

On 05.8.2013, the Magistrate C. Wekesa Ag SRM disqualified herself from hearing the case citing the *'complainants' attitude"* This was the second Magistrate to express discomfort in handling the matter owing to reasons attributed to conduct of the complainant. The record shows that on 20.11.2012, the Chief Magistrate **Hon. W.A. Juma** had disqualified herself citing a complaint letter which had been written by the complainant.

The case came up before **Hon. Aringo** on 23.09. 2013 and on the said date counsel for the appellant informed the court that he wished the case to start afresh and indeed the court in conformity with the provisions of Section **200** of the Criminal Procedure Code directed that the case would start afresh.

Notwithstanding the above clear directive, on 27.02.2014, the case came up before the same magistrate who in total disregard of his own order made on 23.09.2013 proceeded to hear the case from where it had reached and indeed heard the evidence of **PW4** on the said date and on 19.05.2014, he heard the evidence of **PW5** and the prosecution closed its case and ultimately placed the appellant on his defence, heard his sworn defence and rendered the judgement now the subject of this appeal.

Counsel for the appellant submitted that on account of failure to comply with the provisions of Section **200** of the Criminal Procedure Code as aforesaid or even failure by the court to comply with its own order rendered the proceedings a nullity and occasioned serious injustice to the appellant and on that ground, the appeal raises a serious point of law and has high chances of success and urged the court to allow the application and grant the appellant bail pending the hearing and determination of his appeal.

Further, counsel for the appellant submitted that the convicting Magistrate only heard **2** witnesses out of the **5** prosecution witnesses who were the Doctor and the Investigating officer and that he never heard the key prosecution witnesses whose evidence is extremely crucial and therefore this prejudiced the appellant because the convicting magistrate could not assess the credibility of the witnesses he never saw testifying hence could not arrive at a fair decision.

Counsel also submitted that it's on record that there was indeed a grudge between the mother of the complainant and the appellant and that the defence of the appellant in this regard was never considered. Indeed the court record confirms that on 25.09.2012, the complainant complained to the court that the appellant was threatening her and the court directed the prosecutor to look into the matter and on 4.10.2012 the prosecutor informed the court that he asked the DCIO to investigate the matter and the DCIO reported that there were no threats. In fact on the same day a letter dated 12.08.2012 was tabled in court from Mweiga Police Station confirming the complainant had been making false allegations against the appellant and that the police had investigated the said complaints and found no truth in the same.

Thus, on the face of the said hostility, counsel alluded that the appeal has high chances of success because the prosecution may have been propelled by other considerations such as settling scores.

Lastly counsel cited the case of **Simon Mwangi Kirika vs Republic** and stated that the appellant had satisfied the principles under which a court may grant bail pending an appeal as stated in the said case while citing the case of **Jivraj Shah vs Republic** which are:-

i. *The principal consideration in an application 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.*

ii. *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 exists.*

iii. *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.*

Counsel for the state **Miss Chebet** agreed that Section **200** of the Criminal Procedure Code was not complied with and observed that the appellant was represented by an advocate in the lower court yet the lawyer never raised the issue at all and that in her view the appeal does not have great chances of success because the evidence was overwhelming, hence she opposed the application. Counsel also observed that the applicant jumped bail in the lower court; it was cancelled but later on reinstated by the same court. Counsel further submitted that the appellant is serving a life sentence and that the offence was proved beyond doubt. She urged the court to dismiss the application.

In reply to the submissions by the counsel for the Respondent, the appellants' counsel submitted that the rights under Section **200** of the Criminal Procedure Code are conferred to the accused person and not the advocate, hence whether the advocate raised it or not the court was under legal duty to abide by the said section and that failure by the trial court to comply with the said provision was incurable. Counsel further submitted that the bail cancellation by the lower court cannot be re-visited since the same court reinstated it thereby closing the issue. Counsel pleaded with the court to grant bail as prayed and submitted that if granted bail the appellant will abide by any terms or conditions that the court may impose.

I find useful guidance in the words of **Harris J** in the case of **Chimambhai vs Republic** where the learned Judge rendered himself as follows:-

*"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 implicit in the legislation creating the right of appeal in criminal cases. As to the measure of that recognition the decision in **Kanjis** case is directly on the point. There, two persons had been convicted of assault causing actual bodily harm and sentenced to terms of imprisonment. Each appealed against both conviction and sentence and applied to the magistrate for bail pending the hearing of the appeal. The magistrate granted bail to one of the appellants but not the other, where upon the latter applied to the court by way of appeal from such refusal. Although in his judgement 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, he went on; nevertheless, to illustrate what he considered would be circumstances justifying the granting of bail to such an applicant. The mere fact of anticipated delay in hearing an appeal, he said, was not of itself exceptional circumstance but might become one when coupled with other factors, and added that the good character of the appellant together with such an anticipated delay might constitute an exceptional circumstance"*

The Supreme Court of Uganda in the case of **Arvind Patel vs Uganda** cited with approval the above decision by **Harris J** and set out the consideration which should generally apply in applications for bail pending hearing of an appeal as follows:-

i. *the character of the applicant.*
ii. *whether he/she is a first offender.*
iii. *whether the offence of which the applicant was convicted involved personal violence.*
iv. *the appeal is not frivolous and has reasonable possibility of success.*
v. *the possibility of substantial delay in the determination of the appeal.*
vi. *Whether the applicant has complied with bail conditions granted after the applicant's conviction and during the pendency of the appeal (if any)*

Justice Oder in the above cited case had the following to say:-*"In my view it is not necessary that all these conditions should be present in every case."(Emphasis added)*

The Court of Appeal of Uganda in the case of **Igamu Joanita vs Uganda** cited with approval the above case and numerous other authorities and reiterated the above conditions and added that the said conditions are guidelines and are not exhaustive or mandatory and that they need not all be present. A combination or two or more of the said conditions will suffice. The court further added that the main purpose of granting bail especially bail pending appeal is that while the applicant is set free pending trial or appeal, the court must be satisfied that the applicant shall in compliance with the bail conditions be available to attend trial or appeal. The court must therefore be satisfied that the applicant will not abscond.

The Supreme Court of India in ***Gulabrao Baburao Deokar v. State of Maharastra and Others*** cited its previous decision in ***Masroor v. State of Uttah Pradesh and Anor*** where it stated as follows as follows:-

> *"There is no denying the fact that the liberty of an individual is precious and is to be zealously protected by the courts. Nonetheless, such a protection cannot be absolute in every situation. The valuable right of liberty of an individual and the interest of the society in general has to be balanced. Liberty of a person accused of an offence would depend upon the exigencies of the case. It is possible that in a given situation, the collective interest of the community may outweigh the right of personal liberty of the individual concerned."*

Further, the supreme court of India in the case of **Krishnan vs The People** stated the conditions to be satisfied in an application for bail pending hearing of an appeal as follows:-

i. *Bail is granted at the discretion of the court.*
ii. *The court must be satisfied that there are exceptional circumstances that are disclosed in the application.*
iii. *The fact that the appellant due to delay in determining the appeal may, have served a substantial part of his sentence by the time his appeal is heard, is one such exceptional circumstance. Each case is considered on its merits, depending on what may be presented as exceptional circumstances.*
iv. *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.*
v. *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.*
vi. *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 application to bail; pending appeal.*

Article **49 (1) (h)** provides that *"an arrested person has the right 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 **Bail and Bond Policy Guidelines** provide at page **27**, paragraph **4.30** that with respect bail pending appeal, the burden of proof is on the convicted person to demonstrate that there is an

"overwhelming probability" that his or her appeal will succeed.

Granting bail entails the striking of a balance of proportionality in considering the rights of the applicant, and the public interest on the other. On the one hand it is the duty of the court to ensure that crime where it is proved, is appropriately punished, this is for the protection of society; on the other hand it is equally the duty of the court to uphold the rights of persons charged with criminal offences, particularly the human rights guaranteed under the constitution. This position was expressed by the court of appeal in **Gerald Macharia Githuka vs Republic**.

The cornerstone of the justice system is that no one will be punished without the benefit of due process including the right to exhaust the right to appeal. Incarceration before trial or pending hearing of an appeal cuts against this principle. The need for bail is to assure that the accused person will appear for trial and not to corrupt the legal process by absconding. Anything more is excessive and punitive.

On the point of law raised by the applicant, namely failure by the court to comply with the provisions of Section **200** of the Criminal Procedure Code and the counter arguments by counsel for the Respondent, I find striking resemblance and useful guidance in the decision of **Justice Dulu** in the case of **Anthony Musee Matinge vs Republic** where the learned judge stated as follows:-

"I have re-evaluated the evidence on record. The trial was conducted by two succeeding magistrates……. The latter magistrate took over the conduct of the case on 26.6.2007 when one witness PW1… had testified. The record with regard to the taking over the case between the two magistrates states as follows:-

Counsel- *Let the matter proceed from where it had reached. Let proceedings be typed.*

Court-*Matter to proceed from where it had reached. Proceedings to be typed.*

The legal requirement which has to be complied with while taking over proceedings from a previous magistrate by a succeeding magistrate is contained in Section ***200*** *of the Criminal Procedure Code. The relevant part of which provides:-*

200 (3) *Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be summoned and reheard and the succeeding magistrate shall inform the accused person of that right.*

The learned judge proceeded to say as follows:-

"The above provisions of law are couched in mandatory terms. It is the accused person, and not the advocate who must be informed by the court of the right to re-summon witnesses. He is also the person to state whether or not the case should proceed without recalling witnesses. It is not his advocate to do so on his behalf. In our present case, there is no record that the appellant was informed of his right to recall witnesses. Nor is there a record that he elected not to recall witnesses. His advocate could not respond for him. The response has to be that of the accused. The omission by the trial court was fatal to the proceedings. Therefore, the appeal has to succeed on this technicality."

Discussing the importance of complying with the provisions of Section **200** of the CPC, the Court of Appeal in **Ndegwa vs Republic** *inter alia* stated as follows:-

i. *No rule of natural justice, statutory protection and evidence of common sense should be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject since he is the most sacrosanct individual in the system of our legal administration.*
ii. *The statutory and time honoured formula to the Magistrate making judgement should himself see, hear and assess and gauge the demeanour and credibility of witnesses should always be maintained.*
iii. *A magistrate who did not observe the evidence is not in a position to assess the position,*

credibility and personal demeanour of witnesses.

In **Moses Mwangi Karanja vs Republic** the succeeding Magistrate recorded as follows:-

"Section 200 complied with.

Counsel- hearing can proceed from where we left"

The High Court observed that the trial magistrate fell short of the statutory requirement envisaged by the above section while in **Richard Charo Mbole vs Republic** the Court of Appeal held that failure to comply with section **200** of the CPC would in appropriate cases render the trial a nullity.

Emphasising the same point, the court of appeal in the case of **Moses Mwangi Karanja** cited above had this to say:-

*"The record before us, the relevant part of which we have reproduced above clearly shows that the Judge did not comply as was required of him with the provisions of Section 200 (3) of the CPC which as per Section 201 (2) was to apply mutatis mutandis in this case. He did not explain to the appellant his right to demand the recall and re-hearing of any witness as was required under that provision. Miss Oundo counters that by saying the appellant was represented by an advocate and so there was no need for that. Our short answer to that is that, it was the appellant who was on trial and the duty of the court was to the appellant and not to his advocate. The written law makes that duty mandatory. The mention in the judgement that section 200 was complied with is hollow without any evidence on record"- See also **Paul Kithinji vs Republic**.*

In the case of **Rebecca Mwikali Nabutola vs Republic** consolidated with **Duncan Muriuki Kaguura vs Republic** and **Ongonga Achieng vs Republic Justice Mbogholi Msagha** granted bail pending hearing of the appeal and held that failure to comply with the provisions of Section 200 CPC was a sufficient reason to show that the appeal had overwhelming chances of success.

In the present case the appellant was not informed of his rights to recall witnesses; the court disregarded its earlier order directing that the case shall start afresh and to my mind these are serious points of law which cut deep into the rights of an accused person and the administration of justice and the need for courts to adhere to the rules of procedure governing criminal trials. I reiterate that this is a crucial point of law which the court hearing the appeal will determine whether or not it prejudiced the rights of the accused as guaranteed under the lawn or whether it indeed infringed on his rights to a fair trial. In any event a court of law should be the last to disregard its own orders and the implication of this scenario to the entire trial will be a matter for the court hearing the appeal to examine. In **Peter Mugazi Muziza & Another vs Republic Justice Mbogholi Msagha** held that the succeeding magistrate having failed to comply with the provisions of Section 200 (3) of the CPC, the proceedings that followed were vitiated.

I am aware at this stage I cannot delve deep into the merits or otherwise of the grounds of appeal and that in determine the application before me I only need to examine an overview of the grounds that have been presented bearing in mind that to delve deeper may pre-empt the hearing of the appeal. However, to make an informed decision I have identified several salient issues as brought out by the appellants counsel. I have already pointed out the issues surrounding non-compliance of 200 of the CPC as serious points of law which need to be argued at the hearing of the appeal. In any event as was held in the case of **Rachael Mbaluka Nthitu vs Republic,** in the event of conviction where it is established that the accused person is materially prejudiced following non-compliance with Section **200 (3)** of the CPC the High Court may set aside the conviction or in appropriate situations order a re-trial.

Further I have examined the grounds of appeal and in my view they are not frivolous hence the appellant has in my view an arguable case with likelihood of success. In an application of this nature, an applicant is required to satisfy the conditions mentioned in the earlier cited authorities and as indicated earlier a combination of one or two will suffice. In this case I find that the applicant has demonstrated that the appeal has high chances of success, and that by the time the appeal is heard and determined, he may have

served a substantial portion of his sentence which may be a great punishment should the appeal succeed.

It will also be necessary for the court to re-evaluate and assess the evidence adduced before the lower court to arrive at its own conclusions particularly to satisfy itself that the conviction was premised on sound evidence. To me this is an arguable ground of appeal bearing in mind that cases are determined on evidence and since the evidence has been challenged and issues of open hostility by the complainants mother towards the appellant have been cited and are in the record, the court hearing the appeal will need to satisfy itself on the veracity, credibility and reliability of the evidence. Whether or not the defence of the appellant was considered is in my view an arguable ground of appeal.

It has not been demonstrated that there are compelling reasons to warrant this court to deny the appellant bail. I find useful guidance in the position adopted by the Apex court of India which held that deprivation of personal liberty must be founded on the most serious considerations relevant to welfare of the society as specified in Article 21 of their constitution. The said court had this to say:-

"Personal liberty, deprived when bail is refused, is too precious a value of our constitutional system recognized under Article 21 that the crucial power to negate it is a great trust exercisable, not casually but judicially, with lively concern for the cost to the individual and community. To glamorize impressionistic orders as discretionary may, on occasions, make a litigative gamble decisive of a fundamental right. After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of procedure established by law"

My understanding of Article **49 (1) (h)** of the constitution and policy guidelines on bail bond is that an arrested person or an accused person has a right to bail or bond, that the bail/bond must be on reasonable conditions, high conditions may amount to denial of bail/bond, bail/bond can only be denied in exceptional circumstances, and it's the prosecutions duty to prove the existence of any exceptional circumstances or grounds to warrant exceptionally high bond terms.

In **Republic vs Joseph Thomas Olang Justice Muchemi** citing decided cases had this to say:-

"On the other hand, it is also important that the court should not impose such easy conditions that the accused person would not have any difficulty in meeting the same. If the conditions were very lenient, an accused person may be tempted to abscond, because he would not feel the pain of abandoning the bail or security in court. It is therefore important that the court determining an application for bail pending trial should conduct a delicate balancing act, so as to get the reasonable conditions for the particular case at hand"

The Appellant is a Kenya Citizen and no sufficient reasons have been offered to show that he will abscond if released on bail/bond. Accordingly, I order that:--

i. The appellant be released on a bond of **Ksh. 500,000/=** plus one surety of a similar amount; **OR**

ii. Alternatively the appellant may be released upon payment of a cash bail of **Ksh. 250,000/=** plus one surety of **Ksh. 500,000/=.**

iii. That the sureties shall be approved by the Deputy Registrar of this court.

iv. That the appellant must attend mention before the Deputy Registrar of this court at least once per month during the pendency of this appeal or when required by the court and must be present during the hearing of this appeal unless such attendance is dispensed with by the court.

Dated at Nyeri this 26th day of October 2015.

John M. Mativo

Judge