



REPUBLIC OF KENYA



KENYA LAW
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**XYZ v Republic (Criminal Appeal 117 of 2015)
[2015] KEHC 859 (KLR) (9 December 2015) (Ruling)**

Lawrence Kirinya Kiragu v Republic [2015] eKLR

Neutral citation: [2015] KEHC 859 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL 117 OF 2015
P NYAMWEYA, J
DECEMBER 9, 2015**

BETWEEN

XYZ APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant was charged in the trial Court with the offence of rape contrary to section 3(1)(a)(b) and (3) of the *Sexual Offences Act*. The Applicant pleaded not guilty, was tried, convicted of the said offence and sentenced to ten (10) years imprisonment on 22nd July 2015. The Applicant subsequently filed an appeal against the judgment of the trial Court, and also filed an application by way of a Notice of Motion dated 17th August 2015 seeking orders he be admitted to bail and/ or bond pending the hearing and determination of the appeal herein.
2. The Applicant urged his grounds for the application in a supporting affidavit sworn on 17th August 2015 by his Advocate, Bernard M. Kitindio. These grounds are that his appeal has overwhelming chance of success and that it is only fair and just that the Applicant is released on bond/bail lest he serves a substantial part of his sentence. It was also stated that the Applicant is a responsible person in society, and that he attended all court proceedings during the trial when he was also out on bond.
3. The Applicant's Advocates, Kitindio & Musembi Advocates filed submissions dated 16th October 2015, wherein reliance was placed on sections 356(1) and 357(1) of the *Criminal Procedure Code* for the power of this Court to release a person who has been convicted and sentenced on bail pending appeal. The Applicant also cited the decisions of *Jivraj Shah vs Republic* (1986) KLR 605, *Chimabhai vs R* (No 2), [1971] E.A 343, and *Somo vs R* [1972] E.A 476 for the principles that are to be considered in an application for bail pending appeal.



4. On the issue as whether the Applicant's appeal has a high chance of success, the Applicant submitted that the learned trial magistrate erred in overlooking the contradictions on the evidence of penetration in the prosecution case, and the Applicant gave instances of the contradictory evidence from the trial Court record and the judgment. Lastly, on the issue as the existence of exceptional circumstances the Applicant reiterates that there is the possibility of serving his a substantial part of his sentence before his appeal is heard and determined, and that the Applicant is a responsible person given that he is a clinical officer. Further, that his obedience of the bond terms during the trial is a good indicator that it is safe to release him on bond pending appeal. The decision in *Anisa Faraj vs Republic (2003) e KLR* was cited in this respect.
5. The Prosecution opposed the application in a replying affidavit sworn on 8th October 2015 by Cliff Machogu, the Prosecution Counsel, on the ground that the Applicant has not demonstrated that his appeal has high chances of success, and that his assertion that he will not abscond when released even if it is supported by sureties is not sufficient ground. It was the prosecution's averment that the Applicant's appeal can be head on a priority basis, hence he will not suffer any prejudice.
6. The learned prosecution counsel also filed submissions dated 12th October 2015, wherein he reiterated that the Applicant had not advanced any exceptional circumstances to warrant the grant of bail pending appeal. He cited the decisions in *Somo vs R [1972] E.A 476* and *Dominic Karanja vs Republic (1986) KLR* that an applicant must demonstrate that his appeal has high chances of success. It was also submitted by the prosecution that the Applicant had only served 3 months of his ten years prison term, and the interests of justice will be served by his appeal being heard on a priority basis.
7. I have considered the pleadings and submissions by the Applicants and Prosecution. I note that unlike an application for bail pending trial where the Applicant has a constitutional right to be considered innocent until proved guilty, an Applicant for bail pending appeal stands on the premise that he has already been found guilty of the offence. In *Mutua vs R, [1988] KLR 497* the Court of Appeal stated thus:

“It must be remembered that an applicant for bail has been convicted by a properly constituted court and is undergoing punishment because of that conviction which stands until it is set aside on appeal. It is not wise or to set the applicant at liberty either from the point of view of his welfare or of the state unless there is a real reason why the court should do so.”
8. A different test from that applied in bail pending trial is therefore applied in bail pending appeal. When considering an application for bail pending appeal, the court has discretion in the matter which must be exercised judicially taking into consideration various factors as follows:

Ademba vs Republic (1983) KLR 442, Somo vs R [1972] E.A 476, Mutua vs R [1988] KLR 497 in this regard; *Raghibir Singh Lamba vs R [1958] E.A 337; Somo vs R (supra.); Mutua vs R (supra.) Chimabhai vs R, [1971] E.A 343.*
9. This court is clothed with the power and discretion to grant bail/bond pending appeal with or without sureties, or to suspend execution of any sentence imposed by the subordinate court pending the hearing of the appeal pursuant to sections 356 and 357 of the *Criminal Procedure Code*. The issue in this application then is whether there are circumstances that exist that warrant this Court to exercise its discretion in the Applicant's favour.
10. In the instant application, there are two grounds that have been put forward by the Applicant that merit consideration. The first is that of contradictory evidence given in the trial Court about



the commission of the offence he is convicted with. The second is that he has demonstrated his responsibility by attending trial while on bond. I agree with the Prosecution that the ground raised as to the Applicant serving his sentence before his appeal is heard is not applicable, as he is facing a ten-year prison term, and it is unlikely that his appeal will take that long a period to be heard.

11. On the two valid grounds raised by the Applicant, I have perused the trial Court record and note that it is indeed the position that the Applicant was released on a Kshs 200,000/= bond with two sureties during the trial, and that he was present throughout the trial. I have also noted that the evidence referred to by the Applicant in his submissions which he claims to be contradictory is indeed in the record.
12. Given the above circumstances, I am satisfied that this is a proper case in which to exercise this court's discretion in favour of the Applicant. I accordingly allow the application in the Notice of Motion dated 17th August 2015 on the following terms:-
 1. That pending the hearing and determination of the appeal herein, the Applicant be released on his own bond of Kshs.500,000/= (Kenya Shillings Five Hundred Thousand) with two (2) sureties of a like amount;
 2. The sureties shall be approved by the Deputy Registrar of the Machakos High Court;
 3. The Applicant will attend mentions before the Deputy Registrar of the High Court, Machakos once every month until his appeal is heard and determined.
 4. The Applicant shall be required to attend court for the hearing of the appeal without fail.
 5. In default of orders 1, 2, 3, and 4 hereinabove, the bond shall be cancelled immediately and sureties called to account.

It is so ordered.

DATED AT MACHAKOS THIS 9TH DAY OF DECEMBER 2015.

P. NYAMWEYA

JUDGE

