



REPUBLIC OF KENYA

THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO.127 OF 2013

BETWEEN

DORIS BOCHERE NYANCHONGI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from original conviction and sentence of Hon. Ogola Ogembo, Ag. CM, dated and delivered on the 6th November, 2013 in Ogembo SPM's Criminal Case No.647 of 2012)

RULING

1. The applicant herein Doris Bochere Nyanchongi was charged with the offence of attempted murder contrary to **Section 220 (b)** of the **Penal Code** in the Senior Principal Magistrate's court at Ogembo. She denied the offence and was duly tried. She was subsequently convicted of the offence on the 6th November 2013 and sentenced to 3 years imprisonment. She thereafter mounted this appeal. She has now filed a Notice of Motion dated 10th December 2013 pursuant to the provisions of **Section 357 (1)** of the **Criminal Procedure Code Chapter 75** and **Article 49** of the **Constitution** through the firm of Oguttu Mboya & Co. Advocates seeking:-
 1. *That the instant application be certified urgent and same be heard on priority basis and where appropriate, prior to the end of the current High Court term.*
 2. *The Honourable Court be pleased to admit and/or grant the applicant bail pending hearing and determination of the appeal, that is, KISII HCCRA NO.127 OF 2013, on such terms as the Honourable court shall deem fit, appropriate and expedient in the circumstances.*
 3. *In the alternative and without prejudice to the foregoing, the Honourable Court be pleased to certify the appeal vide KISII HCCRA NO.127 OF 2013, as urgent and therefore requiring to be heard and disposed of on priority basis.*
2. The above application was anchored on the grounds, *inter alia*, that the conviction and sentence of the applicant was arrived at without consideration and due regard to the defence evidence on record; the appeal lodged by the applicant raises salient and pertinent issues of law and hence same has overwhelming chances of success; the applicant has a sick child who was diagnosed with paralysis/atheletis and hence requires close home based care and in the circumstances there exists special and peculiar circumstances and/or conditions to warrant granting of bail pending appeal.
3. When the application came up before me for hearing, Mr. Ochwangi advocate duly instructed by the firm of Oguttu-Mboya & Co. Advocates reiterated the averments appearing on the face of the application and contended firstly that since the appeal herein has such high chances of success,

there is no impediment to have the applicant released on bail/bond pending appeal.

4. In **Daniel Dominic Karanja –vs- Republic [1986] KLR 612** and Judiciary of Kenya Bench Book for Magistrates in criminal proceedings Nairobi, Kenya at page 92 stated:-

“The principles governing bail pending appeal are different from those governing bail pending trial. In the application for bail pending trial, the presumption of innocence casts the burden on the prosecution to show why the accused person should not be granted bail. In an application for bail pending appeal, the presumption of innocence is no longer operative. The courts have held that the presumption at that stage is that the accused was properly convicted and the burden is on him to show why he should get bail pending appeal.”

5. Similar sentiments were shared by **Kivutha Kibwana [1992] Law and the Administration of Justice in Kenya**, International Commission of Jurists General Printers Limited. Kenya when he stated:-

“It must be remembered that a person has been convicted by a

properly constituted court and is undergoing punishment because of that conviction which stands until it is set aside. It is not wise to intervene either from the point of view of the welfare of the appellant or the state, unless there is a real reason why the court should hold that he should not be deprived of his liberty, and by the time this appeal is heard and determined the applicant is likely to have served the entire period of the prison term.”

6. Secondly, Mr. Ochwangi submitted that the applicant was ready and willing to abide by any condition that may be imposed by this court on the granting of the application and that in any event, the respondent will not suffer any prejudice if the bail/bond is granted.
7. The application was opposed by the State. Learned counsel for the state Mr. Wainaina submitted that for the application of bail pending appeal to be granted the applicant must demonstrate to the court that the appeal has high chances of success. He submitted that in the instant case, the applicant was properly convicted by a court of competent jurisdiction and that she has not demonstrated that her appeal has high chances of success.
8. Furthermore, counsel submitted that having a sick child was not a ground for granting bail nor was the applicant’s readiness to abide by terms of bond nor is making the application in good faith grounds to be taken into account by the court. In conclusion, he submitted that the applicant has failed to put forward grounds to support her plea for bail/bond. He therefore urged the court to dismiss the application and set down the appeal for hearing taking the shortest time possible as per the best test for that consideration is whether the appellants can show an overwhelming chance of establishing his right to be set at liberty. If he does not do so the law should take its ordinary course.
9. In the case of **Abdi –vs- Republic [1991] KLR 171** the Court state, and I entirely agree that an application for bail pending appeal is to be granted in rare and exceptional circumstances. The Court also stated that to admit the applicant on bail is a discretion of the court which must be exercised judicially, keeping **“ in sight all the facts relating to the application, all the matters material to the trial at the lower court, grounds submitted in the petition and the chances of success and of course, nature of the trial.”** The Court also states and quite rightly so in my view, that **“the chances of success or otherwise of the appeal in particular, is to be carefully evaluated. The time it would take for appeal to be prosecuted and determined is by itself not a sufficient ground.”**
10. In the American case of **Republic –vs- Waxman [1987] 22 CR. Appeal**, cited by Patrick O. Kiage in his book **ESSENTIALS OF CRIMINAL PROCEDURE IN KENYA – Law Africa 2011** – at page 131, it was held that the proper principle to be applied in deciding whether bail should be granted pending appeal is that the court should not grant bail in such cases unless there are exceptional and unusual reasons appearing in the case.”
11. From the proceeding at the lower court, the applicant was charged with attempted murder contrary

to **Section 220 (b)** of the **Penal**

Code. Section 220 (b) of the Penal Code. Section 220 reads:-

“220 (b) Any person who

- a. **attempts unlawfully to cause the death of another; or**
- b. **with intent unlawfully to cause the death of another does any act, omits to do any act which it is his duty to do, such act or omission being of such a nature as to be likely to endanger human life.**

is guilty of a felony and is liable to imprisonment for life.”

12. I have carefully gone through the lower court record and all the evidence that was adduced therein. I have also carefully and consciously gone through the submissions by both counsel appearing in this matter. I have also gone through the judgment of the learned trial court and considered the grounds set out in the petition of appeal.
13. In my view of all the above, and taking into account, the principles for the granting of bond as set out hereinabove, I am not persuaded that the applicant has made out a case for her release on bond pending appeal. The better option that will serve the ends of justice in this matter is to have the appeal heard and determined at the earliest opportunity so that the appellant does not serve her full term before the appeal is heard and determined.
14. In the premises, the application for bond is found to be without merit. I am inclined therefore to grant the applicant's alternative prayer 3 of the application and certify that this appeal is urgent and therefore requiring to be heard and disposed off on priority basis.
15. The Deputy Registrar of this honourable court is directed to immediately process this appeal for hearing during the next Criminal Appeals session.
16. Orders accordingly.

Dated, signed and delivered at Kisii this 30th day of January, 2014

R.N. SITATI

JUDGE

In the presence of:

Mr. Ochwangi (present) for Applicant/Appellant

Mr. Majale (present) for Respondent/State

Mr. Bibu - Court Clerk