



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL APPEAL NO. 92 OF 2013

JOHANA KIPKEMEI APPELLANT

VERSUS

REPUBLIC RESPONDENT

RULING

By way of Notice of Motion dated 20th January, 2014 the Applicant prays that he be released on bond pending the hearing and determination of the appeal. It is premised on the ground that the appeal is likely to take long before it is determined so that the Applicant shall have served most of his sentence.

The applicant has sworn a Supporting Affidavit in which additionally, he depones that the appeal has high chances of succeeding, that if the orders sought are not granted, the appeal is likely to be rendered nugatory and that he shall abide with all the conditions the court shall impose for his release on bond.

Learned state counsel M/s. Oduor opposed the application. She submitted that the appeal has no chances of succeeding and in any event the Applicant had not demonstrated any unusual circumstances that would warrant the granting of bond.

Mr. Tarus advocate for the Applicant in demonstrating that the appeal had a high chance of succeeding submitted that the language in which the plea was taken is not clear.

He further submitted that the Appellant suffers from a mental problem which fact was not brought to the attention of the court. He also submitted that the appeal was likely to take a long time before it was heard. He urged the court to give lenient terms of bond to the Applicant.

The main factors that the court considers in granting bail pending appeal include:-

- (1) The likelihood of success of the appeal.
- (2) Any unusual or exceptional circumstances obtaining on the part of the Applicant.

SUCCESS OF THE APPEAL

Mr. Tarus under this head has raised two issues;

- (a) That the language of the court was not clear.

(b) The ill mental health of the accused was not drawn to the courts attention.

With respect to (a), it is important to note that the Applicant was convicted on his own plea of guilty. Therefore, the only issue the Applicant may raise a quarrel with is the manner in which the plea was taken, of course, including the language of the court.

In this respect, he only contests the language of the court, which he argues was not clear.

A look at the proceedings shows that the plea was taken on 8th May, 2013. The interpretation of the proceedings is indicated was done in the Kiswahili language. At this point nothing shows that the Applicant objected to the use of this language for want of understanding. As such that aspect of argument fails.

With regard to (b), Section 11 of the penal Code provides:-

“Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved.”

The section is silent on whose burden it is to inform the court as to the soundness of the mind of an accused. But again, it is trite that unless that fact of the unsoundness of the accused's mind is drawn to the attention of the court, the court, of itself, would not know. As such it was important that the accused informed the court that he suffered a mental illness. I will however leave the comprehensive interpretation of the said S. 11 of the Penal Code to the court that will hear the appeal. As at now, though, prima facie, the argument of the Applicant under this head cannot bail him out.

EXCEPTIONAL AND UNUSUAL CIRCUMSTANCES

Under this head, the Applicant has argued that the appeal is likely to take long to be heard and determined. But over and over again courts have held that the Appellant must bear in mind that he was convicted by a competent court and that that conviction stands unless it is otherwise quashed. Therefore, the mere fact that an appeal is likely to take long before it is heard, is not good ground for allowing the application. Moreover, the Applicant was sentenced to life imprisonment, which term has no tabulation as it runs through the lifetime of the Applicant.

Further, the mere fact that an Applicant can afford the bond terms cannot be deemed to fall under the bracket of unusual and exceptional circumstances that would warrant the granting of bond pending appeal.

In the result, I find that the application is not merited. The same is accordingly dismissed.

DATED and DELIVERED at ELDORET this 18th day of June, 2014.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:

Mr. Cheserem holding brief for Tarus for the Applicant

Mr. Mulati for the Respondent