



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISC.CRIMINAL APPLICATION NO.45 OF 2014

CLIFF BIKERI MOKUA KBS/31/14/CON 1ST APPLICANT

EDWIN CHWEYA MOKUA KBS/30/14/CON 2ND APPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS, KISII..... RESPONDENT

**IN THE MATTER OF ARTICLE 49 (1) (h) AND ARTICLE 259 (3) (a) OF THE
CONSTITUTION OF KENYA**

AND

IN THE MATTER OF BAIL PENDING APPEAL NO.19 OF 2014 COURT OF PAPEAL

AND

SECTION 356 AND 357 OF THE CRIMINAL PROCEDURE CODE

RULING

1. The appellants herein **KBS/31/14/CON Cliff Bikeri Moku** and **KBS/30/14/CON Edwin Chweya Moku** have moved this court by a notice of motion dated 4th of April 2014 seeking for orders:-

1. *Spent*

2. *That the sentence pronounced on the applicants/appellants KBS/31/14/CON Cliff Bikeri Moku and KBS/30/13/CON Edwin Chweya Moku on the 30th of January 2014 be suspended and the applicants be admitted to bail pending the determination of their appeal.*

1. The application is brought pursuant to the provisions of **Article 49 (1) (h)** and **Article 259 (3) (a)** of the **Constitution of Kenya**, **Sections 356** and **367** of the **Criminal Procedure Code**, **Rule 3 (2)** of the **High Court (Practice and Procedure) Vacation Rules** and all other enabling provisions of the law. It is based on the grounds set out on the face of the application and supported by the affidavit of James Mochere Ondieki and the joint affidavit of the appellants, draft petition of appeal and reasons to be adduced during the hearing.

2. James Mochere Ondieki states in the affidavit that the trial court and the superior court erred in law and fact in their decisions. He is of the opinion that the appellants have an arguable appeal with high chances of success, and which raises weighty legal issues with high chances of being resolved in favour

of the appellants. He further states that he is convinced that the judgment of the superior court was a misdirection and miscarriage of justice and that the fundamental rights in the trial process were violated and trampled upon by both the trial court and the superior court.

3. Mr. Mochere further avers that the judges of the superior court did not analyze the trial court's record, saying that if they had done so, they would have resolved all the inconsistencies thereon in favour of the appellants. That the application for bond/bail by the appellants is a constitutional right that does not get extinguished as long as they have an opportunity to pursue an appeal and the presumption of innocence is still available to the applicants as their appeals have not been exhausted. Lastly that the fundamental rights are always available to the applicants and they are not granted by the State and cannot be taken away by the STATE.

4. In their joint supporting affidavit sworn on the 4th April 2014, the applicants/appellants state that the prosecution intentionally dropped key independent witnesses like the OCS Nyamira police station listed in the charge sheet in favour of witnesses mobilized by the assistant chief, PW6. Further that their appeal has high chances of success and that the entire proceedings of the trial court are premised on a business grudge by the complainant on a case of faulty photocopies they sold to him.

5. The applicants further state that both the trial court and superior court neglected the thorny issue of the photocopier machine and proceeded to convict and sentence them without making a ruling on the grudge. They hold the view that it would be in the interest of justice for them to be granted the orders sought in the application as they believe that they are victims of cleverly, coined and twisted lies of the complainant. That they are ready to abide by any conditions as to bond/bail that will be imposed by this honourable court.

6. On the 8th May 2014 the application came up for oral submissions. Mr. Mochere appeared on behalf of the applicants while Mr. Ochieng appeared for the state.

7. Mr. Mochere submitted that the appellants' appeal had overwhelming chances of success and that the superior court did not analyze evidence on record. He adds that the appeal may take long to be heard and he went ahead and gave a short background of the case at the trial court.

8. Mr. Ochieng for the state opposed the application on grounds that *the applicants had been granted bail by the trial court but the same was cancelled on 23rd November 2012 upon application by prosecution on the grounds that there was reliable information that the applicants were planning to leave the country and thus circumvent the course of justice.*

9. Secondly, that a similar application was made by the applicants on their 1st appeal which application was dismissed. That the appeal was also dismissed and the sentence enhanced on death which means that the temptation to escape is now very high.

10. Lastly, Mr. Ochieng submitted that no new issues have been demonstrated to convince the court that the appeal has high chances of success.

11. I have had the opportunity of going through the notice of motion dated 4th April 2014 together with the supporting affidavits and annexures thereto, the authorities by the applicants' counsel and the submissions by both counsel.

12. This court is alive to the fact that the applicants herein were tried, found guilty and convicted and sentenced to life imprisonment. The court is also alive to the fact that the trial court revoked their bail/bond following an application by the prosecution that they were likely to jump bail and leave the country.

13. This court (differently constituted) denied the applicants' bail application and it went ahead and dismissed their appeal and enhanced the sentence to death sentence. The pending appeal is a second appeal to the Court of Appeal, which by virtue of **Section 361 (1)** of the **Criminal Procedure Code** will

be canvased on points of law.

14. Counsel for the applicants/appellants wants this court to allow the application for bond on grounds that the appeal has overwhelming chances of success. In my considered view, such a ground has no place before this court because to make a finding on such a ground or even make the slightest indication in that direction would clearly mean I am sitting on appeal on my own decision. That is a matter for the Court of Appeal. The arguments would have been validly made before the Court of Appeal which is the court that will be hearing the applicants' appeal.

15. The question that now arises for determination is whether this court should grant the order sought. Upon consideration of all relevant factors in this case such as the fact that the applicants are no longer presumed innocent since they are convicts and the likelihood of the applicants jumping bail, I am not satisfied that the applicants are entitled to the order sought. Having had their sentence enhanced from life imprisonment to death, the motivation to jump bail is very real.

16. The application is accordingly dismissed. The applicants' counsel is urged to speedily process the appeal for hearing. The court is also aware that the applicants have a right to make another application to the Court of Appeal.

17. Orders accordingly

Dated, signed and delivered at Kisii this 24th day of July, 2014

R.N. SITATI

JUDGE.

In the presence of:-

Mr. Majale for State

Mr. Mochere (present) for Accused persons/Applicants

Mr. Bibu - Court Assistant