



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO.155 OF 2014

B E T W E E N

ENOCK H. OKOYANA MARAMBIAPPELLANT/APPLICANT

V E R S U S

REPUBLICRESPONDENT

(Being an appeal from original conviction and sentence in Kakamega Chief Magistrate's Court in Criminal Case No.1944 of 2009 delivered on 13th August 2014 by Hon. M.I.G. Moranga, P.M.)

R U L I N G

Introduction

1. The Appellant herein **ENOCK H. OKOYANA MARAMBI** was charged and convicted of the offence of defilement of a girl contrary to **section 8 (1)** as read with **section 8 (2)** of the Sexual Offences Act No. 3 of 2006 .He was sentenced to serve Fifteen (15) years imprisonment against which he has appealed having been dissatisfied with both conviction and sentence.

The Application

2. By the application dated 15th October 2014 brought pursuant to **Section 357** of the Criminal Procedure Code Cap 75 Laws of Kenya the appellant now seeks to be admitted to Bond/Bail pending the hearing and final disposal of the appeal. The application is based on the grounds set out on the face of the application and supported by the applicant's own affidavit sworn on the 12th September 2014. Briefly he states that the appeal has very high chances of success although the same may take a long time to be heard and determined. He fears that he shall have served a substantial term before the appeal is heard and determined since there are many matters pending in the High Court and states that the appeal will be rendered nugatory if he serves the jail term. He maintains that he will abide by all the conditions regarding bond/bail if he is released pending the hearing of the appeal as he did during the trial in the subordinate court where he never missed any single appointment with the court.

The Submissions

3. Mr. Shilenje for the appellant told the court that the applicant is 70 years old, diabetic and has difficulty in breathing. He submitted further that though the offence of which the appellant was convicted is serious it is bailable and that the appellant never missed any session during trial in the lower courts for over five (5) years. He prays for reasonable bond terms as the appellant is ready to provide adequate security. The

Petition of Appeal is annexed to the application.

4. Mr. Ngetich for the Director of Public Prosecutions did not oppose the application. He asked the court herein to verify the averments of the applicant at paragraph 8 of his supporting affidavit and to exercise caution in considering this application on the grounds that the appellant is now a convict and may feel tempted to abscond. He concluded by submitting that failure to grant the application herein will not render the appeal nugatory.

Analysis of Application and Submissions

5. The court has considered the application, supporting affidavits and the oral submissions by counsel. The right to be granted bail pending the hearing and determination of a case or an appeal is available to all persons as provided under Article 49(1)(h) of the Constitution. However the court has the discretion to grant or refuse bail depending on the circumstances of each case. The court is required to take into consideration settled principles of the law in determining whether or not to grant bail pending hearing of a case or pending the hearing of the appeal.

The Law

6. The principles to be considered in an application for bail pending appeal are well set out in the cases of **ADEMBA -VS- REPUBLIC (1983) KLR, 442** and **MUTUA -VS- REPUBLIC [1988] KLR, 497**.

In the **ADEMBA** case, court held, inter alia, that:-

- **Bail pending appeal may only be granted if there are exceptional or unusual circumstances.**
- **The likelihood of success in the appeal is a factor to be taken into consideration in granting bail pending appeal. Even though the Appellant showed serious family and personal difficulties, in view of the unlikelihood of success in this appeal, the application could not succeed.**

In the **Mutua** case, the Court held as follows:-

"1. The main problem was whether the appeal had overwhelming chances of success for if it did not, then this Court would not grant bail pending the appeal by virtue of the Court of Appeal Rules, rule 5 (2) (a).

2. The test was whether there were exceptional or unusual circumstances, the most important being whether the appeal had overwhelming chances of being successful.

3. 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 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.

4. There was no overwhelming probability that the sentence would be reduced since the Appellate court could not deal with the issue of sentence, and on the other grounds, it was not apparent as a matter of law that the appeal would succeed."

7. Again in **JIVRAJI SHAH -VS- REPUBLIC (1986) KLR, 605**, the Court of Appeal gave guidelines to be considered in an application for bail pending appeal as follows:-

"1. 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 interest of justice to grant bail.

2. 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 urged and that the sentence or substantial part of it will have been served by the time the appeal is heard, condition of granting bail will exist.

3. The main criteria is that there is no difference between overwhelming chances of success and 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."

8. The principles were also simplified by Bosire J (as he then was) in the case of *MWAURA VS REPUBLIC (1986) KLR 600*.

The said principles include the following; the nature of the offence, the strength of the evidence, the character and behavior of the accused and the seriousness of the punishment to be meted if the accused is found guilty. The most important of all considerations is whether the accused will turn up at the appointed place and time for the trial; any exceptional circumstances and whether the accused will interfere with the witnesses if released on bond.

9. Whereas the above principles are applicable in regard to applications made by accused persons seeking to be released on bail pending trial, the same principles are applicable when the court is considering whether to release an appellant pending the hearing of an appeal.

10. In the case of an appellant seeking to be released on bail pending the hearing of an appeal, the court has to put into consideration the added fact that the appellant having been convicted will most likely have a reason to abscond if released on bail.

Analysis of the Application and the Submissions

11. Having carefully considered the application and perused the record of appeal in its entirety, there is no evidence in terms of a medical report or any medical records to show that the applicant herein is diabetic and/or has breathing problems I find this to be just an allegation by Counsel which is not supported. If there had been such evidence, this court would have considered the same as being special circumstances or unusual circumstances. This court has considered the age of the appellant herein being Seventy (70) years and has also considered the history of the case during where the appellant herein never missed any court session and finds that the applicant did not interfere with the witnesses since there was no complaint by the prosecution. As to whether the appellant's appeal will be successful or not this court's view is that the said appeal has a fifty fifty chance of success for which the appellant gets the benefit of the doubt. The more important fact that this court has taken into account is that – the appeal may not be heard very quickly because right now there are more than 100 appeals pending. For the above reasons, I am inclined to consider the applicant's application favourably.

12. Having made the above findings the appellant's application herein is allowed subject to the following conditions:

- The applicant herein may be released on his own Bond of Kshs. 500,000/= with two (2) sureties of similar amount.
- The said sureties shall be approved by the Deputy Registrar of this Court.
- Upon release the appellant shall appear for mention of his appeal once every thirty (30) days until the appeal is heard and determined or until further orders of this court.
- Failure to abide by the conditions set out hereinabove shall lead to the automatic cancellation of the bond and re-arresting of appellant who will then conduct his appeal from remand.
- Mention on 16.01.2015 before the Deputy Registrar.
- Appellant remanded in custody.

Orders accordingly.

Ruling read and delivered in open court at Kakamega this 17th day of December 2014

RUTH N. SITATI

J U D G E

In the presence of

Mr. Onsando for Shilenje - for Applicant/Appellant

Mr. Ngetich (present) - for Respondent

Mr. Murumia - Court Assistant