



REPUBLIC OF KENYA

High Court at Eldoret

Criminal Appeal 7 of 2013

GEORGE KETER ALIAS BOI APPELLANT/APPLICANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal from both conviction and sentence in the Judgment of B. N. Mosiria (Principal Magistrate) in Kapsabet Principal Magistrate's Court Criminal Case No. 7733 of 2012 delivered on 31st December 2012)

RULING

By Notice of Motion dated 16th January, 2013, brought under Section 357 of the Criminal Procedure and Rule 3 (2) of the High Court Practice and Procedure Rules, the Appellant prays that he be released on bail pending the hearing and determination of the appeal.

The same is based on the following grounds:-

- (i) The Principal Magistrate's Court delivered judgment on 31st December, 2012 KAPSABET PMCR. CASE NO. 773 OF 2012 wherein it convicted the Appellant for the offence of attempted defilement contrary to Section 9 (1) as read with Section 9 (2) of the sexual offences Act and sentenced him to 10 years imprisonment.
- (ii) The Appellant/Applicant was dissatisfied and aggrieved by the said Judgment in its entirety and more particular on conviction and sentence.
- (iii) The Appellant/Applicant has preferred an appeal against the said judgment and has actually lodged a petition of appeal to this court.
- (iv) The appeal is arguable and has overwhelming chances of success.
- (v) The Appellant/Applicant has started serving the sentence and as such, it is unjust and inexpedient to deprive him of his freedom of liberty.
- (vi) The Appellant/Applicant is ready and willing to abide by any terms that the Honourable Court may impose upon admission to bail.

It is further supported by the affidavit of the Appellant sworn on 16th January, 2013. He depones that he has an arguable appeal with high chances of success, that he suffers chronic diabetes which requires continuous medication, that he is the sole bread winner of his family and that he is willing to abide with

the terms the court will deem reasonable to impose.

Submissions on behalf of the Appellant were made by Mr. Maritim Advocate, who reiterated the contents deposed in the supporting affidavit. Mr. Kabaka, State Counsel, while conceding to the application stated that the appeal has high chances of success. According to him, the trial Magistrate shifted the burden of proof upon the Appellant contrary to the law on criminal liability.

Section 157 of the Criminal Procedure Code which gives the Court the power to grant bail to a person pending hearing of an appeal, is not framed in mandatory terms. It provides:-

357 (1) “After the entering of an appeal by a person entitled to appeal, the High Court, or the subordinate court which convicted or sentenced that person, may order that he be released on bail with or without sureties, or, if that person is not released on bail, shall at his request order that the execution of the sentence or order appealed against shall be suspended pending the hearing of his appeal:

Provided that, where an application for bail is made to the subordinate court and is refused by that court, no further application for bail shall lie to the High Court, but a person so refused bail by a subordinate court may appeal against refusal to the High Court and, notwithstanding anything to the contrary in Sections 352 and 359, the appeal shall not be summarily rejected and shall be heard, in accordance with such procedure as may be prescribed, before one Judge of the High Court sitting in chambers.”

In pursuance thereof, of the provision, courts have exercised discretionary powers in granting bail pending appeal. This depends largely on circumstances of each case that may demand that bail be granted. The general principle has been that exceptional and unusual circumstances must have arisen since the Appellant was convicted to warrant his release or bail. Whether or not the appeal is arguable with a high probability of success is another factor of consideration.

In **CRIMINAL APPLICATION NO. 5 OF 2008 (NBI) BONIFACE NG'ANG'A -VS- THE REPUBLIC (an application for bail pending the hearing and determination of appeal in Criminal Appeal No. 13 of 2008)**, the Court of Appeal declined to grant bail pending appeal on grounds that the Applicant had not demonstrated any exceptional and unusual circumstances to warrant his being released on bail pending appeal. In that application, Counsel for the Applicant had argued that, the appeal had high chances of success, that the Magistrate who had heard the witnesses is not the one who wrote the Judgment and that the Applicant was in a poor state of health and he required further surgery.

In dismissing the application, the Judges said:-

“The likelihood of success in the appeal is a factor to be taken into consideration. But it must also be reiterated that an applicant seeking bail has been convicted by a properly constituted court and is undergoing punishment because of the conviction which stands until it is set aside.”

The court, in the application, referred to the cases of **ADEMBA -VS- R (1983) KLR, 442** and **MUTUA -VS- R (1985) KLR, 497**.

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

- 1. Bail pending appeal may only be granted if there are exceptional or unusual circumstances.**
- 2. The likelihood of success in the appeal is a factor 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, 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 remembers 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 Appellant would succeed.”

It is submitted that the Appellant herein suffers from chronic diabetes and is the sole bread winner of his family. These are factors touching on his welfare and should not necessitate his being released. I bear in mind that medical health is provided in prison and in serious cases which cannot be handled at the prison are referred for medical care outside the Prison.

It is further submitted that the appeal has high chances of succeeding. Indeed the State Counsel was of a similar view citing the last paragraph of the Judgment of trial Magistrate. However in considering the merits or demerits of the appeal, court will evaluate all the evidence tendered before the trial Magistrate. It is not therefore wise for me at this juncture to evaluate such evidence as it may prejudice the hearing and findings of the Judge who will hear the appeal. Therefore, although the likelihood of the success of the appeal is a factor to be looked into, it must be borne in mind that the Appellant has been convicted by a properly constituted Court and is undergoing punishment because of the conviction which stands until or unless it is set aside.

On the whole, I find that the Appellant has not demonstrated any exceptional or unusual circumstances to warrant his being released on bail pending appeal.

I accordingly dismiss the application.

DATED and DELIVERED at ELDORET this 12th day of March, 2013.

G. W. NGENYE – MACHARIA

JUDGE

Mr. Mokuia Advocate for the Appellant/Applicant

Ms. Ruto holding brief for Kabaka for the State/Respondent