



REPUBLIC OF KENYA

High Court at Eldoret

Criminal Appeal 31 of 2010

DUNCAN OLUOCHO OGUTA APPELLANT/APPLICANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal from both conviction and sentence in the Judgment of G. A. Mmasi (Senior Resident Magistrate) in Eldoret Chief Magistrate's Court Criminal Case No. 2033 of 2009)

RULING

The Applicant, Duncan Oluoch Oguta is the Appellant herein. He has filed this application by way of Notice of Motion dated 10th January, 2013, brought under Section 357 (1) of the Criminal Procedure Code and all other enabling provisions of the law. The main prayer is that he be released on bail pending the hearing and determination of the appeal.

It is based on the grounds that the appeal has high chances of succeeding, the Appellant was on bond in the lower court and never absconded throughout the trial, the appeal is likely to take a long time before it is heard and decided and the foregoing reasons are overwhelming unusual circumstances that ought to attract the court's discretion in favour of the Applicant.

It is further supported by the Affidavit of Omondi Obudho, an advocate of the High Court of Kenya practicing with the firm of M/s. G. O. Obudho & Co. Advocates sworn on 10th January, 2013. It is deponed that the appeal has high chances of succeeding and that the Appellant is a person of good character who never absconded from court throughout the trial before the Magistrate's Court.

Although this application was filed by Mr. Omondi Obudho Advocate, it is the Appellant who argued it in person. The Appellant only submitted that he is ailing at the prison and there was a likelihood that the appeal would take a long time to dispose of.

The State Counsel, Mr. Kabaka opposed the application. He submitted that the Appellant was convicted on account of credible evidence, that he committed very serious offences and was instead handed very lenient sentence and that, besides he willfully transmitted [information withheld] to the victim.

The Appellant argued the application on 20/12/2012 while the State Counsel replied on 21/2/2013. On the latter date, one Mr. Ng'eno Advocate came on record as holding brief for Mr. Obudho for the Appellant. His rejoinder was that the offences for which the Appellant was convicted are bailable and that there are no compelling reasons of denying him bail.

Section 357 (1) of the Criminal Procedure Code under which this application is brought reads:-

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.”

Its interpretation gives the Court the discretion to grant or not to grant the bail pending appeal. This means that bail under S.357 (1) of the Criminal Procedure Code is not a guaranteed right. The emerging jurisprudence of decided case law too has urged the courts to exercise extreme caution when granting bail pending appeal. This is premised on the assumption that, the Appellant is serving a sentence having been found guilty by a competent court. That therefore, the courts should not release the Appellant who is already serving a punishment unless there are extremely exceptional and unusual circumstances that demands for his release.

In the case of **BONIFACE NG'ANG'A -VS- REPUBLIC – NAIROBI CRIMINAL APPLICATION NO. 5 OF 2008**, the Judges sitting in the Court of Appeal, declined to grant bail pending appeal to the Applicant on grounds that he had failed to demonstrate any exceptional and unusual circumstances that had arisen to warrant him the relief sought. In the application, Counsel for the Applicant had submitted 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 referred to the cases of **ADEMBA -VS- R (1983) KLR, 442 AND MUTUA -VS- R (1985) KLR, 497.**

In the **ADEMBA** case, it was 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.”

The Appellant was not able to provide prove of his illness, but besides, this mounts to an issue of his personal welfare, which to me is not an exceptional and unusual circumstance that would warrant this court to grant him bail. Although he did not abscond from the proceedings of the trial court, I am minded that he was convicted by a properly constituted Court, and that he is serving a sentence for an offence he committed, unless the sentence is set aside. It is for the same reason I would not grant the prayer sought, notwithstanding that the appeal is arguable or not. The consideration of the merit or demerit of the appeal is left for consideration by the Judge who will hear the appeal.

Therefore, having taken into account the submissions of both the Appellant and the State, it is clear that this application does not meet the guiding principles set out in the case law above. The Applicant has not demonstrated any exceptional or unusual circumstances to warrant his being released on bail pending appeal.

I find that the application has no merit and I dismiss it accordingly.

DATED and DELIVERED at ELDORET this 11th day of March, 2013.

G. W. NGENYE – MACHARIA

JUDGE

Mr. Obudho Advocates for the applicant

Mr. Wainaina for the State