



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(Coram: Ojwang, J.)

MISC. CRIMINAL APPLICATION NO.635 OF 2007

SAMUEL ODHIAMBO OCHIENG'.....APPLICANT

-AND-

REPUBLIC.....RESPONDENT

RULING

The applicant has appealed from a decision by the learned Principal Magistrate, **L. Mutende** dated 6th August, 2007 in **Republic v. Samuel Odhiambo Ochieng & Another**, Nairobi Chief Magistrate's Criminal Court Case No. 727 of 2004. He comes before this Court by Chamber Summons dated 11th September, 2007 and his substantive prayers are:

- (a) that this Honourable Court be pleased to admit the applicant to bail, with or without sureties pending the hearing and determination of the appeal filed herein;
- (b) that in the result and/or concurrently, this Honourable Court be pleased to stay the execution of the sentence or order of the Honourable **Ms. Mutende** appealed against, until the hearing and determination of the appeal filed herein.

The grounds in support of the application are as follows:

- (i) that the applicant has a cogent appeal, with high chances of success;
- (ii) that the offences with which the applicant is charged are bailable;
- (iii) that the applicant demonstrated throughout the trial process in the Subordinate Court that he is prepared to undergo trial, and did not jump bail;
- (iv) that the Subordinate Court, even though it had the jurisdiction to decide the question, directed that this application be heard before the High Court;
- (v) that the appellant is prepared to abide by any conditions or restrictions such as this Court may impose in granting bail.

The applicant's advocate, **Mr. Odera** swore a supporting affidavit in which he deposed that the applicant

had been convicted of the bailable offence of making a document without authority, and was on 6th August, 2007 sentenced to a seven-year prison term. The applicant had then made an application for bail pending appeal, but the trial Magistrate declined to hear the application. It is deponed that the appeal has overwhelming chances of success.

When this matter came up before me on 11th September, 2007 I directed that the Attorney-General be served and, on the occasion of hearing, on 13th September, 2007 learned counsel **Ms. Gateru** represented the State Law Office.

Learned counsel **Mr. Odera** urged that the appeal had overwhelming chances of success, and in aid of his argument, he relied on the persuasive authority in **Motichand v. Republic** [1972] E.A. 399.

In the **Motichand** case the appellant had been convicted of handling stolen property and sentenced to seven years' imprisonment. He applied for bail pending appeal, contending there was an overwhelming likelihood of his appeal succeeding and "that there were exceptional factors in his previous good character, the probable delay in the hearing of the appeal, the hardship he would suffer and his ability to give recognisances for his appearance" (p.399). The High Court (**Muli, J.**) held that "it is sufficient if the appellant demonstrates a probability of success on appeal rather than an overwhelming probability of success" (p.399).

Mr. Odera urged that the instant application was properly founded on s.357(1) of the Criminal Procedure Code (Cap.75, Laws of Kenya), which provided scope for the grant of bail, with or without sureties, to a person convicted on a criminal charge; and where release on bail was not granted, the High Court may order a suspension of execution of the sentence imposed.

Learned counsel proposed to demonstrate that the applicant's appeal had a probability of success. In ground 6 of the petition of appeal it was stated that the trial Magistrate had erred in fact and in law, by not allowing the applicant to make final submissions before judgment was given – and this was in breach of the terms of s.311 of the Criminal Procedure Code (Cap.75). By s.211 of the Criminal Procedure Code, an accused person may opt to remain silent when put to his defence, which is the option the applicant herein had taken; but s.311 of the CPC then provides:

"If the accused person says that he does not intend to give or adduce evidence and the Court considers that there is evidence that he committed the offence, the advocate for the prosecution shall then sum up the case against the accused person, and the Court shall then call on the accused person personally or by his advocate to address the Court on his own behalf."

The trial Court in the criminal case in question, however, counsel submitted, did not accord the accused (applicant herein) the opportunity to make a final address in Court. On this point alone, counsel urged, the applicant would have an appeal likely to succeed.

It was contended too that the learned Magistrate had shifted the burden of proof, from prosecution to accused; and the relevant portion of the trial Court judgment was this (p.6, para.2):

"What is evident is that he [applicant herein] was not found doing the actual printing. When put on his defence he opted to remain silent hence [offering] no explanation why he had the documents in his office."

Silence, **Mr. Odera** urged, is a constitutional right of an accused person; and thus, even if the applicant had remained silent, it was not his obligation to show why he believed he was innocent. Counsel relied on the English case, **Woolmington v. DPP** [1935] AC 462 in which it had been held that at the end of a criminal trial, it was not for the accused to establish his or her innocence.

In response, learned State Counsel **Ms. Gateru** urged that whenever an accused is convicted, as was the case with the applicant herein, he or she must be *regarded* as duly convicted, until the merits of the conviction are considered and disturbed by an appellate Court. In counsel's view, the applicant had not

demonstrated that the appeal had overwhelming chances of success.

Counsel urged that there was no likelihood the applicant would have served a substantial portion of the seven-year jail term imposed, by the time of hearing the appeal – and so there was no danger of the appeal proving to be nugatory.

Ms. Gateru urged that no special circumstances had been placed before this Court that would entitle the accused to be admitted to bail pending appeal. She relied on a statement of principle in a persuasive authority, **Raghibir Sing Lamba v. R** [1958] E.A. 337 (Tanz.), in which the Court (**Spry, Ag. J.**) had held that “neither the complexity of the case nor the good character of the applicant, nor the alleged hardship of his dependants” (p.337), by themselves, justified the grant of bail.

Ms. Gateru urged that if the Court should be minded to grant bail pending appeal, then stringent conditions for bail should be imposed, “to ensure he is present during the hearing of his appeal.

Learned counsel **Mr. Odera** submitted that the principle in the **Raghibir Singh Lamba** case was no longer applicable, in the light of the statement of the law contained in the **Motichand** case. Both cases, however, as I find, are only persuasive authority, though at the same time, they carry the common principle that the chances of success of an appeal is an important consideration, in deciding on an application for bail pending appeal.

An assessment of the merits of the application, and of the divergent positions of counsel, led me to make appropriate orders on 13th September, 2007 and the same are herein restated, in this Ruling which fully gives the context and the reasoning:

“The question before the Court is whether or not the applicant is to be released on bail pending the hearing and disposal of his appeal.

“During trial, the applicant had been out on bond; and now learned counsel Mr. Odera raises several grounds of appeal. He urges that the applicant will have an arguable case on appeal, and he brings before this Court authorities to support the application.

“In view of the authorities urged by counsel on both sides, I need to state reasons for the orders which I am inclined to make right away, in the light of the personal-liberties aspect of this application. I will make orders as follows:

(1) I hereby admit the applicant to bail pending the hearing and determination of his appeal, on the terms set out below.

(2) The applicant shall be released on bail upon payment of Kshs.100,000/= into the High Court’s Cash Office, and in addition producing a surety who shall also pay a similar amount to the High Court’s Cash Office.”

DATED and DELIVERED at Nairobi this 3rd day of March, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Tabitha Wanjiku

For the Appellant/Applicant: Mr. Odera

For the Respondent: Ms. Gateru