



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL CASE NO. E019 OF 2021

ANTHONY KIPKETER ROTICH.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

RULING:

Anthony Kipketer Rotich was charged in the lower Court with the offence of forcible detainer, contrary to *Section 91 of the Penal code*.

The particulars of the offence being that on the 23rd day of March, 2016 at Sertwet village in Wareng Sub-County within Uasin Gishu County, the accused being in possession of land Registration Cheptiret/Cheplaskai Block 3 (Sertwet)/257 of Kiprotich Sorure, without colour of right held possession of the said land in a manner likely to cause a breach of the peace against Kiprotich Sorure who is entitled by law to the possession of the said land.

On 26/3/2016 the accused, who's the applicant herein pleaded not guilty and the matter proceeded to full trial. After both sides were fully heard, the Court found the applicant guilty of the offence and was accordingly convicted. He was sentenced to serve 12 months imprisonment.

The applicant dissatisfied with the said conviction and sentence has preferred an appeal through a petition of appeal dated 30/3/2021. His grounds of appeal are:-

1. That the trial magistrate erred in law in making findings and conviction against the appellant.
2. That the Hon. trial Magistrate erred in law and fact by sentencing the appellant to 12 months custodial sentence.
3. That the Hon. trial magistrate erred in law and fact in the application of principles of law.
4. That the Hon. trial magistrate erred in law and fact in relying on evidence against the appellant.
5. That the Hon. trial magistrate erred in law and fact by failing to find that the prosecution had not proved their case beyond reasonable doubt.
6. That the Hon. trial magistrate erred in law and fact by failing to consider and appreciate the evidence and testimony of the accused in relation to the subject matter and the purported complainant.

Pending hearing and determination of the said appeal, the appellant filed a chamber summons dated 30th March, 2021, in which he urges this Court to admit him to bail or bond.

The application was heard virtually on 12/5/2021. The applicant urged this Court to consider that he's a civil servant employed by T.S.C and is not therefore a flight risk. He attached a payslip in support of the allegation. His advocate also averred that he is unwell and needs be treated outside prison. They availed a letter from prison indicating that he's asthmatic and had been diagnosed with dysentery and accordingly treated.

The applicant further submits that his appeal has high chances of success. He relied on criminal Appeal No. 1 of 2018 of George Wambugu Thumbi -Vs- Republic in which it alleged the appellant was granted bail pending appeal in similar circumstances. Further, the applicant argues that he's likely to serve the 12 months sentence before the appeal is determined given that he has already served 3 months.

The Prosecution opposed the application. They averred that the evidence against the appellant is strong and the appeal stands no chance of

success. The appellant if unwell can be treated in prison. A pre-sentence report produced in the lower court was not in favour of a non-custodial sentence. There are no exceptional circumstances in the case which would entitle the convict to be released on bond.

Section 357(1) of the *Criminal Procedure Code* provides that:-

“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.”

Article 49(1)(h) of the constitution of Kenya 2010 provides that:-

“an accused person has the right.....(h) to be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released.”

From the foregoing provisions it is clear that the right to bail or bond, whether pending trial or hearing of an appeal, is not an absolute right; it can be withheld, curtailed or denied if there are compelling reasons. It should also be noted that an accused person awaiting trial is a suspect who's presumed innocent until proven guilty unlike an appellant who has been found guilty and is serving a legal sentence. In weighing grounds or circumstances for release on bond for an appellant, different principles must apply as was held in the case of **Masrani -Vs- R (1060) EA 321.**

In an application for bail pending appeal the major factors to be considered are as follows:-

1. Whether there's a preferred appeal. The application is for bail pending hearing of a preferred appeal but not pending filing of an appeal. This avoids a situation where a convict maybe granted bail and then fail to file an appeal.
2. Whether the said appeal is sound or has chances of success. An appeal that is a sham or founded on flimsy grounds wouldn't entitle a suspect to freedom pending its hearing.
3. Whether the appellant is a flight risk.
4. Nature of the offence and the sentence meted.
5. Character and antecedents of the appellant.
6. Whether he was on bond or bail in the lower court and how well the terms were observed.
7. Need to protect the victims of the crime.
8. Whether the appellant is gainfully employed.
9. Need for public order, peace or security.
10. Safety of the appellant.

In applying the foregoing to the present case, I have noted that before the appellant was sentenced a probation officer's report was called for. The complainant in this matter is the appellant's father. The land in dispute belongs to the father. It is alleged the appellant sold his 30 acres of land for 18 million to MTRH and bothered his parents to be apportioned a part of the family land. He was shown where to build but demands more. The parents narrated the painful experiences the applicant has taken them through. The mother stated how he assaulted her and she curses that she bore him. The sister alleged that she was assaulted and her hand broken by the applicant. The father is full of bitterness, alleging the applicant brought him sorrows for many days.

The disclosure by the family members who live with the applicant shows that he's of bad character and quarrelsome. He's a risk to them if released on bond. Though he's allegedly unwell, the letter from prison shows he has

been treated. This Court is in a position to accord him a soon hearing date of the preferred appeal and a substantial part of the sentence won't have been served before the appeal is heard and determined.

I accordingly find that there are no established extra ordinary circumstances of which warrants the applicant be released on bail or bond. The application lacks merit and is hereby dismissed.

The lower Court record should be processed, filed and served to enable a soon hearing of the appeal.

S. M GITHINJI

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 3RD DAY OF JUNE, 2021.

In the presence of:-

Mr. Arigo holding brief for Ms Kipsei for the applicant.

Ms Muhonja for state

Gladys - Court assistant