



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
CRIMINAL APPEAL NO.E111 OF 2021

DANIEL OMONDI ODEMBA.....APPLICANT

VERSUS

REPUBLIC.....PROSECUTOR

RULING

1. Vide a **Notice of Motion** application dated **1st November, 2021**, the Applicant, **DANIEL OMONDI ODEMBA** has sought for orders:-

a) Spent;

b) Spent;

c) That pending the hearing and determination of the appeal filed herein, he be released on reasonable bail terms as shall be ordered and/or imposed by court.

d) That pending the hearing and determination of the appeal, the Honourable Court be pleased to suspend execution of the sentence imposed by the trial court vide Judgment delivered by the Hon. Kithinji A. R. in Makandara Chief Magistrate Criminal Case No.1484 of 2016, REPUBLIC -vs- DANIEL OMONDI ODEMBA delivered on 21st October, 2021.

e) That cost of the application do abide by the main appeal.

2. The application is premised on the grounds set out on the face of it and the **Supporting Affidavit** sworn by **DANIEL OMONDI ADEMBA**, the Applicant on **1st November, 2021**.

3. The Applicant has deposed that he was arrested and charged with the offence of obtaining money by false pretences in **Makadara Law Courts, Criminal Case No.1484 of 2016, REPUBLIC –vs- DANIEL OMONDI ODEMBA** on **27th May, 2016**. That after a full trial, the Applicant was convicted and sentenced vide a Judgment delivered on **21st October, 2021** whereby he was fined a sum of Kshs.500,000/- or in default serve an imprisonment term of two (2) years. The Applicant has also deposed that in addition to the sentence, he was directed by the court to compensate the complainant a sum of Kshs.4,229,000/=, which compensation was to take precedence.

4. It is the Applicant's deposition that a part of the conviction and sentence have aggrieved him, hence has lodged an appeal. But while the appeal is pending hearing and determination, the Applicant has sought to be admitted on bail. According to the Applicant, his appeal has overwhelming chances of success which he has gone on to outline on the face of the application and the **Supporting Affidavit**.
5. When the application came up for hearing, both Counsel opted to canvass the same orally.
6. In his submissions, Counsel for the Applicant, **Mr. Amalemba** submitted that while the Applicant can afford to pay the fine that he was ordered to pay, he is unable to do so because of the condition imposed that the compensation of Kshs.4,229,000/= to the complainant be paid first. He states that the Applicant was not given a chance to respond to the issue of compensation and no justification was given by the court for the said order.
7. Counsel for the Applicant has submitted that the intended appeal has a high or overwhelming chances of success in view of the issues raised in the grounds of the Petition of Appeal.
8. **Mr. Swaka**, Counsel for the Applicant has further submitted that his client suffers from high blood pressure, diabetes and hence requires specialized observation and treatment, so that they are apprehensive with such underlying conditions, he is at risk of being infected with the Corona virus in this Covid-19 Pandemic times due to congestion within the prison facilities. There is no guarantee that there will be social distancing.
9. **Mr. Chebii**, Counsel for the State orally opposed the application on the ground that having perused the appeal document, the same does not exhibit any overwhelming chances of success since the case against the Applicant was proved beyond reasonable doubt. He submitted that the compensation was ordered as per **Section 24** of the **Penal Code** on punishment which provides for the sentences a court can pass against any person and that it is at the discretion of the court.
10. He however, submitted that the Applicant could be ordered to deposit the amount equivalent to the compensation in court, then pay out the fine as the appeal proceeds. He further opined that the Applicant could access even the most specialized medical facilities at the prison.
11. I have considered the application, **Supporting Affidavit** of the Applicant and the oral submissions by Counsel for both parties. The issue for determination is whether or not to grant the Applicant bail/bond pending as sought for in the application.
12. This court is clothed with the power to grant bail or bond with or without sureties, or to suspend execution of any sentence imposed by a subordinate court pending the hearing of the appeal by **Section 357** of the **Criminal Procedure Code** which provides:-

357. Admission to bail or suspension of sentence pending appeal-

(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.

(2) If the appeal is ultimately dismissed and the original sentence confirmed, or some other sentence of imprisonment substituted therefor, the time during which the appellant has been released on bail or during which the sentence has been suspended shall be excluded in

computing the term of imprisonment to which he is finally sentenced.

(3) The Chief Justice may make rules of court to regulate the procedure in cases under this section.

In granting bail pending appeal, the court is obliged to consider the circumstances of each case so as to exercise its discretion judiciously and not capriciously.

13. In the case of **Mutua -vs- R [1988], KLR, 497**, the Court of Appeal stated that:-

“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”.

14. In the case of **Jivraj Shah -vs- Republic [1980] KLR, 605**, the Court of Appeal set out the parameters to be considered by an appellate court in application for bail/bond pending appeal;-

a) 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 interests of justice to grant bail.

b) If 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, conditions for granting bail will exist.

c) The main criteria is that there is no difference between overwhelming chances of success and a 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.

15. It is therefore clear that in an application for bail pending appeal, the Applicant must establish the existence of exceptional or unusual circumstances, and whether the Applicant has established that the appeal has a high chance of success to enable the court rule in his favour.

16. Having read through the application, Supporting Affidavit and listened to both Counsel in their oral submissions, I have also read through the proceedings and Judgment of the trial court together with the statute and case law. I find that through his Counsel, the Applicant has cited ten(10) grounds of appeal and in arguing the application, argued that the appeal has overwhelming chances of success, which the Respondent’s Counsel has opposed arguing that the prosecution proved their case against the Applicant beyond reasonable doubt for the offence he was charged with.

17. It is trite that it is not for the court to delve into the merits of each ground at this stage but it should suffice that all the grounds are examined, and a conclusion is made *prima facie* the prospects of the appeal succeeding are either high or low.

18. I have examined the grounds of appeal that the Applicant has raised and find the issues raised by the Applicant arguable but in my opinion should be left to the court that will determine the appeal for re-evaluation of the evidence and a decision made thereto.

19. With regard to whether there exist any unusual and exceptional circumstances, it has been raised and the court has taken note of the fact that the Applicant was sentenced to pay a fine of Kshs.500,000/= or in default, serve two (2) years imprisonment. Further, the Applicant was ordered to pay to the complainant compensation of Kshs.4,225,000/=, which compensation was directed to take precedence of the said sentence.

20. According to the Applicant's Counsel in their submissions, the condition has made it difficult for the Applicant to secure his release even if he could afford the fine.

21. The Respondent's Counsel on the other hand argues that the issue of compensation is provided for by the law at **Section 24** of the **Penal Code** as a sentence and the same is usually at the discretion of the court.

22. I have read through the legal provision with regard to the issue of compensation as part of a sentence a court may order, and in my view, while the same is legally provided for, there are parameters set out in the law within which the same should be provided. I find the sentence wanting and an impediment to the Applicant's right to be heard with regard to the same. But as indicated above, I will not venture into those parameters at this stage and leave the same to be considered on appeal.

23. On the issue of the Applicant being hypertensive and diabetic, I find that the same do not constitute exceptional circumstances, for the Applicant's condition can be managed at the prison facility.

24. In view of the exceptional circumstances that I have pointed out with regard to the sentence that was meted against the Applicant, and conditions attached thereto, I find the application merited allow the same on the following terms:-

a) The Applicant may be released on cash bail of Kshs.1,000,000/= and the cash bail deposited by the Applicant during the trial in the lower court to apply herein, pending the hearing and determination of the appeal.

b) The execution of the sentence imposed by the trial court be and is hereby suspended pending the determination of the Appeal.

Orders accordingly.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED THIS 16TH DAY OF NOVEMBER , 2021.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Amalemba for Applicant

M/S Akunja Counsel for Respondent

Court Assistant - Gitonga