



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO. 1 OF 2019

(Appeal Originating from Nyahururu CM's Court

Cr.No.2531 of 2016 by Hon. S.N. Mwangi – S.R.M.)

JOHN KIHONGE NJERI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

R U L I N G

By the application dated 04/05/2020, *John Kihonge Njeri*, seeks to be released on bail/bond pending the hearing and determination of his appeal. The application is brought under *Section 357 of the Criminal Procedure Code, Articles 51 and 165 of the Constitution*.

On 10/01/2019, the applicant was convicted by Hon. Susan Njeri (SRM) on several offences inter alia making a document without authority contrary to Section 357(a) of the Penal Code and was sentenced to nine years and six months imprisonment. The applicant is dissatisfied with the judgment of the trial court and has filed an appeal on 17/01/2019.

The on grounds upon which the application is made are inter alia, that the appeal has high chances of success, that the appellant was out on bond of Kshs.60,000/- during the trial in the lower court and he attended the court faithfully; that the appellant has a permanent place of abode and a business at Nyahururu Town in Laikipia County with a young family and therefore not a flight risk and that he is ready to abide with all the terms that the court will grant. The applicant contends that it might take long before the appeal is heard because he applied for typed proceedings but is yet to be supplied with them because of the Covid – 19 Pandemic; that if bond is not granted, he is likely to serve a substantial part of the sentence before the appeal is heard. The application was supported by an affidavit sworn by the appellant's Counsel Mr. Waichungo. He also filed written submissions on 29/05/2020.

In his submissions, Counsel reiterated the grounds upon which the application is premised and urged that since 31/10/2016 when the appellant was granted bond till 10/01/2019 when he was convicted, the appellant faithfully attended court.

Counsel submitted that in considering such an application, the court is guided by the following principles;

- 1. Whether the appeal has high chances of success;***
- 2. Whether there is a possibility of delay in the determining of the Appeal;***
- 3. Whether the applicant is a first offender;***
- 4. Whether the applicant complied with the bail terms during his trial in the trial court.***

On whether there are high chances of success Counsel relied on the case of *Somo vs Republic (1972) E.A. 476* which considered the above principle as being the most important. Counsel argued that the appeal has raised 13 grounds of appeal in which points of law and fact are raised and even though the proceedings are yet to be typed, it can be gleaned from the grounds of appeal. Counsel for the above argument, also relied on the decision of *Charles Owangu Aluoch vs Republic Cr. Appeal 164/2013 Nku*. Counsel also relied on the fact that the appellant was treated as a first offender and had attended court during the trial. For that submission, Counsel relied on the decision of *Samuel Macharia Njagi vs Republic Cr. Appeal 50/2013*.

The application was opposed and Ms. Rugut filed her submissions on 17/06/2020. Counsel relied on the decision of *Jivraj Shah vs Republic (1986) eKLR* where the court set down the principles to guide the court in such an application which include;

- 1. The existence of exceptional or unusual circumstances upon which a Court of Appeal can fairly conclude that it is in the interest of justice to grant bail;**
- 2. Whether the appeal has overwhelming chances of success;**
- 3. Whether there is a likelihood of the appellant having served a substantial part of the sentence by the time the Appeal is heard and determined.**

Counsel urged the court to recall that because of the conviction, the appellant has lost his right of presumption of innocence.

Counsel further submitted that at page 27 paragraph 4.3.0 of the Bail and Bond Policy Guidelines, it provides that the burden lies on the applicant to demonstrate that there are overwhelming chances of success. That the appellant has only attached the judgment of the trial court without the proceedings which is not enough to demonstrate whether or not the appeal has high chances of success.

As for whether there will be a delay in hearing the appeal, Counsel submitted that the appellant was sentenced to serve 10 years imprisonment on 11/01/2019 and if he has applied for proceedings it is unlikely that he will serve a substantial part of the sentence before his appeal is heard. Counsel urged that the courts are upscaling their operations and there is no possibility of delay in determining the appeal.

Counsel argued that the appellant has not demonstrated that there are any exceptional circumstances to warrant the grant of the order. Counsel also argued that even the appellant's previous good character and hardships facing his family are not unusual or exceptional circumstances. See *(Dominic Karanja vs Republic (1986) KLR 612)*. Counsel added that the fact that the appellant did not breach the bail conditions is not a special circumstance to entitle him to bond pending appeal.

I have considered the application and the submissions of both Counsel. Having been convicted, the appellant has lost his right of presumption of innocence a right that is available to an accused who is yet to be convicted. It is the duty of the applicant who wants the court to exercise its discretion in his favour to demonstrate that he is entitled to be released on bond. In the case *Jivraj Shah (supra)* the court set down the legal parameters in an application for bail pending appeal. The court said;

“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 a substantial part of it, will have been served by the time the appeal is heard, conditions for granting bond exist. The decision in Somo vs Republic (1972) EA 476 which was referred to by this court with approval in Cr. App. No. Nrb. 14 of 1986 Daniel Dominic Karanja vs Republic where the main criteria was stated to be the existence of overwhelming chances of a success does not differ from a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed.”

The principles espoused in the above cited case are the main considerations in an application for bail pending appeal. However, in exercise of the court's discretion, and because each case depends on its own peculiar circumstances, there may be other exceptional circumstances to be considered.

The applicant did not avail the typed proceedings in the trial court to enable the court without going into any detail, appreciate whether the appellant has arguable grounds. The listed grounds of appeal are not enough for the court to know whether or not the appeal has high chances of success.

On whether the applicant is likely to serve a substantial part of the sentence before the appeal is heard, the appellant deponed that he applied for typed proceedings of the lower court but has so far not received them. However, he did not attach anything like a letter requesting for proceedings or payment for the same, to demonstrate that indeed he is keen on appealing and that indeed he has already applied for the proceedings.

The court appreciates that there has been a slowdown in the operations of the court due to the Covid – 19 pandemic. Even though the courts are trying to upscaling, things will not return to normalcy any soon. The applicant was convicted on 10/01/2019. He has already been in prison for 1 ½ years. Since the proceedings are not yet typed and this court has no idea when they may be ready, it is likely that the applicant is likely to serve a substantial part of his sentence before the appeal can be heard.

In my view, the fact that the applicant was on bond in the trial court and attended court faithfully cannot be an only reason I would grant him bond. In the case of *Samuel Machria Ngugi (supra)* apart from the fact the court considered that he applicant had been on bond, the court also found that the appeal had high chances of success.

Having found that it may take long before the appeal is heard and the appellant may have served a substantial part of the sentence, I am satisfied that the appellant is deserving of an order of bond pending appeal. I allow the application, I hereby grant the applicant bond of KShs.300,000/- with one surety of the same amount.

Dated, Signed and Delivered at Nyahururu this 16th day of July, 2020.

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R.P.V. Wendoh

JUDGE

PRESENT:

(Virtual hearing)

Ms. Rugut for State Counsel

Ms. Wanjiru Muriithi for applicant

Eric – Court Assistant

Applicant - present