



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL CASE NO. 240 OF 2019

RASTUS OTIENO ARUM.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

RULING

The matter now comes up for the application of the applicant RASTUS OTIENO ARUM dated 26.11.2019. The same is shown to be brought under Article 46 of the constitution and section 357(1) of the Criminal Procedure Code. It is supported by the affidavit of the Applicant dated 26.11.2019. In the submissions made to court on 12.6.2019, Mr. Ogwe for the applicant stressed that the same seeks that the applicant be placed on bail pending the hearing and determination of the appeal he has filed. Counsel made only short submissions that the applicant is the breadwinner of his family, and that in the lower court, he attended his trial without fail. That he is therefore not a flight risk.

Ms. Chege, appearing for the state, opposed this application she stated that the applicant was tried and convicted on 21.11.2019 and sentenced on the several counts charged. That the test of bond pending appeal is different from that of bond pending trial since the applicant does not now enjoy the benefit of the right to presumption of innocence. It was her plea that this application lacks merit and ought to be dismissed.

In a short further response, counsel for the applicant went on that since the appeal is yet to be heard, it is not possible to determine whether the same has high chances of success.

I have considered the submissions of both sides regarding this matter. A perusal of the file herein reveals that the applicant first filed for bail pending appeal vide the application dated 26.11.2019. A similar application dated 9.4.2020 was again filed by the applicant seeking the same orders. I can only conclude that this has been occasioned by the partial lockdown of the courts out of the COVID 19 pandemic necessitating that pleadings be filed online. The parties otherwise made submissions based on the initial application dated 26.11.2019. This determination would relate to these 2 applications since they are similar in all their substance.

It is clear from the heading of this application that the same is basically brought under section 357(1) of the Criminal Procedure Code. This section provides;

Section 357(1)

“After 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 the order appealed against shall be suspended pending the hearing of his appeal.”

This application is therefore for bail pending appeal. It means that the applicant was duly tried, convicted and sentenced. This distinction is material as it is what makes the difference between bail pending trial under section 123 of the Criminal Procedure Code, and Article 49(1)(h) of the constitution, and bail pending appeal under section 357 of the Criminal Procedure Code as in our present case.

With respect, the submissions made by the Applicant that he is not a flight risk as he duly attended his trial, and that he is the sole breadwinner of his family, to me would be more relevant on the issue of bail pending trial. Similarly, his health conditions would be a major consideration for bail pending trial. And that is when the innocence of the accused would still be presumed.

In the court of Appeal case of Mutua Versus. Republic (1988)KLR, 497, the court held;

“It must be remembered that the 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.”

The above decision of the Court of Appeal directs that for bail pending appeal to be granted, the applicant must show a good reason.

The more recent decision of the Court of Appeal in Jackson Maina Wangui Versus Republic (2018)eKLR, aptly directs on the standards to be applied in the grant of bail pending appeal. Thus;

“The applicant must demonstrate that the appeal has overwhelming chances of success and that exceptional and unusual circumstances exist in the appeal.”

And this has been our jurisprudence all along. In the Somo versus Republic (1972)EA476 the court held that the applicant must demonstrate the existence of overwhelming chances of success. That the appeal is strong, so meritorious, that at the end, the probabilities would favour acquittal. And the onus of proving this is on the applicant.

So, did the applicant herein prove that his appeal has overwhelming chances of success? In the submissions made, the applicant only pleaded on how he would not abscond if released on bail, that he is his family’s breadwinner and that he is of ill-health. No submissions were made to convince this court that the appeal as filed stands an overwhelming chance of succeeding. Failure to meet this burden means that the application(s) for bail filed by the applicant dated 26.11.2019 (and 9.4.2020) must fail. I dismiss both accordingly.

D. O. OGEMBO

JUDGE

10.7.2020

Court:

Ruling read out in open court (Skype) in presence of the applicant and Mr. Mutuma for the state.

D. O. OGEMBO

JUDGE

10.7.2020