



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CRIMINAL APPEAL NO. 76 OF 2020

RACHAEL MUTHIKE JOHN.....APPELLANT/APPLICANT

-VERSUS

REPUBLIC.....RESPONDENT

RULING

1. This is the Notice of Motion application dated 17th August 2020. The Applicant seeks an order of bail pending the hearing and determination of Makueni HCCRA No. 76 of 2020. It is premised on the following grounds:

- a) **That** the Appellant/Applicant was convicted and sentenced to pay a fine of Kshs.2,000,000/= in default to serve five (5) years imprisonment.
- b) **That** the Appellant/Applicant has already preferred an appeal being Makueni Criminal Appeal No. 76 of 2020.
- c) **That** the appeal lodged raises serious matters of law and has overwhelming chances of success.
- d) **That** during the entire criminal proceedings in Makindu, the Applicant was on bail and she dutifully attended court and adhered to set bail terms therein.
- e) **That** the Applicant is therefore not a flight risk.

2. The application is also supported by the Applicant's sworn affidavit in which she restates the above grounds. She adds that she is a single mother with a small child who is barely three (3) years of age. That owing to the COVID – 19 pandemic she finds it difficult to survive the harsh prison life. She adds that during the trial she was on bond and complied with the bond terms and conditions and she is not a flight risk.

3. The Respondent filed a replying affidavit through learned counsel M/s Eunice Gitau, who has deponed that the Applicant has not demonstrated any exceptional circumstances to warrant the granting of bond pending appeal. That she has also not shown what caused the delay in the disposal of the appeal.

4. She avers that the prison takes precautions before admission of persons at the facility to avoid the spread of COVID -19 and so there is nothing special about it. Counsel also depones that the Applicant has not shown any special circumstances pertaining to her child.

5. The application was disposed of by written submissions.

6. In his submissions, learned counsel for the Appellant/Applicant Mr. Masaviru for the Appellant/Applicant admits that upon conviction the Appellant/Applicant lost her automatic right to bond/bail under Article 50(2) (q) of the Constitution. He is however quick to add that the Appellant/Applicant has the right to appeal guaranteed under the Constitution which is the corner stone of the justice system and no one should be punished without the benefit of the due process. To him incarceration before hearing and determination of an appeal amounts to violation of the Appellant's human rights and freedom. He has referred to the case of **Chimambhai –vs. Republic No. 2 (1971) E.A 343**.

7. He further cites the case of **Arvind Patel –vs- Uganda S.C Criminal Application No. 1 of 2003** where the following considerations were cited for purposes of an application for bond/bail pending appeal:

- a) *The character of the Applicant;*
- b) *Whether he/she is a first offender or not.*

c) Whether the offence of which the Applicant was convicted involved personal violence;

d) The appeal is not frivolous and has a reasonable possibility of success.

e) The possibility of substantial delay in the determination of the appeal.

f) Whether the Applicant has complied with bail conditions granted after the Applicant's conviction and during the pendency of the appeal (if any).

8. He submits that the Applicant has demonstrated that she deserves to be released on bail pending appeal. Further that she has a very strong appeal with high chances of success.

9. Learned counsel M/s Eunice Gitau submits and sets out the principles for granting bond pending an appeal as outlined in the case of **Jivraj Shah –vs- Republic (1986) KLR 605**. She summarizes them as:

i. Exceptional or unusual circumstances making it possible for the court to grant bond/bail.

ii. Appeal having a likelihood of success and the sentence or a substantial part of it being served before the appeal is heard.

iii. Likelihood of success of the appeal grounded on the set of circumstances disclosing substantial merit in the appeal.

10. It is counsel's submission that besides stating that the appeal has high chances of success the Applicant has not demonstrated any particular ground or grounds she is relying on for the said success. She argues that no unusual circumstances have been given to necessitate the granting of the bond sought. To her, the COVID-19 pandemic is not unusual in the circumstances of this case. She cites the case of **Dominic Karanja –vs- Republic (1986) KLR 612** where the Court of appeal stated *inter alia*:

“... (b) The previous good character of the Applicant and the hardships if any facing his family were not exceptional or unusual factors. Ill health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners;

(c) A solemn assertion by an Applicant that he will not abscond if released, even if it is supported by sureties, is not sufficient ground for releasing a convicted person on bail pending appeal; ...”

11. It's her submission that since the applicant's conviction still stands she lacks the advantage of Article 49 of the Constitution. She urged the court to dismiss the application and let the Applicant remain in prison during the hearing of the appeal.

Analysis and determination

12. I have considered the application and the submissions by both parties. The provision of the Law that deals with bond/bail pending appeal is section 357 of the Criminal Procedure Code which provides as follows:

Section 357(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

section 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.

Section 357(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.

13. The principles for granting bond/bail pending an appeal have been reiterated in the case of **Jivraj Shah –vs- Republic (supra)** which laid down the principles as follows:

i. The principal consideration in an application for bond pending appeal is the existence of exceptional or unusual circumstances upon which the court of appeal can fairly conclude that it is in the interest of justice to grant bail.

ii. 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 argued and that the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail exists.

iii. 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.”

14. In the case of **Chimambhai vs- Republic (1971) E.A 343 J. Harris** stated thus:

“the case of an appellant under sentence of imprisonment seeking bond lacks one of the strongest elements normally available to an accused person seeking bail before trial, namely the presumption of innocence, but nevertheless the law of today frankly recognizes, to an extent at one time unknown, the possibility of the conviction being erroneous or the punishment excessive, a recognition which is implicit in the legislation creating the right of appeal in criminal cases”

15. I have also looked at the considerations set out in the case of **Arvind Patel –vs- Republic (supra)** and **Dominic Karanja –vs- Republic (supra)**. I have equally examined the grounds of appeal and the averments by the Applicant. She states that the appeal raises serious issues of facts and law. That she is a single mother with a small child. She did not attach any documents to support the ages of her children or any challenges they may be having. She did not also attach any document to support any challenges to her health.

16. She further claims that her defence was not considered by the trial court. Before this court is only a copy of the judgment which I have carefully read, with the summarized evidence by the learned trial Magistrate. I find that he did consider the defence and made a conclusion. Without the proceedings I may not know what was considered and what may not have been considered. I would not also know what she told the court in her mitigation.

17. The Applicant was fined Kshs.2,000,000/= in default five (5) years imprisonment. There is nothing laid before this court to show that there will be any delay in hearing the appeal. The Deputy registrar has already called for the original record and copy of proceedings and judgment from the lower court on 12th August 2020. It's already here.

18. I find no exceptional or unusual circumstances raised to warrant the grant of bond/bail pending appeal. The application is therefore dismissed.

Delivered, signed & dated this 11th day of November 2020, in open court at Makueni.

.....

H. I. Ong'udi

Judge