



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 2 OF 2019

NIZARETA RWAMBA.....APPELLANT/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

A. Introduction

1. This ruling is in regard to the application dated 22nd January 2019. The application seeks the following orders:

a) That the appellant/applicant be granted bail pending appeal.

b) That there be a stay of execution of the ten (10) year imprisonment imposed upon her by the Senior Principle Magistrate on the 11th December 2019 until the appeal herein is heard and determined.

2. The applicant was charged and convicted on two offences. Count I is of aiding in female genital mutilation contrary to Section 20 as read with Section 29 of the prohibition of female genital mutilation act (No. 32 of 2011) Laws of Kenya. Count II is of use of premises to perform female genital mutilation contrary to Section 22 as read with Section 29 of the prohibition of female genital mutilation act (No. 32 of 2011) Laws of Kenya. She was sentenced to serve seven (7) years imprisonment on the first count and three (3) years on count I and three (3) years' imprisonment on count II.

B. Applicant's Case

3. It is the applicant's argument that the appeal is against the whole judgement, conviction and sentence and has overwhelming chances of success. It is stated that the offence she was convicted is bailable and that she was on bail during trial whereas she complied with the terms.

4. The applicant further states that she is 69 years old and suffers from hypertension and rheumatoid arthritis and thus requires constant and regular medical management. It is the applicant's case that the hearing of the appeal will take long and that she may complete her sentence before the appeal is heard and determined.

C. Respondent's Case

5. The prosecution filed their response to the application vide a replying affidavit dated 22nd February 2019 in which they opposed the grant of bail to the applicant pending the hearing and determination of the appeal. It is the respondent's case that there were no inconsistencies in the witness testimonies and the that the evidence on record supported the applicant's conviction and sentence.

6. It is the prosecution's case that the purpose for which the sentence was meted out shall not be served if the Applicant is released on bail pending the hearing of her appeal considering the victim of the offence had suffered an irreversible impairment. Further the prosecution states that the applicant has not demonstrated how her appeal before this court has a high chance of success.

7. The respondent further states that the cumulative sentence meted out on the applicant was too lenient in light of the seriousness of the offences she was charged with. Considering that the applicant was the principal care giver of the victim, she ought to have protected her but she went ahead and colluded with other people to occasion the young girl grievous harm.

D. Analysis of the Law

8. Having carefully considered the application and the pleadings of the parties, I find that the only issue for determination is **whether the**

Applicant should be granted bail pending appeal.

9. Section 357 (1) of the Criminal Procedure Code provides admission to bail pending appeal, it states 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.”

10. In the case of **Jivraj Shah versus Republic [1986] KLR 605** the principles for grant of bail pending appeal were established as:

a. The existence of exceptional or unusual circumstances upon which the Court of

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 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.

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 the weight and relevance of the points to be argued.

11. It is important to note that the case of an appellant under sentence of imprisonment seeking bail lacks some of the elements that may favour an accused person seeking bail before trial, that is the presumption of innocence. The law, however, recognizes that there is a possibility that the conviction may be erroneous or the punishment excessive. See the case of **Chimambhai versus Republic [1971] E.A. 343.**

12. In this application, Ms. Muriuki for the applicant argued that the appeal has overwhelming chances of success. The applicant’s petition for appeal dated 16th January 2019 raises six (6) grounds of appeal. It is trite law that it is not for the court to delve into the merits of each ground but it should suffice that all the grounds are examined, and a conclusion is made on whether the appeal has high chances of success.

13. I have carefully examined the grounds of appeal raised by the applicant which fault the trial magistrate for misdirecting herself in law. It is alleged that, the magistrate shifted burden of proof to the applicant which was wrong. Further that the defence was disregarded and that the sentence was harsh, oppressive and excessive.

14. I have also carefully perused the proceedings and Judgment in **SPMC Runyenjes No. 474 of 20175** and found that the trial magistrate addressed most of the issues raised by the appellant. The evidence was evaluated and the relevant law was applied. Reason for conviction were given which have not been challenged in this appeal thus diminishing the chances of success of the appeal.

15. The applicant is required to establish that there exists exceptional circumstances to warrant the appellant to be admitted to bail pending appeal. The applicant in her pleadings states that she is 69 years old and suffers from hypertension and rheumatoid arthritis and thus requires constant and regular medical management. She further states that the offence she was convicted and sentenced of is bailable, further that she was on bail during trial and she complied with the terms. The applicant further states that if the court upholds the conviction there is a likelihood that the court may vary the sentence and substitute it with a non-custodial sentence.

16. In the case of **Peter Hinga Ngatho versus Republic [2015] eKLR** which cited the case of **Krishnan versus The People** it was held that the fact that the applicant did not breach the bail conditions in the court below, is not an exceptional circumstance which can warrant a decision to admit an applicant to bail pending appeal.

17. As for the applicant being hypertensive and requiring regular medical attention, I note that no medical report was annexed to this application to support her claim. I am aware that Kenyan prisons have medical facilities for use by prisoners. Any medical condition that facilities may not handle will be referred to the county government facilities.

18. It has not been shown that the applicant’s condition, if any, cannot be treated in the prison medical facilities.

19. I find that the appellant has not proved existence of any exceptional circumstances warranting grant of bail pending appeal.

20. The sentence in count 1 is seven years’ imprisonment. It is not possible that an appeal in this court will take a long time to be determined given that the appeals being fixed for hearing are recent ones. This rules out the possibility that the full sentence may be served before the appeal is heard and determined.

21. I find no merit in this application and it is hereby dismissed.

22. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 6TH DAY OF MAY, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Muriuki for Ithiga for Applicant

Ms. Mati for Respondent

Appellant present in person