



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL NO. 12 OF 2019

PATRICIA ALUOCH OKETCH.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. On 14th March, 2019; the Applicant/Appellant was convicted on three counts of forgery contrary to section 349 of the Penal Code Cap 63 Laws of Kenya and was on 20th March, 2019 sentenced to serve eighteen (18) concurrent months' imprisonment in each count.

2. By a Notice of Motion dated 4th April, 2019 brought under Article 49 of the Constitution and Sections 356 and 357 of the Criminal Procedure Code the Applicant/Appellant has moved the court praying for orders that:

This Honourable Court be pleased to admit and or grant the applicant bail pending the hearing and determination of the appeal on such terms as the Honourable Court shall deem fit, appropriate and expedient in the circumstances

3. The application is based on the grounds **THAT**:

a. The applicant's health is deteriorating and that the Prison Health Centre has indicated that it cannot manage her health

b. The appeal has high chances of success

c. Applicant is a first offender

d. The applicant was on bond during the trial

e. Application is ready, able and willing to adhere to and abide by any such reasonable terms and conditions as the court shall impose

4. The application is supported by the Applicant/Appellant's affidavit sworn on 4th April, 2019 in which she reiterates the grounds on the face of the application. Attached to the affidavit are sale agreements, probation officer's report and medical reports from Prison and Kisumu County and Referral Hospital marked **POA 1, 2 and 3** respectively. At the hearing, Mr. Achura, advocate for the Applicant/Appellant stated that he was placing reliance on **Mungai Wachanga Hinga v Republic [2016] eKLR**.

5. Ms. Gathu, learned counsel for the state opposed the application on the grounds that that Article 49 of the Constitution was not available to a convict; that Applicant/Appellant's sickness was not an exceptional circumstance for bond pending appeal and finally that it had not been demonstrated that the appeal had high chances of success.

6. I have carefully considered the application, the submissions and cited authority. Section 357 of the Criminal Procedure Code provides: -

(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

7. This court is thus clothed with the power to grant bail/bond with or without sureties, or to suspend execution of any sentence imposed by the subordinate court pending the hearing of the appeal. In granting bail pending appeal, the court is obliged to consider the circumstances of each case so that the discretion is exercised judiciously and not capriciously.

8. 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 applications for bail 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.

9. In *Mutua v R, [1988] KLR 497* the Court of Appeal stated thus:

“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.”

10. In view of the foregoing, the onus is always on the appellant to demonstrate to the court that there are good reasons why he/she should not be allowed to continue serving sentence but should be allowed to enjoy his/her liberty pending the hearing and determination of his or her appeal.

11. The Applicant/Appellant herein has not demonstrated to the court, through affidavit that there exist a set of circumstances which disclose substantial merit in the appeal. The contention that the Prison Health Centre has indicated that it cannot manage Applicant/Appellant's hypertension and diabetes is not supported by the medical report from that facility which only indicates that her condition is currently poorly controlled. And even if that be so, the facility has a duty to refer the Applicant/Appellant to any other health facility for necessary treatment. Further to the foregoing, I have personal knowledge of the fact that dates for hearing of appeals are available and that the appeal is likely to be heard before sentence is served.

12. Regarding compelling reasons provided for under the provisions of Article 49(1) (h) of the Constitution, I am in agreement with the state that the Applicant/Appellant herein cannot benefit from the said right which guarantees an accused the right to be released on bond or bail, on reasonable conditions, pending a charge and trial, unless there are compelling reasons not to be released, since she is not an accused but a convict. (*Emphasis mine*)

Disposition

13. For all the foregoing reasons, I have come to the conclusion that the Applicant/Appellant has not passed the test for grant of bond pending appeal. The Notice of Motion dated 4th April, 2019 is not merited and it is accordingly dismissed.

SIGNED AND DELIVERED IN KISUMU THIS 9th DAY OF May 2019

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Appellant - Present

Counsel for the Appellant/Applicant - Ms Rabura

Counsel for the State - Ms Gatho