



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 28 OF 2013

REPUBLIC..... PROSECUTOR

VERSUS

SAMMY NYAMWEYA NYABOGA 1ST ACCUSED

ALICE MORAA OMWENGA 2ND ACCUSED

RULING

1. Alice Moraa Omwenga (“Applicant”) was convicted of the murder of her husband, Edward Omwenga (“Deceased”). The trial was conducted by Justice Maureen Odero who wrote the judgment, and on whose behalf I read it. However, Justice Odero had been transferred out of the station so it was incumbent on me to carry out the sentence hearing. I ultimately sentenced the Applicant to fifteen years imprisonment.

2. The Applicant is dissatisfied with her conviction and sentence. She has preferred an appeal to the Court of Appeal. Contemporaneously with that appeal, the Applicant has filed the instant application with a single substantive prayer: that she be admitted to bail pending the hearing and determination of her appeal upon such terms and conditions as the Court may deem fit.

3. At the hearing of the Application, Mr. Kanyi Ngiure, counsel for the Applicant valiantly argued the grounds listed on the face of the Applicant’s Application. They are as follows:

a. That the Accused/Applicant who was sentenced for murder on 15th January, 2019 to serve a term of 15 years imprisonment is aggrieved by the conviction and has since lodged an appeal to the Court of Appeal whereby there is a likelihood that she may serve a substantial or full sentence term if her application for bail/bond is not granted.

b. That the Appeal against conviction may be rendered nugatory if the term of sentence is served and thereafter the Appeal turns successful.

c. That the Applicant is the only bread winner to four (4) Children aged between 21 years to 13 years and they all depend on her for upkeep and maintenance/education needs since their father was the deceased victim in the murder case.

d. That the Applicant does not pose any flight risk for she has deep roots and ties within the community at Kiti – Teachers Estate and have a permanent place of abode within Nakuru County at Kiti – Teachers Estate.

e. That the law allows under Section 6 of the Appellate Jurisdiction Act that a convicted person be granted bail/bond pending the hearing of their Criminal Appeal before the Court of Appeal

f. That the Applicant is ready and willing to abide with a condition to report to a public officer in authority for purposes of extinguishing any risk of absconding.

g. That the Applicant has only lodged a first Appeal to the Court of Appeal and there is no valid reason to deny bond unless the State furnishes a compelling reason why bond should not be granted.

h. That in the interests of justice, the Applicant’s Application for bond/bail pending full determination of her appeal ought to be granted otherwise she and her family will be available to suffer irreparable harm.

4. During the oral hearing of the Application, Mr. Kanyi argued that the Court has power to admit a person to bail pending Appeal. He referred to section 375 of the Criminal Procedure Code. He stressed that the Applicant was not sentenced to death and that therefore the main issue the Court should focus on is whether the Applicant is a flight risk. In this regard, Mr. Kanyi argued that the Applicant is not a flight risk as she has no incentive to abscond: that she is the sole bread winner of a young family of four and has deep roots in the community; that she had her own plot.

5. Mr. Kanyi also argued that the character and previous antecedents of the Applicant are favorable. That she was declared a first offender during the sentencing.

6. Turning to case law, Mr. Kanyi relied on three decisions. The first: **Jivraj Shah v Republic [1986] KLR 605** is a decision of the Court of Appeal of Kenya. In context, this decision would be binding if on all fours with the present case. The second: **George Onyango Anyango & Another v Republic [2016] eKLR**, is a decision of the High Court of Kenya. It is of persuasive value to this Court. So is the third decision relied on: **Cheeye v Uganda [2010] 1 EA 40-41**.

7. I have carefully read all three decisions and taken them into consideration.

8. Before I apply them and our emergent decisional law on the subject to the case at hand, I will state Mr. Kanyi's last argument. It is that he believes the Applicant has "weighty" grounds of appeal. Mr. Kanyi argued that the Applicant was convicted on "weak" circumstantial evidence. The weakness, he argued, was that the Government Chemist report fingered the Co-Accused who was acquitted because "the Court did not believe the evidence of the Arresting Officer." Mr. Kanyi submitted that in his defence, the Co-Accused did not rebut that the jacket had blood stains; and that it is therefore possible that the real killer was released. Based on this, Mr. Kanyi argued that there are "unusual and exceptional circumstances" in this case. Further, he argued that there is a possibility that the Accused will serve a substantial part of her sentence before her appeal is heard.

9. Mr. Chigiti, the Prosecution Counsel, strongly opposed the Application. He argued that the Applicant is a convict not an Accused person; that there is already a finding that she is guilty; that the Applicant has not shown any overwhelming chances of success. Mr. Chigiti argued that the sought can only be made in very exceptional circumstances and that no such circumstances have been shown in the present case. Finally, he argued that there is no evidence that she will serve substantial part of her sentence before the Appeal is heard and determined.

11. I should begin with the obvious point that bail pending disposition of an Appellant's case at the Court of Appeal is not an entitlement. Instead, it is generally a matter of the Court's discretion. There is no constitutional requirement to grant bail pending appeal. Article 49(i)(h) of the Constitution creates an entitlement to bail *pending a charge or trial* unless there are compelling reasons not to grant one. By its very terms, that section talks of bail to be granted before conviction and is an instance of the veritable legal principle that a person is presumed innocent until proven guilty. That presumption, however, dissipates upon a valid conviction. At that point, a different presumption kicks in: the presumption of the validity of the conviction and sentence imposed. See **Isaac Tulicha Guyo v. Republic (Crim. App. No. 16 of 2010)**. As the Court of Appeals said in the **Guyo Case**:

The Court has to bear in mind that a person who has been convicted by a competent court has lost the presumption of innocence conferred on him by the Constitution and that during the hearing of the pending appeal, the burden would be upon the convicted person to show that the conviction was wrong. It is not, therefore, surprising that it has been stated time and time again that bail pending appeal will only be granted in rare and exceptional circumstances.

11. Consequently, our jurisprudence has established the legal principles which should govern the granting of bail pending appeal. The court of Appeal succinctly restated those principles in the case of **Dominic Karanja v. Republic [1986] K.L.R. 612** thus:

That the most important issue was that if the appeal had such overwhelming chances of success, there was no justification for depriving the applicant of his liberty and the minor relevant consideration would be whether there were exceptional or unusual circumstances.

12. Similarly, in **Jivraj Shah v. Republic [1986] K.L.R. 605** which the Applicant's counsel cited, the Court of Appeal held:

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 interest of justice to grant bail. 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...The Main criteria is that there is no difference between overwhelming chances of success and a set of circumstances which discloses 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.

13. Hence, even after **Jivraj**, the test remains the same: the question here is whether the Applicant herein has satisfied the two-pronged **Karanja Test** spelled above. First, has the Applicant demonstrated that his appeal has overwhelming chances of success or are there circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed? Mr. Kanyi focused on the "weakness" of the circumstantial evidence which connected the Applicant to the murder. In my estimation, that is not an eminently palpable ground as urged before the same Court that reached the verdict, to come to the conclusion that it discloses substantial merit or overwhelming chances of success. It is certainly an arguable one; but certainly not one that reaches the threshold demanded for bail pending appeal. The less I say about the merits of the case the better, of course, lest I embarrass this Court or the Court of Appeal bench which will eventually hear the appeal or lest I prejudice the appeal.

14. It is true that where an Applicant is likely to serve the whole of her sentence or a substantial portion of it, that would form unusual and exceptional circumstances for consideration of bail pending appeal. Here, the Applicant was sentenced to fifteen years in prison. It is unlikely that she will serve a substantial portion of the sentence before her appeal is heard and determined by the Court of Appeal. If there

are any unusual circumstances which makes the Applicant believe that her appeal will not be heard timeously by the Court of Appeal, she did not bring them to the attention of this Court. Perhaps, therefore, her application for bail pending appeal is better suited for consideration by the Court of Appeal which has unique knowledge of its docket. As things stand, and with the information this Court has, I am unable to make a finding that the Applicant will serve a substantial portion of her judgment before her appeal is heard and determined.

15. Having failed to satisfy the requirement of showing overwhelming chances of success on the merits or that there are any exceptional or unusual circumstances, the Applicant's application must fail. In the circumstances, the Application for bail pending appeal is hereby dismissed.

16. Orders accordingly.

Dated and delivered at Nakuru this 6th day of June, 2019.

.....

JOEL NGUGI

JUDGE