



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CORAM: A.K NDUNG’U J.**

**MISC. CRIMINAL APPL. NO. 63 OF 2019**

**DOMINIC ANGOTE.....APPELLANT/APPLICANT**

**VERSUS**

**REPUBLIC through ODPP.....DEFENDANT/RESPONDENT**

*(An appeal from the Judgment and Order of Hon. Mobisa, PM dated and*

*delivered on the 9<sup>th</sup> day of July 2019 in the original SO Case No. 6 of 2019)*

**RULING**

1. Dominic Angote (hereinafter, the appellant) has moved this court vide the notice of motion dated 4/9/2019 seeking orders;

1. This honourable court be pleased to grant bond/bail terms to the appellant/applicant pending the hearing and determination of this appeal.
2. That in the alternative the execution of the order of the court appealed against and delivered on the 9<sup>th</sup> day of July 2019 by **Hon. Mobisa PM in SO CMCC No. 6 of 2018** be suspended pending the hearing and determination of this appeal.
3. This honourable court be pleased to issue such other/further orders as it may deem fit in the interests of justice.
4. The costs of this application be provided for.

2. The application is premised on grounds that;

1. The appellant being aggrieved and devastated by the conviction and sentence of the trial court delivered on 9<sup>th</sup> day of July 2019 by **Hon. Mobisa in SO CMCC NO. 6 of 2018** consequently lodged this appeal. (A Copy of the petition of appeal is annexed and marked as “DO1”)
2. The pending appeal has overwhelming chances of success and the appellant has taken the necessary steps to pursue the pending appeal with zeal.
3. The appellant stands to suffer great prejudice if this application is not granted,
4. The appellant should not be punished without the benefit of due process including the right to exhaust the right of appeal.
5. The appellant has parental duties under the Children Act No. 12 of 2012 and other financial obligations.
6. The appellant is not a flight risk as he has a physical address and residence at known places and that he is a family man with five children.
7. The respondent will not suffer any prejudice if any or all the orders sought herein are granted.

3. The application is further supported by the applicant’s affidavit sworn on the 4/9/2019.

4. The gist of the application as gleaned from the grounds and affidavit in support is that the applicant was convicted and sentenced in CMCC No. 6 of 2018. He was aggrieved by the conviction and sentence and has since appealed the decision. The sentence appealed against is a term of imprisonment for 20 years.
5. It is urged that the appeal has overwhelming chances of success and the applicant stands to suffer great prejudice if the application is not granted.
6. The applicant is not a flight risk and has parental duties under the Children Act and other financial obligations.
7. It is urged that no prejudice will be suffered by the respondent and that during the pendency of the trial at the lower court, he complied with bail conditions granted to him before the conviction and sentence.
8. At the hearing, oral arguments were advanced by Mr. Omwenga for the applicant and Mr. Otieno for the State.
9. It was submitted for the applicant that the appeal herein has overwhelming chances of success. The appellant will suffer great prejudice and he should not be punished before exhausting his legal rights. He has parental responsibilities. He is not a flight risk. He has a fixed abode and is a family man. He obeyed his bail terms at the trial court.
10. In opposing the application, Mr. Otieno submitted that the appellant is now a convict. He no longer enjoys the guarantee to bail for accused persons. The temptation to abscond is now higher. It is urged that he has to demonstrate exceptional circumstances. In addition, counsel maintains that appeals in this court are heard expeditiously. Indeed on the hearing day, it was stated there was an appeal filed after the applicant's appeal and it was slated for hearing on that day. The court was urged to dismiss the application.
11. In rejoinder, Mr. Omwenga submitted that the applicant has demonstrated exceptional circumstances. He reiterated that the applicant has a fixed abode and is a family man.
12. The principles applicable are clearly and exhaustively laid out in the Case of **Somo -Vs- Republic [1972] E.A 476** which followed the decision in **Lamba -Vs- R (1958) E.A 337**. The test is whether there are exceptional or unusual circumstances, the most important ground being whether the appeal has overwhelming chances of success. If the latter case is made out, there will be no justification for depriving the appellant his freedom.
13. It is worthwhile to state at the outset that the previous good character of the applicant and the hardship, if any, facing the wife or children of the applicant are not exceptional or unusual factors.
14. Further a solemn assertion by an applicant that he will not abscond if released is not sufficient ground, even with sureties, for releasing a convicted person on bail pending appeal. (See **Daniel Karanja -Vs- R (1986)eKLR**).
15. I have perused the application, the supporting grounds and the affidavit in support. I have considered the submissions on record. I note that this court is disadvantaged in that the application herein was prosecuted before the lower court record was called for and availed.
16. On the material before court I am respectfully of the view that at this stage there is no demonstration of an overwhelming chance of success of the appeal herein.
17. The application is dismissed.

**Dated and delivered at Kisii this 16<sup>th</sup> day of October 2018.**

**A.K NDUNG'U**

**JUDGE**