



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 48 OF 2019

JOHN KASOA MULI.....APPELLANT/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicant applied for bail pending determination of his appeal. The application was lodged by Notice of Motion under Article 19(3) (a) and 49(1)(h) of the Constitution.

2. The grounds of the application as contained in the Notice of Motion are:

a) The Applicant had been charged with the offence of rape where he pleaded not guilty to the charges but on 21.5.2019 the learned trial magistrate found him guilty as charged, convicted him and sentenced him to serve a 10 year imprisonment sentence.

b) That being aggrieved by the conviction and sentence of the learned trial magistrate, the applicant has since appealed against the said conviction and sentence by filing the present appeal.

c) The Applicant has been a responsible citizen and he has a permanent place of abode at Mbiuni, Mwala sub-county within Machakos County.

d) That during his trial at the Machakos court, the applicant had been released on bond and he always attended court without fail from the time plea was taken until the date he was convicted and sentenced by the court on 21.5.2019.

e) The applicant is ready and desirous of attending court each and every time he is require to do so and promises to do so until the appeal is heard and determined by this court.

f) The applicant has relatives who are ready to meet the reasonable cash bail/bond terms.

g) The appeal is merited and has overwhelming chances of success.

3. The application was filed in the court registry on 3rd June, 2019 and is supported by the affidavit of the Applicant commissioned on 30th May, 2019. In the affidavit in support of the application, the Applicant reiterated the grounds in the notice of motion and added that there were no compelling conditions to deny him bond/ bail pending the determination of the appeal. No copy of the petition of appeal is annexed to the supporting affidavit.

4. On record is grounds of opposition by Cliff Machogu to an application dated 9th April 2016 and which was filed on 15th July, 2019 as well as an undated replying affidavit by Cliff Machogu. The grounds of opposition to the application dated 9th April 2016 state as follows

a) That the applicant is serving a serious sentence for a serious offence for which he was convicted on the basis of overwhelming evidence.

b) That the applicant/respondent has not demonstrated that his appeal has overwhelming chances of success.

c) That based on grounds 1 and 2 above, grant of bond pending appeal at this stage shall jeopardize the respondent's case by defeating the very objective of conviction and sentence.

5. The affidavit in reply is that of Cliff Machogu Prosecution Counsel working with the office of the DPP. He found the prayer sought as

misconceived, unmerited and premature and should not be granted because the applicant has not demonstrated that his appeal has high chance of success. He averred that the assertion that an applicant will not abscond if released on bond even if he is supported by sureties is not sufficient ground for releasing a convicted person on bail/bond pending appeal. The deponent has alluded to an assertion that is not in the applicant's affidavit that he will serve a substantial part of his sentence and opposed the assertion by averring that the same lacks merit since this appeal will be heard within 45 days from the date herein. Cliff Machogu averred that the applicant/appellant has failed to satisfy the extreme high standard for bond pending appeal and he sought that the application be dismissed and that the appeal be set down for hearing.

6. The court directed that the application be canvassed vide written submissions. The office of the DPP which represented the Respondent has not filed submissions while Counsel Janet Jackson and Susan LLP who represented the Applicant filed their submissions dated 23rd July, 2019 on the same day.

7. The Applicant's Learned Counsel in her submissions reiterated the grounds in the Notice of Motion and Affidavit in support. The Applicant's case in summary is that Article 49(1) of the Constitution grants the applicant a right to be released on bond or bail. On the question of the grounds which an application for bail pending hearing and determination of an appeal may be granted Counsel directed the court to peruse the decision in **Kenneth Mwaniki Njoroge v R (2015) eKLR**. The decision held inter alia that an appeal with overwhelming chances of success is one ground. The second ground is previous good character of the appellant and thirdly a solemn assertion that the applicant would not abscond if released.

8. The Applicant's Counsel argued that the evidence of the lower court does not demonstrate that the prosecution proved its case beyond reasonable doubt because it was clear from evidence on record accepted by the trial magistrate that there is inconsistency on the date of commission of the offence; the witnesses testified that the applicant was arrested on the date of the offence whereas the charge sheet shows that the appellant was arrested on 25.5.2017 and that there was a time lapse between the arrest and the date of commission of the offence. The Applicant's Counsel submitted that the evidence of Pw3 differs from that of the complainant in terms of the weapons that the applicant was carrying and therefore the inconsistencies raise doubt as to the circumstances of commission of the offence. Learned counsel submitted that with regard to the character of the applicant, there is no bad record. Finally, counsel urged the court that the applicant was on bond during trial and he did not abscond and therefore it was just that the application be allowed.

9. I have carefully considered the application for bail pending appeal together with the evidence and taken into account the submissions of Counsel for the applicant. I do not need to belabour the conditions for grant of bail pending appeal which the court to set out in the case of **Jivraj Shah versus Republic [1986] KLR 605**. For emphasis the following principles are pertinent:

i. The existence of exceptional or unusual circumstances upon which the Court may rely upon.

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 the weight and relevance of the points to be argued.

10. A convicted person who knows he or she has little chance of succeeding on appeal is unlikely to wait patiently to serve what might be a severe sentence of imprisonment. Secondly if bail is to be granted to a person serving a severe sentence, very stringent conditions must be imposed. Bail pending appeal maybe granted when there are exceptional and unusual circumstances which depend on the facts of each case. Thirdly, bail may be granted if there is an overwhelming probability of the appeal succeeding. Last but not least bail would be granted if it is unlikely that the appeal would be heard until the end or after the expiration of the sentence appealed against.

11. In **Raghubir Singh Lamba v R [1958] 1 EA 337** (High Court of Tanganyika) Spry Ag J at page 338 it was held that the burden is on the prosecution pending trial why the accused should not be released on bail. The onus shifts to the accused to show why he or she should be released on bail pending appeal after his or her conviction and sentence.

12. In **Girdhar Dhanji Masrani v R [1960] 1 EA 320** Sheridan J, held that different principles should apply to applications for bail pending appeal after conviction compared to applications for bail pending trial. A person applying for bail pending appeal lacks one of the most important elements normally available to a person seeking bail before trial which is the presumption of innocence (See Harris J in **Chimambhai v Republic (No. 2) [1971] 1 EA 343 (High Court of Kenya at Mombasa)**).

13. In **Kaguma v Republic [2004] 1EA 68** it was reiterated by the Court of Appeal of Kenya following earlier precedents that *"The most important issue here is if the appeal has such overwhelming chances of success that there is no justification of or depriving the Applicant his liberty"*.

14. In **Kenneth Mwaniki v R (2015) eKLR** the court included the fact of previous good character of the applicant. Counsel for the Applicant argued that the applicant complied with bail terms that had previously been granted by the lower court. In the cited case, other factors to consider include an assertion not to abscond.

15. Bail pending appeal proceeds under Section 357 (1) of the Criminal Procedure Code which provides for admission to bail pending appeal as follows:

"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.”

16. The entitlement to bail is subject to compelling reasons as per Article 49(1) (h) of the Constitution, nevertheless the law is silent on what amounts to compelling reasons. In **Hassan Mahat Omar & Another Vs Republic, Nairobi High Court Criminal Revision No. 31 of 2013**, Lady Justice L. Achode rendered herself thus:-

"What amounts to compelling reasons as envisaged in Article 49(1) (h) of the Constitution is a matter of judicial discretion. Kenya does not have statutory guidelines to govern the granting of bail. However, a glimpse at pertinent laws of other common law countries such as the Bail Act of England and Section 60(4) of the Criminal Procedure Code of South Africa, gives us examples of issues to consider in determining whether or not compelling reasons exist in a given case."

17. In the Ugandan Trial on Indictments Act, exceptional circumstances are defined by section 15 (3) and additional factors are considered by section 15 (4) which are reproduced for ease of reference:

"(3) In this section, "exceptional circumstances" means any of the following-

(a) grave illness certified by a medical officer of the prison or other institution or place where the accused is detained as being incapable of adequate medical treatment while the accused is in custody;

(b) a certificate of no objection signed by the Director of Public Prosecutions; or

(c) the infancy or advanced age of the accused.

(4) In considering whether or not the accused is likely to abscond, the court may take into account the following factors-

(a) whether the accused has a fixed abode within the jurisdiction of the court or is ordinarily resident outside Uganda;

(b) whether the accused has sound securities within the jurisdiction to undertake that the accused shall comply with the conditions of his or her bail;

(c) whether the accused has on a previous occasion when released on bail failed to comply with the conditions of his or her bail; and

(d) whether there are other charges pending against the accused."

18. Bail after conviction cannot be considered more lightly than bail pending trial where exceptional circumstances have to be proved. In this case it is undisputed that the Applicant had been released on bail pending trial and complied with the bail terms until it was cancelled upon his conviction and sentence to a term of 10 years imprisonment. There is no evidence whatsoever that there are other charges pending against the Applicant.

19. Turning to the facts of this application, the first and main issue is whether the Applicant's appeal will succeed or whether the appeal has a high chance of success and the second is compelling reason or exceptional circumstances warranting the release of the Appellant on bail pending appeal that have been discussed above. The petition of appeal has not been annexed to the application. However the same is on the court record and was filed on 30th May, 2019.

20. The Applicant through his learned counsel, argued that the appeal has overwhelming chances of success. Learned counsel has filed a Petition for Appeal in which she raises ten (10) grounds for 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 that *prima facie* the prospects of success are dim or high.

21. I have carefully examined the grounds of appeal raised by the Applicant. The Applicant/Appellant raises issues such as the proof of the prosecution case and discrepancies and inconsistencies in the prosecution case. I could state that the appeal is arguable but am constrained to speak to the success of the appeal.

22. I note that the Respondent herein has also not offered sufficient reasons to show that the Appellant will abscond if granted bail. I am unable to accept the grounds of opposition because they refer to an application dated 9th April, 2016 that has not been availed to the court. These circumstances will work well towards the applicant.

23. Going back to the appeal, did the applicant rape the complainant? What were his acts? Were they proven? A perusal of the judgement of the trial court as against the charge sheet that was presented raises the question of whether the Applicant could have been convicted of the alternative charge. For the moment I cannot establish the same, however point out that the trial court did not make a finding on the alternative charge. In this regard, if the appeal succeeds on the main charge and perchance the alternative charge may succeed, the same attracts a sentence of not exceeding five years or to a fine of not exceeding fifty thousand shillings or to both under Section 11(A) of the Sexual Offences Act.

24. I am unable to consider the doctrine related to delays in hearing an appeal alluded to by the respondent, for the same has not been raised by the applicant. Be that as it may, there is no evidence that the appeal that was filed on 30th May, 2019 will not be heard within a year. Its hearing could be expedited. In fact the appeal has already been admitted and what is now remaining is for the parties to take directions on the disposal of the appeal. The common practice is that such appeals are disposed of by way of written submissions which can be wrapped up

within a month. Hence the appeal can easily be concluded without any delay. I find the applicant's apprehension on delay is not justified.

25. In the result I find the application dated 30/5/2019 lacks merit. The same is dismissed. Parties are hereby directed to fix the matter for directions on the disposal of the appeal.

It is so ordered.

Dated and delivered at Machakos this 14th day of October, 2019.

D. K. Kemei

Judge