



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 77 OF 2019

AMOS ODHIAMBO OKOTH.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(an application for bail pending appeal from Judgment , conviction and sentence in Siaya PM's Court Traffic Case No. 65 of 2019 dated 3/10/2019)

RULING ON BAIL PENDING APPEAL

1. By an application under certificate of urgency dated 22.10.2019, the appellant applicant herein has sought to be released on bail pending appeal.
2. The application which was certified as urgent and the trial court record submitted instant was heard interpartes on 30.10.2019 and argued orally with Mrs. Odoyo advocate representing the applicant/applicant and Mr. Ngetich Prosecution Counsel representing the Respondent State.
3. The application is erroneously brought under Order 357 of the Criminal procedure Code instead of Section 357 of the Criminal Procedure Code. I shall treat the error as a typo since the Criminal Procedure Code has no Orders like the Civil Procedure Act.
4. In her submissions, counsel for the appellant relied on her supporting affidavit and grounds on the face of the application and submitted that the Appellant is sickly in prison, that he has filed his petition of appeal which has high chances of success. That the investigation Officer did not explain the point of impact, that the cyclist was not licenced to ride a motor cycle, that her client is a first offender and that he religiously attended Court without fail hence if granted bail, he will attend this Court as and when required. Further, that the sentence of 2 years in prison, a fine of KShs.200,000/= and cancellation of his driving licence for 3 years was very harsh for a first offender.
5. Opposing the application, Mr. Ngetich prosecution Counsel submitted that there were no medical records tendered before this Court, that there was no mention whether the Applicant cannot be treated in prison as prison authorities have health facilities and they take prisoners to Major Hospitals.
6. On the submission that the appeal has high chances of success, the Prosecution Counsel submitted that the appeal has minimum chances of success as the appellant was driving the accident motor vehicle and that there were eyewitnesses who saw him and that they testified in court.
7. On sentence, counsel submitted that it was proper in law.
8. In a brief rejoinder, Mrs. Odoyo submitted that she had met her client in prison and that she had sworn what he told her that he was sickly although he did not get treatment notes. She emphasized that the applicant was is a first offender and that he was willing to abide by any conditions that the Court may impose.

DETERMINATION

9. Having carefully considered the application and the oral submissions of the parties' advocates on record, I find that the only issue for determination is whether the Applicant should be granted bail pending appeal.
10. Section 357 (1) of the Criminal Procedure Code provides admission to bail pending appeal, and states:

“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.”

11. In **Jivraj Shah versus Republic [1986] KLR 605** the principles for grant of bail pending appeal were set out as hereunder:

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

ii. 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.

12. These grounds can be narrowed down and stated as whether the appeal has overwhelming chances of success and whether there are exceptional circumstances warranting the release of the Appellant on bail pending appeal.

13. It is however, important to note that the case of an Appellant under sentence of imprisonment seeking bail lacks some of the elements that may be available to an accused person seeking bail pending trial which is, the presumption of innocence. Nonetheless, the law recognizes that there is a possibility that the conviction may be erroneous or the punishment might be excessive, as was held in **Chimambhai versus Republic [1971] E.A. 343**.

14. In the instant case, the Applicant through his counsel, Mrs. Odoyo argued that the appeal has overwhelming chances of success. Counsel has filed a Petition for Appeal dated 16th October 2019 raising seven (7) grounds of appeal.

15. It is however trite law that it is not for this court to delve into the merits of each ground. It suffices that all the grounds are examined, and a conclusion is made that prima facie the prospects of success are hazy or overwhelming.

16. I have however perused the 7 grounds of appeal and I find that grounds 1-4 are generalized grounds whereas ground 5 claims that the trial court shifted the burden of proof from the prosecution to the appellant. In ground 6, it is alleged that there was no evidence to support the charge to warrant a conviction and in the last ground, the appellant claims that the sentence imposed on him is excessive in the circumstances.

17. From the evidence on record, it is not obvious that the appeal herein has overwhelming chances of success.

18. Delving into the second limb for grant of bail pending appeal of whether there are any exceptional circumstances to warrant the Appellant to be admitted to bail pending appeal, counsel for the appellant submitted that her client was sickly and unable to get proper medication in prison. There were no medical notes to prove the allegation. I have however perused the trial court proceedings and noted that the appellant on the same day that he took plea before Ho. T.Olando on 14/8/2019 stated that he was sick and asked for free bond and the trial court released him on cash bail of Kshs 10,000 which he paid and the trial proceeded while he was on bail. However, in **Peter Hinga Ngatho versus Republic [2015] eKLR** citing with approval **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.

19. The **Krishnan vs The People** case set out conditions to be satisfied in an application for bail pending hearing of an appeal as follows:

i. Bail is granted at the discretion of the court.

ii. The court must be satisfied that there are exceptional circumstances that are disclosed in the application.

iii. The fact that the appellant due to delay in determining the appeal may have served a substantial part of his sentence by the time his appeal is heard, is one such exceptional circumstance. Each case is considered on its merits, depending on what may be presented as exceptional circumstances.

20. It is however important to bear in mind that in an application for bail pending appeal, the Court is dealing with a convict, and sufficient reasons must therefore exist before such a convict can be released on bail pending appeal.

21. It is not for the court to delve into the merits of each ground. But it suffices that all the grounds are examined, and a conclusion is made that prima facie the prospects of success of the appeal are dim.

22. The fact that the applicant did not breach the bail conditions in the court below is not an exceptional circumstance which can warrant admission to bail pending appeal.

23. The appellant has begun serving the sentence. The diary of the court for hearing of cases is already to the brim. Therefore, in my humble view, if bail is not granted and delay is occasioned in determining the appeal herein, then the Appellant may have served a substantial part of his sentence and if the appeal is successful the Appellant will be prejudiced. I find this to be an exceptional circumstance warranting grant of bail pending appeal.

24. The Respondent has also not proffered sufficient reasons to demonstrate that the Appellant will abscond if granted bail. For the foregoing reasons I will allow the application dated 22nd October, 2019 and order that:

a) The Applicant AMOS ODHIAMBO OKOTH be released on a bond of Kshs.500,000/= with one surety of similar amount pending the hearing and determination of this appeal;

b) The surety shall be approved by the Deputy Registrar of this court;

c) The appellant shall attend mentions before the Deputy Registrar of this court at least once every month during the pendency of this appeal or when required by the court and must be present during the hearing of this appeal unless such attendance is dispensed with by an order of this court.

Dated, signed and Delivered at Siaya this 4th day of November, 2019.

R.E. ABURILI

JUDGE