



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO.42 OF 2019

(Appeal Originating from Nyahururu CM's Court CMCR.1984 of 2019 by: Hon. O. Momanyi - SRM)

CALEB OMBIMA ODERO.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

R U L I N G

Caleb Ombima Odero was on 1/11/2019 convicted on his own plea on two charges of *personating person employed in the public service contrary to Section 105(b) of the Penal Code*. Upon conviction, he was sentenced to serve 16 months imprisonment on each count and sentences were ordered to run concurrently.

He has filed an appeal No.47/2019 challenging the conviction and also a chamber summons dated 26/11/2019 seeking to be released on bond with an alternative of cash bail, pending the hearing and determination of the appeal.

The grounds upon which the application is premised are that the applicant is a 3rd year student at Laikipia University pursuing a Bachelors of Education Degree and the end of semester examinations are scheduled to start on 6/12/2019; that the applicant is not a flight risk and is likely to serve most of the sentence before the appeal is heard. It is also argued that the appeal has high chances of success because the plea was unequivocal and that the sentence is harsh since the court did not consider non-custodial sentence.

Mr. Waichungo, counsel for the applicant added that the applicant is 20 years old and his father is in court ready to stand surety for the applicant.

Ms. Rugut, learned counsel for the State did not oppose the application basically because the applicant is likely to serve most of the sentence before the appeal is heard.

Counsel however, urged that having been convicted, there is need for the court to grant bond with a surety.

Section 357 of the Criminal Procedure Code provides for admission to bail or suspension of sentence pending appeal. It states at subsection (1)

“Section 357

(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:

Provided that, where an application for bail is made to the subordinate court and is refused by that court, no further application for bail shall lie to the High Court, but a person so refused bail by a subordinate court may appeal against refusal to the High Court and, notwithstanding anything to the contrary in sections 352 and 359, the appeal shall not be summarily rejected and shall be heard, in accordance with such procedure as may be prescribed, before one judge of the High Court sitting in chambers.”

Upon conviction, the applicant lost the presumption of innocence which is available under Article 49(1)(h) of the Constitution whereby an accused is entitled to bond unless there are compelling reasons to deny an accused bond.

Having been convicted it to the duty of the applicant to convince this court that he is fit to be released on bond.

The provision for release on bond is based on the principle that one should be allowed to exercise the right of appeal. In Gerald Macharia Githuka v Republic Cr.A.119/2004, the court said:

“The cornerstone of the justice system is that no one will be punished without the benefit of due process including the right to exhaust the right to appeal incarceration before trial or pending hearing of an appeal cuts against this principle.”

I also draw guidance from the decision of Arvind Patel v Ugandan Cr.A.1/2003 where the court set out the circumstances under which bail pending appeal can be granted.

They include said:

“(1) The character of the offender;

(2) Whether the applicant is or is not a first offender;

(3) Whether the offence of which the applicant is convicted involves personal violence;

(4) The appeal must not be frivolous and has reasonable chance of success;

(5) The possibility of substantial delay in the determination of the appeal; and

(6) Whether the applicant complied with bail conditions granted before the applicant’s conviction during the pendency of the appeal.”

I am also guided by the decision in Chimambhai v Republic (No.2) [1971] EA 343:

“The case of an appellant under sentence of imprisonment seeking bail lacks one of the strongest elements normally available to an accused person seeking bail before trial, namely, the presumption of innocence, but nevertheless, the law of today frankly recognizes, to an extent at one time unknown, the possibility of the conviction being erroneous or the punishment excessive, a recognition which is implicit in the legislation creating the right of appeal in criminal cases.”

I have considered that the applicant is a student. He exhibited a copy of a current student Identity Card from Laikipia University and that he is not therefore a flight risk. His father was also said to be in court and willing to stand surety for him.

The applicant was only sentenced to only 16 months improvement. I agree that if not released on bond, he may serve a substantial or the whole of the sentence before the appeal is heard.

As to whether the appeal has high chances of success, I have looked at the proceedings and one cannot say that the conviction is totally without basis. However, bearing in mind the special circumstances of this case, that the applicant is a student and is said to be going to sit end of semester examinations and that he might serve a substantive part of the sentence or the whole sentence before the appeal is heard, I grant the applicant bond.

Taking into account the nature of the offence, I will grant bond of Kshs.100,000/= with one surety of the same amount. I decline to grant an alternative of Cash Bail.

It is so ordered.

Delivered, Signed and Dated at NYAHURURU this 6th day of November, 2019.

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R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Rugut – State counsel

Ms. Muriithi holding brief for Mr. Waichungo for appellants

Soi – Court Assistant

Applicants – present