



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 35 OF 2019

ELIZABETH KERUBO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

{Being an appeal against the Judgement of Hon. B. M. Kimtai – PM Keroka dated and delivered on the 3rd day of September 2019 in the original Keroka Principal Magistrate’s Court Criminal Case No. 769 of 2019}

RULING

1. The appellant was sentenced to six (6) months imprisonment without option of a fine after pleading guilty to a charge of possession of alcoholic drinks contrary to Section 27 (1) (b) as read with Section 27 (4) of the Alcoholic Drinks Control Act.
2. The particulars of the charge were that on 2nd September 2019 at Esani area in Masaba North Sub-county of Nyamira County she was found in possession of 40 litres of chang’aa for sale without a licence.
3. Being aggrieved and with the leave of this court she appealed against that decision albeit out of time. Thereafter she filed a Notice of Motion dated 2nd October 2019 seeking bond pending appeal.
4. The application is premised on grounds that the appeal has very high chances of success; that the appellant is sickly; that the plea was unequivocal; that the conviction is unsafe; that it is only fair and just if this application is allowed and that the appellant/applicant is likely to suffer irreparable loss if this application is not granted.
5. The application is supported by an affidavit sworn by the appellant/applicant on 22nd October 2019 in which she deposes inter alia that she did not understand the language used by the trial Magistrate and only learnt much later that she was charged with possession of chang’aa, further that she is suffering from chest pains and has been attending clinic at Nyamira Hospital. To the affidavit she has annexed a tuberculosis appointment card and other documents pertaining to her children known as Teresa Kemunto and Kelvin Mogere.
6. At the hearing she was represented by Mr. Momanyi Advocate who submitted that the language used by the trial court was not indicated; that the previous convictions alluded to by the prosecution were not proved; that the appeal has high chances of success and that the applicant suffers from TB and her health will deteriorate and she is likely to suffer substantially if bond is not granted.
7. The application was not opposed. Mr. Konga, Learned Prosecution Counsel conceded the application due to the nature of the offence and the documents annexed to the application.
8. To succeed in an application for bond pending appeal the applicant must fulfil certain conditions. This is because the applicant unlike in the case of an accused person seeking bail pending trial lacks the presumption of innocence. The conditions to be fulfilled were set out in the case of **Arvind Patel v Uganda SCCRA No. 1 of 2003** as: -

“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 involved 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.”

9. In **Dominic Karanja v Republic [1986] KLR 612** our own Court of Appeal held: -

“1. 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 considerations would be whether there were exceptional or unusual circumstances.

2. The previous good character of the applicant and the hardships, if any, facing his family were not exceptional or unusual factors. Ill health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners.

3. A solemn assertion by an applicant that he will not abscond if released, even if it is supported by sureties, is not sufficient ground releasing a convicted person on bail pending appeal.

4.”

10. The applicant herein contends that her appeal has high chances of success as the plea was unequivocal given that the language was not indicated and the previous convictions proved. She has also contended that she risks her health deteriorating and hence she is likely to suffer irreparable and substantial loss. It is my finding that she has not fulfilled the conditions for grant of bond pending appeal. Firstly, and at the risk of going into the merits of the appeal, the language of the court is indicated as Kiswahili and there was an interpreter. Secondly, the previous convictions need not have been proved as she readily admitted them. Thirdly, her illness is one that can be attended at the prison hence no exceptional circumstances have been demonstrated and lastly it is not likely that she will serve the sentence imposed before hearing and determination of the appeal except that she herself occasions the delay and by a copy of this ruling the Deputy Registrar of this court is directed to call for the lower court file forthwith and to prepare this appeal for admission and likewise Counsel for the applicant is directed to file and serve the Record of Appeal within fourteen (14) days from today. The application for bond pending appeal is otherwise dismissed for lack of merit.

Signed, dated and delivered in Nyamira this 14th day of November 2019.

E. N. MAINA

JUDGE