



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO.22 OF 2019

(Appeal Originating from Nyahururu CM's Court SOA.47 of 2018 by: Hon. S.N. Mwangi- S.R.M.)

FRANCIS IHUTHIA NYAWIRA.....APPELLANT/APPLICANT

V E R S U S

REPUBLIC.....RESPONDENT

RULING

Before me is an application for bail pending appeal, Francis Ihuthia Nyawira was on 17/5/2019 convicted for the offence of *defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act* and sentenced to serve 15 years imprisonment.

The applicant is aggrieved by the said judgment and has preferred an appeal *Nya.Cr.A.No.22/2019* against the whole judgment. Meanwhile, the applicant has filed this Notice of Motion dated 2/7/2019 seeking to be released on bond pending the hearing and determination of the appeal.

The grounds upon which the application is premised are that the applicant has filed an appeal against the judgment of the trial court; that the appeal has overwhelming chances of success and if bail is not granted and there is a delay in determining the appeal, the appellant will be prejudiced; that the applicant is the only bread winner of his family and will not abscond. He will abide by any terms and conditions that the court will impose on him.

Mr. Ikua, the applicant's counsel added that the applicant was on bond in the trial court; that he is not a flight risk. Counsel relied on the decision of *Cr.A.2/2014 (Nyeri) Peter Hinga Ngotho v Republic*.

The application was opposed. Ms. Rugut, learned counsel for the State submitted that having been convicted, right to bail is not guaranteed; that the applicant has been sentenced to 15 years and is unlikely to serve a substantial part of the sentence before the appeal is heard; that since proceedings are ready, the record of appeal should be prepared so that the matter can be heard once and for all.

I have considered the application and submissions. Section 357(1) of the Criminal Procedure Code provides for admission to bond or suspension of sentence pending an appeal. It reads as follows:

“(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.

(2). If the appeal is ultimately dismissed and the original sentence confirmed, or some other sentence of imprisonment substituted therefor, the time during which the appellant has been released on bail or during which the sentence has been suspended shall be excluded in computing the term of imprisonment to which he is finally sentenced.

(3). The Chief Justice may make rules of court to regulate the procedure in cases under this section.”

The grant of bond under Section 357 of the Criminal Procedure Code is an exercise of the court's discretion. The case of *Jivraj Shah v Republic 1986 KLR 605* laid down the principles that guide the courts in applications for bail pending appeal. The court said as follows:

“(1). The principle consideration in an application for bail pending appeal is the existence of exceptional or unusual circumstances upon which the Court of Appeal can fairly conclude that it is in the interest of justice to grant bond;

(2). 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 the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail will exist.”

The said principles can be summed up into two, that is, whether the appeal has high chances of success and whether there are exceptional circumstances to warrant the release of the appellant on bail pending appeal. The peculiar circumstances/facts will obviously vary from case to case.

In the *Peter Hunga's case (Supra)*, the court considered the Ugandan case of *Arvind Patel v Ugandan Supreme Court Criminal Appeal 1/2003* where the court listed some of the issues to be considered in an application for bail pending appeal which include:

- (1) *The character of the applicant;*
- (2) *Whether he/she is a first offender;*
- (3) *Whether the offence involved personal violence;*
- (4) *Whether the appeal is frivolous and not likely to succeed;*
- (5) *The possibility of substantial delay in the determination of the appeal;*
- (6) *Whether the applicant complied with bond terms in the trial court.*

I have also considered the case of *Dominic Karanja v Republic (1986) KLR 612* where the court said in part:

“(b) *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;*

(c) *A solemn assertion by an applicant that he will not abscond if released, even if it is supported by sureties, is not sufficient ground for releasing a convicted person on bond pending appeal;*

(d).....”

From a reading of the above decisions, it is clear that the grant of bail pending appeal is an exercise of the court's discretion and each case will depend on its own special circumstances save for the key considerations espoused in the *Jivraj case*.

It is the duty of the applicant to satisfy the court that he is deserving the order sought. See *Chimanbhai v Republic (1971) EA 343*.

One of the grounds on which the applicant relies upon is that he was on bond in the lower court and attended court faithfully. Whereas that may be positive on the appellant's conduct, yet that was before he was convicted. Once one is convicted, the temptation to abscond is very high.

The applicant also contended that he is the only bread winner for his family. This is not an exceptional circumstance because virtually, all the convicted people would have this excuse. Nearly every person has some duty towards his dependants and it is not good reason enough to release one on bond once convicted.

In such an application, unlike an application under Article 49(1) of the Constitution, the applicant has already lost that Constitutional right to be presumed innocent till proved guilty.

Whether the appeal has high chances of success; at this stage, I do not need to delve into the grounds of appeal in detail. I have however had a cursory look at the evidence before the trial court, the judgment of the court and the grounds of appeal and I cannot state that on the face of it, the conviction is without basis.

The other ground to be considered is whether the applicant will have served a substantial part of the sentence before the appeal is heard. The applicant was sentenced on 18/2/2019 to 15 years imprisonment. The proceedings are already typed and what is left is to prepare the record of appeal and the matter will be set down for hearing. He will not have served a substantial part of the sentence before it is heard. The applicant will not be prejudiced if the matter is set down for hearing.

I have considered the decision of *Peter Hinga (Supra)* that was relied on by the applicant's counsel and is distinguishable from this matter in that, in that case, there was clear evidence that the appeal raised arguable issues in that the trial court had not complied with Section 200 Criminal Procedure Code. In this case, no triable issue was alluded to by the applicant.

In the end, I find that the applicant has not demonstrated to this court that he is entitled to be released to bond pending appeal. The application is declined and dismissed.

Dated, Signed and Delivered at NYAHURURU this 11th day of December, 2019.

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R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Rugut – prosecution counsel

Mr. Sigilai holding brief for Mr. Ikua for applicant

Soi – Court assistant

Applicant - present