



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: A.K NDUNG'U J.

CRIMINAL APPEAL NO. 70 OF 2019

KENNEDY OCHIENG'.....APPELLANT/APPLICANT

VERSUS

REPUBLIC through ODPP.....DEFENDANT/RESPONDENT

(An appeal from the conviction and sentence of Hon. R. Oanda, PM dated and delivered on the 31st day of May 2019 in the original PMCR No. 1028 of 2015)

RULING

1. Kennedy Ochieng' (hereinafter, the appellant) has moved this court vide the notice of motion dated 6/9/2019 seeking orders;

1. That the honourable court be pleased to admit and/or grant the appellant/applicant bail pending hearing and determination of the appeal herein on such terms as the honourable court shall deem fit and proper in the circumstances.

2. The application is anchored on his affidavit and grounds;

a. The applicant/appellant has been sentenced and currently serving a jail term.

b. The conviction and sentence of the applicant/appellant herein was arrived at without consideration and due regard to the defence evidence on record.

c. Besides, the learned trial magistrate proceeded to and rendered a conviction based on hypothesis, as opposed to evidence on record.

d. In any event, the conviction of the appellant/applicant was founded on evidence devoid of probative value and without consideration of the defence, whatsoever.

e. On the other hand, the applicant herein was convicted and sentenced contrary to established principles of criminal law.

f. In a nutshell, the conviction and sentence of the appellant/applicant herein was arrived at in vacuum.

g. In the premises, the conviction and sentence of the applicant/appellant was/is irregular, illegal and unlawful.

h. The appellant/applicant is the only bread winner to his family and therefore the instant conviction and sentence shall greatly affect his family.

i. The appeal lodged by the appellant/applicant has overwhelming chances of success.

j. Consequently, it is in the interest of justice that the instant notice of motion be heard and allowed.

3. The application was canvassed through oral submissions.

4. For the applicant, Mr. Ochwangi holding brief for Mr. Ochoki submitted that there is no written response to the application. Efforts to secure the proceedings of the trial court have failed due to capacity issues at the trial court.

5. It is urged that the appellant attended the trial at the lower court diligently. An assurance is given that he will continue attending.
6. Ms Kibungi for the State submits that it is not mandatory that a written response be filed. Their response to the application is oral.
7. It is submitted that the court is dealing with a scenario where the applicant is now a convict. There is now no constitutional right as to the presumption of innocence. The applicant ought to show exceptional circumstances to warrant release on bail pending appeal.
8. It is submitted further that appeals in this court are fast tracked and there will be no prejudice on the applicant.
9. In response, Mr. Ochwangi stated that there is no evidence tendered that the applicant is a flight risk. It is noted that the court does not have the proceedings of the lower court. The fact that appeals are fast tracked should not be a ground upon which to deny bail to the applicant.
10. The principles applicable are clearly and exhaustively laid out in the Case of **Somo –Vs- Republic [1972] E.A 476** which followed the decision in **Lamba –Vs- R (1958) E.A 337**. The test is whether there are exceptional or unusual circumstances, the most important ground being whether the appeal has overwhelming chances of success. If the latter case is made out, there will be no justification for depriving the appellant his freedom.
11. It is worthwhile to state at the outset that the previous good character of the applicant and the hardship, if any, facing the wife or children of the applicant are not exceptional or unusual factors.
12. Further a solemn assertion by an applicant that he will not abscond if released is not sufficient ground, even with sureties, for releasing a convicted person on bail pending appeal. (See **Daniel Karanja –Vs- R (1986)eKLR**).
13. I have perused the application, the supporting grounds and the affidavit in support. I have considered the submissions on record. I note that this court is disadvantaged in that the application herein was prosecuted before the lower court record was called for and availed.
14. On the material before court I am respectfully of the view that at this stage there is no demonstration of an overwhelming chance of success of the appeal herein.
15. The application is dismissed.

Dated and delivered at Kisii this 5th day of December 2019.

A.K NDUNG’U

JUDGE