



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL MISC. NO. 25 OF 2018

REPUBLIC.....DIRECTOR PUBLIC PROSECUTION

VERSUS

JAMES OBIERO OKELLO.....1ST APPLICANT

CONSOLATA ATIENO OBIERO.....2ND APPLICANT

PHILISTUS NANDI OBIERO.....3RD APPLICANT

R U L I N G

Introduction

1. The applicants in this matter are James Obiero Okello, Consolata Atieno Obiero and Philistus Nandi Obiero. They were tried found guilty and convicted of the offence of grievous harm by the Butere SRM in by Criminal Case No. 63 of 2016. The judgment was delivered on 3rd April, by Hon. I. M. Shimenga. All the three applicants were alleged to have committed the offence on the 4th day of February, 2016 at Musoma Village, Bushieni Sub-Location, Manyala Location in Butere Sub-County within Kakamega County. They were found guilty of causing grievous harm to Boniventure Museve Okello.

Application for bond pending appeal

2. Being aggrieved by both conviction and sentence, the applicants filed the Notice of Motion dated 17th April, 2018 seeking to be released on bail/bond pending appeal. Together with the Notice of Motion was filed what is referred to as SKELETON MEMORANDUM OF APPEAL of even date. The grounds in support of the application are set out on the face of the application. The major one being that it is in the interest of justice to grant the applicants bond because the first and 2nd applications are old aged 74 and 66 years respectively while the third applicant is a student nun at Kisumu Catholic Diocese. It is also contended that the appeal has high chances of success. There is also an affidavit sworn by Wakiaga Peter Semeka advocate on 17th April, 2018. The court wonders why the applicants could not swear their own affidavits to support their application.

3. The court has also been shown Probation Officer's Reports dated 15th March, 2018.

4. The application is not opposed mainly on humanitarian grounds, considering the age of the first two applicants and the fact that the third applicant is a student

Analysis and Determination

5. As the court considers the instant application, it is aware of the fact that the applicants are all convicts judgment having been passed by a court of competent jurisdiction. The court is also aware of the fact that sentencing of an accused person is a matter of discretion of the trial court. So that is the absence of any special circumstances, an appellate court will not grant bail/bond to a convict.

6. In **Nganga – vs – Republic [1985] KLR 451**, a case that involved an application or bail pending trial the court held the view that “*the primary consideration in deciding whether or not to grant bail to an accused person is whether the accused is likely to attend trial. In making this consideration, the court must consider:-*

(i) The nature of the charge or offence and the seriousness of the punishment to be awarded if the applicant is found guilty.

(ii) The strength of the prosecution case

(iii) *The character and antecedents of the accused;*

(iv) *The likelihood of the accused interfering with prosecution witnesses”*

7. The above principles are Mutati’s Mutandis applicable even in applications for bail/bond pending appeal. It is however to be noted that these principles were enunciated long before the promulgation of the Constitution of Kenya 2010. Under Article 49(1)(h) thereof, every arrested person has a right to be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released.

8. In the instant case, the applicants are convicts and consideration of their application is to be guided by the principles set out in **Ademba – vs – Republic [1983] KLR 442** where the Court of Appeal sitting at Kisumu held, inter alia,

1.) *Bail pending appeal may only be granted if there are exceptional or unusual circumstances.*

2.) *The likelihood of success of the appeal is a factor taken into consideration in granting bail pending appeal.*

9. Applying the above principles to the present application. I am satisfied that there exist exceptional circumstances in this case to warrant a favourable consideration of the applicant’s application. Though the first and second applicants do not suffer from any physical disability, they are both fairly advanced in years, being aged 74 and 66 years respectively. It also appears from the probation officers reports that the offence may have been committed (though all three applicants deny committing the same) due to family land dispute. There is therefore a chance that on reconsideration of the evidence, the appeal is likely to succeed. As for the third applicant she is a student Nun and her continued incarceration is likely to prejudice her studies. Further, all the three applicants have no previous criminal antecedents that would work against them concerning this application. Finally release of the applicants on bond side relieve the prison of the great strain on space.

Conclusion

10. In conclusion, I allow the application for bail/bond pending appeal as follows:-

1. Each of the three applicants shall be released on bond of KShs.100,000/= (Kenya shillings one hundred thousand) only plus one surety of a like amount.
2. The surety shall be approved by the DR of this Honourable Court. The applicants shall keep the peace and not jeopardize their bonds.
3. Once released, each of the applicants must attend court as and when required to do so until the appeal is heard and determined or until further orders of this court I/D the bonds shall
4. Counsel for the applicants shall file proper petitions of appeal for each of the applicants separately within next seven (7) days from the date hereof.

These are the orders

Ruling delivered, dated and signed in open court this 7th day of May 2018

RUTH N. SITATI

JUDGE

In the presence of:-

Mr. Wakiaga.....for Applicants

Miss Chebet.....for Respondent

Polycap Mukabwa.....Court Assistant