



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 30 OF 2018

HALIMA ADAN HASSAN.....1ST APPELLANT

KHEIRTA IBRAHIM ALL.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. Before me is an application brought by way of Notice of Motion under section 357 of the Criminal Procedure Code requesting for an order that the two appellants be admitted to bail pending appeal against the conviction and sentence of the Mandera Magistrate's Court Criminal Case No. 225 of 2018, and any further orders as this court may deem fit to grant.

2. The application was filed through counsel for the appellants, M/s Kimathi Muthuri & Co. Advocates and has grounds on the face of the Notice of Motion. It is supported by an affidavit sworn by Clifford Kimathi Muthuri Advocate in which the advocate stated that the appellants were fined Ksh.30,000,000/= and in default to serve thirty (30) years imprisonment after having pleaded guilty to trafficking in persons, and the 1st appellant also sentenced to a fine of Ksh.100,000/= or in default one (1) year imprisonment for giving false information to a person employed in the public service.

3. The application was filed under certificate of urgency and, on the hearing date, Mr. Kimathi for the appellants made oral submissions in court. Counsel stated that the appeal which had been filed has great chances of success as the magistrate failed to take care to ensure that the appellants understood the charge and the severity of sentence before convicting and sentencing them. Counsel relied on a case of **Simon Gitau Kinene vs Republic [2016] eKLR – Kiambu High Court**. He also said that the section under which the appellants were charged for trafficking in persons had an element of exploitation which was absent in the particulars of the offence herein.

4. Counsel further stated that the two appellants were female illiterate Kenyan Muslims who were fasting during this month of Ramadhan, with one of them breastfeeding and the 2nd appellant being pregnant. Counsel said that both were not a flight risk.

5. Mr. Okemwa the Principal Prosecution Counsel in response, submitted that he had talked to Mr. Mulama the representative of ODPP in Mandera, and informed the court that they did not have serious compelling reasons to object to the application for bail pending appeal.

6. Bail pending appeal is not a Constitutional right like bail pending trial. It is a statutory right conferred by section 357 of the Criminal Procedure Code (Cap. 75) and is exercisable on the discretion of the trial or appellate court on established legal principles. Section 357 (1) of the Criminal Procedure Code (Cap. 75) provides as follows;-

“357 (1) After entering of an appeal by 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.”

7. Courts have considered such applications for bail pending appeal, and set down conditions for the grant of such bail. A convict is presumed to have been properly convicted before his or her appeal is heard and determined. The presumption of innocence of an accused person therefore is thus replaced by a presumption of guilt where bail pending appeal is to be considered, and an applicant for bail pending appeal has to demonstrate unusual circumstances. Courts have held that the most important consideration by a court in an application for bail pending appeal is whether the appeal has overwhelming chances of success. There are of course other reasons to be considered such as the health of an appellant or delay in hearing the appeal. The main reason however, still stands out as the probability of success in the appeal. See the case of **Somo vs Republic [1972] 476, Jivraj Shah vs Republic [1980] KLR 605**.

8. In our present case, the prosecution does not oppose bail pending appeal. The magistrate convicted the appellants on their own plea of

guilty. Such conviction is being challenged on appeal because according to counsel for the appellants, the procedure adopted by the trial magistrate was not proper and the conviction on a plea of guilty is not thus sustainable.

9. I will not go to the merits of the appeal since I have not had the opportunity of hearing the appeal. Though I am told that the appellants are not a flight risk, I do not have any suggestion of the kind of security that will ensure that they do not cross the border to Somalia or Ethiopia, Mandera being a border town.

10. I do not have any assurance from an Administrator, the chief, District Officer, Deputy County Commissioner or the police that the applicants are not flight risk. I also do not have any undertaking from any person in Mandera who will ensure that the appellants attend court and do not cross the border to another country.

11. I appreciate that the appeal is an arguable appeal, and I am aware that it is now the month of Ramadhan in which our brothers and sisters the Muslims, are fasting. I have also been told that one of the appellant is breastfeeding, and the other appellant is five (5) months pregnant which I do not have any reason to doubt.

12. However in the circumstances of this case, I do not find it reasonable or desirable for this court to exercise its discretion to grant bail pending appeal to the two appellants. In my view it is more preferable for them or their counsel to ask for speedy hearing and disposal of their appeal rather than asking for bail pending appeal.

13. To conclude therefore, I find that for the above reasons, this application has to be dismissed. I thus dismiss the application and disallow the request for bail pending appeal. This court can give a priority hearing date for the appeal.

14. It is so ordered.

Dated, Signed and Delivered at Garissa this 12th June, 2018.

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George Dulu

JUDGE