



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL APPEAL NO. 30 OF 2017

OTUMOI PUTUAIAPPELLANT/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal from the original judgement and conviction dated 27/8/2018 in the Chief Magistrate's Court at Narok in Cr. Case No. 967 of 2018, R. v. Otumoi Putuai]

RULING

INTRODUCTION

1. The applicant was convicted on his own plea of guilty to a charge of assault contrary to section 251 of the Penal Code [Cap 63] Laws of Kenya and was sentenced to two years imprisonment. Being aggrieved by the conviction and sentence, the appellant filed an appeal in this court being Criminal Appeal No. 30 of 2018. During the pendency of the appeal, he filed an appeal under notice of motion dated 3rd September, 2018, seeking to be released on bail pending appeal pursuant to the provisions of sections 356 and 357 of the Criminal Procedure Code [Cap 75] Laws of Kenya.

2. Mr. Omwega for the respondent opposed the application.

THE APPLICANT'S CASE

3. The applicant brought his application under certificate of urgency and was certified urgent as such to be heard under the vacation rules of this court. In support of his application, he has stated four grounds that appear on the face of the notice of motion. The major grounds are as follows. First, he has stated that his appeal has good chances of succeeding and that he would have been unfairly imprisoned unless he is released. Second, he has also stated that he is a father of five school going children in respect of whom, he is the sole bread winner and that his imprisonment will affect their education

4. The applicant has deponed to an eleven paragraphs supporting affidavit dated 2nd September, 2018. He has replicated what he has stated in his grounds of appeal. He has deponed in particular that his five school going children will continue to suffer and will miss their classes following his imprisonment. He has also deponed that he is a resident of Narok County and has immovable property (land) and for that reason, he cannot abscond if he is released on bail pending appeal. The rest of the factual averments are a replication of what he has stated in his grounds in support of the application.

5. Counsel for the applicant (Mr. Meingati) made a short oral submission in this court and cited a number of authorities in support of his application. He challenged both the conviction and sentence. He further submitted that the plea of guilty was not unequivocal. In this regard, he submitted that after the statement of facts were stated by the prosecutor, the applicant in his mitigation stated that he was very drunk, when he committed that offence. The applicant further stated in mitigation that he did not know what he had done until the following day when the police went to his home due to being drunk. Counsel further submitted that the sentence of two years was manifestly excessive.

THE CASE FOR THE RESPONDENT

6. Mr. Omwega, counsel for the respondent opposed the application. He submitted that the plea of guilty was unequivocal. In that regard he cited the case of *Adan v. Republic (1973) EA 445*. Furthermore, he submitted that the applicant has not demonstrated that his application has overwhelming chances of success. Finally, he submitted in response to the issue of reconciliation that it is a discretionary matter. He further submitted that it is upon the parties to initiate the process of reconciliation. He therefore urged the court to dismiss the application.

ISSUES FOR DETERMINATION

7. In the light of the affidavit evidence and the applicable law, the issues for determination are as follows.

- 1) Whether or not the applicant's appeal has overwhelming chances of success.
- 2) Whether or not there are exceptional or unusual circumstances in the appellant's appeal.

ISSUE 1

8. After perusing and considering the proceedings and the judgement, I find that the issue of the sentence that is prescribed by section 251 of the Penal Code, was not brought to the attention of the applicant before he pleaded guilty. Additionally, his mitigation was that he was very drunk to the extent of not knowing what he did when the offence was committed until the following day, when police went to his home. It appears that the trial court did not address its mind to these two issues.

9. In the circumstances, I find that the applicant's appeal has high chances of succeeding in view of the complaint that his plea of guilty was not unequivocal.

ISSUE 2

10. I find no unusual exceptional circumstances in this appeal.

11. The upshot of the foregoing is that the applicant's appeal is hereby allowed.

12. He will therefore be released on bail in the sum of Ten thousand shillings (Kshs.10,000), pending the hearing and determination of his appeal.

Ruling delivered in open court at **Narok** this **20th** day of **September, 2018** in the presence of Mr. Meingati for the appellant and Mr. Omwega for the respondent.

J. M. BWONWONGA

JUDGE

20/9/2018