



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO. 7 OF 2016

ALI KINGI BAYA.....APPLICANT

VS

REPUBLICRESPONDENT

RULING

This is a ruling in an application by way of appeal of Notice of Motion dated 14th March, 2016, where the applicant is seeking to be released on bail with no without surety pending the hearing of his appeal.

The applicant also seeks to have the court order that the execution of the sentence or order appealed against suspended pending the hearing of his appeal.

This application is premised on the grounds that:

- i. The applicant has a meritorious appeal with high chances of success.***
- ii. Given the period the applicant has spent in Borstal Institution and the time it will take for the appeal to be heard and determined, the same may be rendered nugatory.***
- iii. The applicant's court attendance while on bail is a demonstration that he shall not abscond from attending his appeal.***
- iv. The applicant is a school-going child and his education may be jeopardized if he continues to remain in Borstal institution.***

The application is supported by an affidavit sworn by his counsel, Mr Yusuf Aboubakar who has attached copies of:

- a. Charge sheet reviewed KB'I'
- b. Judgment reviewed KB'2'
- c. Petition of appeal reviewed KB'3'

The applicant was charged with other one count of arson and three (3) counts of grievous harm.

In count 1, the applicant was charged with arson contrary to section 332 (e) of the Penal code.

The facts being that:

“On 28th day of January, 2014 at Majaooni village in Majaoni sub location in Bamburi, Kisauni district within Mombasa county, the applicant willfully and unlawfully set fire to the dwelling house valued at Kshs. 150,000.00 belonging to IBRAHIM BAIB.”

In counts II,III and IV, the applicant was charged with grievous harm contrary to section 234 of Penal code:

“The particulars being that: “On 28th day of January, 2014 at Majaooni village in Majaoni sub location in Bamburi, Kisauni district within Mombasa county, the applicant caused grievous harm to:

i. Ibrahim Baiba

ii. Ibrahim Baiba

iii. Naomi Ibrahim Baiba”

The applicant was tried, convicted for all the offences and sentenced to serve 3 years in Borstal Institution without an option of a fine.

During the hearing of the application, Mr Aboubakar submitted on the merits of the appeal by pointing out the weaknesses in the evidence which was adduced by the prosecution and which the trial magistrate relied on to convict the applicant.

He also submitted that the applicant is a minor and ought to have been given a chance on non-custodial sentence.

He further submitted that one can only be denied bail /pending appeal if it is shown that they are likely to abscond but in this case, the applicant has not been shown to be capable of such. He went on to submit that there is a possibility of the applicant’s appeal being allowed and it would therefore not be fair for him to serve the jail term and the appeal be allowed.

The application was orally opposed by M/s Ochola, counsel for state on the ground that the applicant’s counsel has not demonstrated that the appeal has a high chance of success.

M/s Ochola submitted that the prosecution’s evidence was well corroborated and the applicant introduced the alibi evidence in his defence late.

She further submitted that court attendance by an appellant during his trial in the lower court is normally not a ground to be considered when dealing with the issue of bail pending appeal.

To this, Mr. Aboubakar responded by saying that the state, by failing to file grounds of opposition had not opposed their application.

I have read through the copy of charge sheet and judgment attached to the supporting affidavit of the applicant’s counsel and considered all grounds of appeal, the affidavit in support of the application and submissions by both counsel. I am of the view that there is a likelihood of the appeal succeeding.

I therefore find the application meritable and allow it.

The applicant may be released on his own bail of Ksh. 100,000.00 with one surety of a similar account.

Ruling delivered, dated and signed on 17th of January, 2017

D.O CHEPKWONY

JUDGE

In the presence of:

M/s Ocholla for the state

Mr Aboubakar for applicant

Court/Assistant: Constance