

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

MISC. CRIMINAL APPLICATION NO. 3 OF 2017

ABDIHAKIM BISHAR AHMED.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

Before me is an application brought by way of Notice of Motion under section 357 of the Criminal Procedure Code Cap. 75 dated 10th January 2014 for bail pending appeal. The application was filed under certificate of urgency and it emanates from the conviction and sentence in Wajir Senior Principal Magistrate Court Criminal Case No. 85 of 2015.

The sentence was pronounced on 6th January 2017 and the applicant was sentenced to serve 15 years imprisonment. A petition of appeal dated 10th of January 2017 was also filed with the application, but both the petition of appeal and the documents filed herein do not show that an appeal has been lodged in this court and an appeal number given in the High Court at Garissa.

Mr. Omingo for the applicant made strong submissions on the application for the bail pending appeal. He stated specifically that the appeal has high chances of success as stated in the petition of appeal. He also submitted that there were exceptional circumstances as the applicant was a young man who had just started life and secured employment. He stated that the applicant was on bond during trial and complied with all conditions set by the court.

Mr. Okemwa learned prosecuting counsel also submitted that the appeal was likely to have overwhelming chances of success as the issue of age of the complainant was not testified to by the prosecution witnesses at the trial. According to counsel, in sexual offences on which the appellant was charged, it was important for the prosecution to have proved the age of the complainant.

I have considered the application and the arguments on both sides.

In several cases determined by the courts, the issue of bail pending appeal has been considered. Currently there are also bail/bond guidelines published by the Judiciary.

Bail pending appeal under our system is not a Constitutional right. The Constitutional right to bail only applies to cases of bail pending trial. Bail pending appeal is a statutory right under section 357 of the Criminal Procedure Code (Cap. 75). The presumption of innocence does not apply in matters of bail pending appeal.

The case that has often been quoted or relied upon in matters of bail pending appeal is the case of ***Somo Vs. Republic [1972] EA*** where the High Court held that the most important consideration is whether there is an overwhelming chance of success of the appeal. There are also other considerations which a court can take into account.

My perusal of the hand written record of evidence shows that the age of the complainant was not adequately addressed through the prosecution evidence. In the charge sheet she was said to be 17 years. However the evidence seems to dwell on her being in primary school. Since the prosecution did not specifically address this issue of age of the complainant, in my view the appeal has overwhelming chances of success. The father of the complainant Pw2 merely referred to the age in cross examination.

On that account, I am persuaded that the appeal has overwhelming chances of success.

On unusual circumstances, I do not think that the fact that the applicant is a young man of about 24 and had just secured employment is an unusual or exceptional circumstance. It is normal for adults whether young or old to seek and secure employment.

As I have found above that the appeal herein has overwhelming chances of success, I allow the application for bail pending appeal and order that the appellant be released on bail pending appeal on the same terms of bail determined by the trial court provided that a formal appeal is filed and the appellant attends every mention of the appeal and the hearing of the appeal.

In this regard therefore and since I have not been given any appeal number, I order that this matter be mentioned on 7th of March 2017 together with the appeal which will have been filed. Once the appeal is filed, the applicant will be released forthwith on bail as above ordered.

Dated and delivered at Garissa this 13th day of January, 2017

GEORGE DULU

JUDGE