



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO.108 OF 2016
JOSEPH MULI MUNYAO.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT
RULING

The Appellant, Joseph Muli Munyao was charged and convicted of **defilement** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**. He was sentenced to life imprisonment. Aggrieved by his conviction and sentence, he has filed an appeal to this court. Contemporaneous with filing the appeal, the Appellant made an application to be released on bail pending the hearing of the appeal. The grounds in support of the application are stated on the face of the application. The Appellant states that he is a man of advanced age, is sickly and will not be able to endure imprisonment. The Appellant averred that his medical condition required constant attention by a doctor which attention he cannot receive while he is in prison. He contends that his appeal has overwhelming chances of success in that his conviction was arrived at after the trial court had substantially breached part of the law. He was of the view that an appellate court, properly applying itself to the facts of the case, will most likely than not allow his appeal. The application is supported by the annexed affidavit of the Appellant.

During the hearing of the application, this court heard oral rival submission made by Mr. Naragwi for the Appellant and by Ms. Nyauncho for the Respondent. Mr. Naragwi essentially reiterated the contents of the application and the annexed affidavit. He submitted that the Appellant was sickly and was suffering from diabetes, high blood pressure and is asthmatic. He explained that the medical evidence adduced before the trial court did not support the contention by the prosecution that there was penetration. He urged the court, on the basis of the submission, to admit the Appellant on bail pending appeal. He stated that the Appellant was not a flight risk. He submitted that if the Appellant is not released on bail pending appeal, he will likely die in prison before his appeal is heard and determined.

Ms. Nyauncho for the State opposed the application. She submitted that the prosecution had adduced sufficient culpatory evidence which established the Appellant's guilt on the charge of defilement to the required standard of proof. Evidence was adduced which established that the complainant had been injured in her genitalia during the sexual assault. In that regard, she was emphatic that the prosecution had established penetration and therefore the possibility of the Appellant succeeding in his appeal is remote. She urged the court not to be persuaded by the argument advanced by the Appellant to the effect that his age and medical condition should form a basis to be excused from serving the term in prison. She submitted that there were medical facilities in prison which will cater for the Appellant's medical needs. She urged the court to dismiss the application.

Having heard the submission by both parties to this application, this court takes the following view of the matter: the starting point is that the position of the Appellant is not similar to that of an accused person awaiting trial who is presumed innocent unless otherwise proven guilty. In **Samuel Macharia Njagi –vs- Republic [2013]** eKLR Abuodha J held thus:

“The Appellant/Applicant is prima facie a convict and his constitutional freedoms and rights are thus significantly circumscribed by his conviction. He no longer enjoys the absolute presumption of innocence available to person facing trial at the first instance. In admitting such a person to bail the court ought to, in addition to the principles governing admission to bail pending appeal, bear in mind the possible dilemma of resending such a person to prison in event that his/her appeal fails.”

In **Dominic Sibi Peter –vs- Republic [2014]** eKLR Lesiit J held as follows:

“Unlike an application for bail pending trial where the Applicant has a constitutional right to be considered innocent until proven guilty (Article 49 of the Constitution) an Applicant for bail pending appeal stands on the premise that he has already been found guilty of the offence.”

This court has taken into consideration the fact that the trial magistrate’s court has already made determination that the Applicant is guilty as charged in respect of the charge that was brought against him. His position is thus more precarious when asserting his innocence than accused person who is yet to be tried. However, this court concedes that under **Article 50(2)(q) of the Constitution**, the Applicant is entitled to the right to a fair trial which includes the right to:

“if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.”

Another principle which this court ought to take into account is the likelihood of the appeal succeeding. (See **Ademba –vs- Republic [1983] KLR 442, Jivraj Shah –vs- Republic [1980] KLR 605 and Somo –vs- Republic [1972] EA 476**). The court must also take into consideration whether there exists exceptional circumstances that may convince the court that it ought to exercise its discretion in favour of granting the Appellant bail pending the hearing of the appeal. In that regard, it is now accepted that hardship that may be suffered by the Appellant’s family during his incarceration or illness *per se* may not constitute exceptional circumstances to persuade the court to exercise its discretion in favour of such applicant. In **Jeremiah Wachira Muchiri –Vs- Republic [2016] eKLR**, Mativo J held that where the medical condition of the applicant is such that his life may be at risk if he continues to be incarcerated, then the court should consider releasing such applicant on bail pending the hearing of the appeal if other conditions have been established in his favour.

Another principle which the Appellant urged the court to take into consideration is whether, taking into account the period that the Appellant has been sentenced to serve in custody, he would have unnecessarily lost his liberty during the period that his appeal is pending hearing and determination. This especially is applicable where an appellant seeking bail pending the hearing of the appeal is serving a short sentence. This principle was considered by the court in **Tonny Dhiman –vs- Republic [2007] eKLR; Chimambhai –vs- Republic [1971] EA 343** and in **Muchoki Muriuki & Another –vs- Republic [2016] eKLR** where Kasango J held that:

“The jurisprudence that has applied in respect of application for bail pending appeal has pointed to the need to ensure the Appellant does not serve the entire of his sentence as he is awaiting his appeal to be heard.”

Another principle which the court should take into account is the conduct of the Appellant if he had been granted bail pending trial. In that regard, the issue that the court ought to take into consideration is whether the Appellant obeyed the conditions attached to his release on bail pending trial. (See the **Uganda Supreme Court case of Arvind Patel –vs- Uganda Criminal Application No.1 of 2013**). The Appellant urged the court to take into consideration that he had faithfully attended court when he was so required without fail and therefore the court should not be in any doubt that he shall comply with any

conditions that shall be attached to the order releasing him on bail pending the hearing of the appeal.

In the present application, the Appellant contends that his appeal has overwhelming chances of success. In support of this assertion, the Appellant argued that the prosecution failed to establish an essential ingredient of the charge which is that the Appellant had caused penetration in the complainant's genitalia. Having carefully perused the proceedings of the trial court, this court cannot, at this stage of the proceedings, find one way or the other that indeed the prosecution failed to prove penetration. The court will require further arguments to be made during the hearing of the appeal. This court cannot therefore reach a finding that the Appellant's appeal indeed has overwhelming chances of success. As regard the Appellant's medical condition, this court agrees with the prosecution that the Appellant's medical condition cannot constitute the sole ground, in the absence of other favourable grounds, to admit the Appellant on bail pending appeal. It is unlikely that this court will take a long time to hear the substantive appeal.

Indeed, it is evident that the Appellant has already secured the duly certified copies of the proceedings and judgment of the trial court. If the Appellant so wishes, this court can fix the hearing of the appeal during this term. Therefore, there will be no delay in the hearing and determination of his appeal. This court has also taken into consideration the fact that the Appellant has been sentenced to serve life imprisonment. There is no possibility therefore that he will have served his sentence by the time the appeal is heard and determined.

For the above reasons, this court finds no merit with the Appellant's application to be released on bail pending appeal. The application is dismissed. It is so ordered.

DATED AT NAIROBI THIS 21ST DAY OF FEBRUARY 2017

L. KIMARU

JUDGE