



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CRIMINAL APPEAL NO. 217 OF 2015

JOHN MUMBA KARISA.....APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

RULING

This is a ruling in respect of an application by way of Notice of Motion dated 23rd December, 2015 brought under articles 49,157 and 159 of the Constitution. The same is supported by the grounds on the face of it and supporting affidavit of E. Masila.

The applicant is seeking for orders that there be a stay of execution orders granted by the Justice P.J. Otieno on 18th .12.2015 in Criminal Appeal case No 215 of 2015.

The application is based upon the following grounds;

- (a) that the said orders were granted exparte without granting the applicant an opportunity to respond and be heard;
- (b) that the respondent is serving a lawful sentence hence an application for bail pending appeal is not a constitutional right under Article 49 (1) (h) of the Constitution, which provides for the right for an accused person, not convicted, to be released on bond.

In response, the Respondent urged the court to strike out the Applicant's application on grounds that;

1. the order sought to be set aside were granted by a court of equal jurisdiction as the one they were before.
2. the applicant should have sought to have the said orders reviewed upon providing new evidence.

In arguing their application, M/s Ocholla while assisted by Mr Masila, also a learned state counsel, told court that the main reason they were seeking to have the orders granted by Justice P.Otieno set aside as because the state was not given a right to respond to the application for bail pending appeal by the Respondent, as the same proceeded exparte and orders obtained.

In considering the arguments by both counsel, I confirm that bail pending appeal is not a Constitutional right under Article 49 (1) (h) of the Constitution since it is trite law that a convicted person is believed to be serving a lawful sentence unless the contrary is shown.

I wish to point out that in an application for bail pending appeal, the main consideration is for the applicant to show that his appeal has overwhelming chances of success. The other factors such as the applicant having been on bond during the trial in the lower court or being able to attend court, are not very important. Even the fact of the health is never a major consideration in such application.

This being the case, it is therefore trite practice that the state be served with the application and the proceedings in respect of the case in which the applicant will have been convicted be availed to the court for a determination on whether the applicant's appeal has high chances of success, before being considered for released on bail.

This did not happen in this case, so that even though, the court which granted the Respondent bail pending appeal in this is a court of equal status, I find it was an error on the face of the record.

I therefore order a stay of execution of the said order and direct that;

1. the respondent to serve the applicant with their application dated 17th December, 2015.
2. the Deputy Registrar to avail the original lower court proceedings;
- 3 further directions on mention date to be fixed.

Ruling signed, dated and delivered this 8th day of February 2017.

D.O.CHEPKWONY

JUDGE

In the presence of:

M/s Ocholla for the state

M/s Ake for the Appellant

C/clerk – Kiarie