



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL MISC. APPEAL NO. 10 OF 2017

BETWEEN

PHILIP OKOTH MUTSWENJE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of Hon. T.A. Odera, SPM in Mumias Cr. Case No. 640 of 2015 delivered on 03.02.2017)

R U L I N G

Introduction

1. The appellant herein was charged with the offence of attempted defilement contrary to Section 9(1)(2) of the Sexual Offence Act No. 3 of 2006 and an alternative charge of committing an indecent act with a child contrary to section 11(1) of the same Act. He was found guilty on the first count and convicted and sentenced to serve ten (10) years in prison.

2. He has filed an appeal against both conviction and sentence of the lower court. The appeal is pending hearing.

Application

3. The appellant wants to be released on bail/bond pending the hearing of the appeal. His application is dated 9.2.2017 and brought under the provisions of Section 357 of the criminal Procedure Code. The application is based on the grounds that he was recently employed as a teacher at Itete Primary School and that he may lose the said job unless he is released on bail.

4. He further states that he is not a flight risk and that his appeal has high chances of success. He adds that he is willing to deposit security for his appearance in court whenever required.

5. His application is supported by the annexed supporting affidavit of Charles Masese Anyona an advocate of the High Court of Kenya wherein he reiterates the grounds set out on the face of the application. Annexed to the affidavit are copies of letters of appointment and posting dated 25.11.2015 and 3.1.2017 respectively which are marked "CMA 5(a) and (b)"

Submissions

6. The application was canvassed orally by both the parties herein. Mr. Anyona submitted that the

appellants appeal has high chances of success and that the appellant has recently been appointed as P1 teacher and if he does not report for the job he is likely to lose it. He adds that the applicant is the stole bread winner and has a young family and is the one who also supports his other siblings and the mother.

7. He adds that the applicant was on bond during trial and religiously attended court and that he will also do so during the appeal if bail is granted.

8. Mr. Ng'etich senior public prosecution Counsel opposed the application. He submitted that even though the appellant attended the trial religiously before, the circumstances have now changed as he is now a convict and that he is likely to abscond. He maintained that the burden of the prosecution was discharged appropriately hence the conviction of the appellant which he opines raises doubt as to the appeal having high chances of success. Counsel urged the court to expedite the hearing of the appeal on its merits.

Determination

9. Having considered the application the rival submissions made by both learned counsel and the evidence adduced before the trial court it is clear that this court has wide discretion in deciding whether or not to admit an appellant on bond pending appeal as provided for under Section 357 of the Criminal Procedure code.

10. This discretion must however be exercised judiciously and in accordance with the law taking into account the particular circumstances of each case.

11. From the record, the appellant was convicted and sentenced to 10 years imprisonment and not 20 years imprisonment as counsel for the appellant wants this court to believe. This court notes that the circumstances of the appellant have now changed as he is now a convict and should be treated as such. There is also no provision in the Constitution of Kenya 2010 which provides for bond pending appeal. The only provision in the Constitution which guarantees the right to bail or bond is found in Article 49 which only protects the right to bail of arrested persons who are either waiting to be charged with a criminal offence or have already been charged and are awaiting trial. Article 49 does not apply to persons who have already been convicted. It does not consequently give appellants the right to bond pending appeal.

12. In determining an application for bond pending appeal this court is guided by the principles set out in a number of previously decided cases. There are two main principles that the court must consider:

(a) Whether the applicant has demonstrated that his appeal has high or overwhelming chances of success.

(b) Whether he has shown that exceptional or special circumstances exist to warrant the grant of bail pending appeal. See **Dominic Karanja – Vs – Republic [1986 KLR 612] and Raghbir Singh Lamba – vs – Republic (1958) E.A 337 as well as Jivraj Shah – vs – Republic [1986] KLR 605**

13. These principles are predicated on the fact that once an accused person has been convicted of an offence by a court of competent jurisdiction, his constitutional right to the presumption of innocence is extinguished and he is deemed to have been lawfully convicted unless and until his conviction is overturned on appeal.

14. In order to ascertain whether the applicant's appeal herein has high chances of success, this court has gone through the entire evidence adduced before the trial court and the judgment delivered by the trial court and without going into much detail in order not to prejudice the court which will eventually hear the appeal, I am of the considered view that the appellants appeal has high chances of success.

15. The appellant has also shown that he has been appointed as a P1 teacher and even posted to the Kakamega County to teach. He has produced the letters dated 25th November, 2016 "CMA 5(a) and

CMA 5(b) dated 14th December, 2016. I have no doubt that the appellant having been so appointed to the noble teaching profession, will exhibit very high standards of integrity even as he awaits the outcome of his appeal. The evidence of appointment and posting as a teacher and likelihood of losing the job demonstrate exceptional circumstances and/or special circumstances to justify the appellant's admission to bond pending appeal. There is no doubt that his continued detention will deprive him of his newly acquired means of livelihood. In the circumstances and for the above reasons the appellant's application is allowed in the following terms.

16. The appellant/Applicant shall be released on his own bond of kshs. Five hundred thousand (500,000/=) plus one surety of a like amount.

- 1) The surety shall be approved by the DR of this Honourable court
- 2) Once he is released on bond, the appellant shall attend court each and every time he is required to do so, in default the bond shall be cancelled forthwith without notice and the surety called to account.
- 3) Appellant's counsel shall expeditiously process the appeal for hearing

Orders accordingly.

Ruling delivered, dated and signed in open court at Kakamega this 14th day of March 2017

RUTH N. SITATI

JUDGE

In the presence of;

Mr. Onsando for Anyona (present).....for appellant

Mr. Jamsumba(present).....for respondent

Polycap.....Court Assistant