



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 34 OF 2017

BERNARD SHIKALA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against both conviction and sentence in Kakamega CMC Cr. Case No. 60 of 2015 delivered on 18.01.2017 by Hon Felix Makoyo RM)

R U L I N G

Introduction

1. The appellant (herein referred to as applicant) was arraigned before the Chief Magistrate's Court at Kakamega on a charge of grievous harm contrary to Section 234 of the Penal Code, the particulars being that on 29th September, 2014 at Kwirenyi Village in Kakamega East District of Kakamega County, unlawfully did grievous harm to Wilson Sango
2. After a full trial during which the prosecution called 5 witnesses and during which the appellant gave sworn evidence and called 2 defence witnesses, the applicant was found guilty as charged, convicted and fined Kshs.50,000/=(Kenya shillings fifty Thousand only) in default to serve three(3) years imprisonment. The appellant was aggrieved by both conviction and sentence and has now filed this appeal on the strength of three (3) grounds of appeal. He prays that the appeal be allowed, conviction quashed and sentence set aside so he can regain his freedom of movement. The appeal is yet to be heard.

The Application

3. In the meantime the applicant has asked this court to release him on bond/bail pending appeal. His application is premised on grounds that his young family is suffering as there is no one to look after them. He also wants the court to allow him to adduce additional evidence on grounds that the trial court did not allow him to call all his witnesses.

Response to the Application

4. The application is opposed. Relying on the case of Dominic Karanja – vs – Republic [1986]KLR 612 counsel submitted that the applicant has not demonstrated to this court that his appeal has such overwhelming chances of success that he need not be kept behind bars as he awaits for the hearing and determination of his appeal. Secondly that the applicant has not demonstrated that there exist special or exceptional circumstance to warrant him being released on bond/bail pending appeal. Counsel prayed that the application be dismissed.
5. Regarding the applicant's application for leave to adduce additional evidence counsel submitted that the same has no merit as applicant has not shown the necessity for calling such evidence.
6. Counsel also submitted that the applicant's desire to call more witnesses is a mere afterthought in the absence of concrete proposals on how the intended evidence will affect this appeal; and that in the circumstances then second application should also be dismissed.

Analysis and Determination

7. In deciding whether or not to grant bond/bail pending appeal, this court is guided by the principle that only in very rare circumstances should the court grant bond/bail pending appeal. This goes a long way in explaining why even the Constitution of Kenya 2010 does not make provision for release of convicts on bond/bail pending appeal. It is also worth noting, and as held in the Dominic Karanja case, no amount of suffering of an applicant's family or his ill health, or his avowed assertion to abide by whatever bond terms the court may impose,

should move the court to grant bail to a convict seeking to be so released, the reason being that until the judgment is overturned, an appellant is in prison following due process of hearing and determining the case.

8. In the instant case, the only reason the applicant gave for his desire to be released on bond/bail pending appeal is that his family has no caregiver. He does not say that his appeal has overwhelming chances of success. Infact, a careful look at the proceedings and in particular the Judgment of the learned trial Court, shows that this appeal does not have overwhelming chances of success. In any event, the sole reason why the applicant wants to be released on bond/bail now is that his family is suffering. It has been stated by the courts over and over again, and I entirely agree, that the suffering of the family of a person who has been found guilty and convicted by a competent court, is not a reason to move a court to release such a person on bond/bail pending appeal. There is also no peculiar or special circumstance demonstrated to the court by the applicant in this case. In the circumstances, I find no merit in the applicant’s application for bond pending appeal.

Application to adduce additional Evidence.

9. Section 358 of the Criminal Procedure Code Cap 75 Laws of Kenya clothes the High Court with power to take additional evidence when dealing with an appeal from a subordinate court. Such evidence will be taken if the High Court thinks the additional evidence is necessary and upon recording reasons for such thinking. That in essence means that the applicant must place such material before the High Court as would lead it into determining that the additional evidence is necessary.

10. In the instant case, prosecution counsel opposed the application on the ground that the applicant’s application is a mere afterthought and that he has also failed to show how this anticipated new evidence will affect his appeal. In other words, the applicant has failed to demonstrate to the court that such evidence is necessary.

11. In my considered view, the applicant’s application is wanting in a member of areas first and foremost, he has not disclosed the nature of the evidence he intends to call. All he says is that the trial court did not give him an opportunity to call all his witnesses. From the record, the applicant called two witnesses and after his second witness (DW3) testified he stated; “Accused - I close my case.” There is nothing on record to show that he made an application for an adjournment to enable him call other witnesses who were not present at the court on the material day. I therefore concur with the submissions by the prosecution counsel that the application to call additional evidence is an afterthought.

12. Secondly, the applicant has not disclosed to the court the nature of the additional evidence he proposes to adduce. Thus in itself ties the hands of the court as there is no basis upon which this court can think or determine that such evidence is necessary.

Conclusion.

13. In light of the above findings, I find that the applicant’s two applications one for bond pending appeal and the other for leave to adduce additional evidence have not merit. The two applications are therefore dismissed in their entirety.

It is so ordered.

Ruling delivered, dated and signed in open court at **Kakamega this 10th day of May 2017**

RUTH N. SITATI

JUDGE

In the presence of;

.....Present in person.....For Applicant/Appellant

.....Mr. Juma - Present.....for Respondent

.....Polycap.....Court Assistant