



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 29 OF 2017

BENARD ROBERT OTIENO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

On 7th April 2017; the applicant was convicted for the first count of malicious damage to property contrary to section 339(1) of the Penal Code in which he was fined Kshs. 5,000/- in default 3 months imprisonment and for the second count of offensive conduct contrary to section 94(1) of the Penal Code in which he was sentenced to serve 4 years imprisonment. The applicant has by a Notice of Motion dated 23.6.17 brought under Section 357(1) of the Criminal Procedure Code, moved the court praying for orders that:-

a. The appellant /applicant be admitted to bail pending the hearing and determination of Kisumu HCCR. A 1 of 2017

b. Such other or further order as this Honourable court shall deem just and expedient

The application is based on the grounds that among others that:

- a. The appellant has filed Kisumu HCCRA 29 of 2017 which has overwhelming chances of success
- b. The appellant has a psychiatric problem and ought to not to have been sentenced to imprisonment
- c. The applicant is ready, able and willing to adhere to and /or abide by any such reasonable terms and conditions as the court shall impose
- d. It will be an injustice if appellant serves for a long time and this court finally allows his appeal
- e. The respondent does not stand to suffer any prejudiced should this application be allowed as prayed

The application is supported by an affidavit sworn on 23.6.17 by Ricahrd Onsongo, advocate for the applicant, who reiterates the grounds on the face of the application. Attached to the affidavit is the Memorandum of Appeal in Kisumu HCCRA 29 of 2017, applicants treatment notes and proceedings and judgment in Winam Criminal Case 253 of 2016.

Ms. Wafula, learned counsel for the state, did not oppose the application. She urged the court to ensure

that the appellant's surety gives an undertaking to ensure that he attends the hearing of his appeal.

I have carefully considered the application and submissions. Section 357 of the Criminal Procedure Code which provides for admission to bail or suspension of sentence pending appeal provides that:-

(1) After the entering of an appeal by a person entitled to appeal, the High Court, or the subordinate court which convicted or sentenced that person, may order that he be released on bail with or without sureties, or if that person is not released on bail, shall at his request order that the execution of the sentence or order appealed against shall be suspended pending the hearing of his appeal:

This court is thus clothed with the power to grant bail/bond with or without sureties, or to suspend execution of any sentence imposed by the subordinate court pending the hearing of the appeal. In granting bail pending appeal, the court is obliged to consider the circumstances of each case so that the discretion is exercised judiciously and not capriciously. In the case of **Jivraj Shah -vs- Republic [1980] KLR 605**, the Court of Appeal set out the parameters to be considered by an appellate court in applications for bail pending appeal:-

a. The principal consideration in an application for bail pending appeal is the existence of exceptional or unusual circumstances upon which the Court of Appeal can fairly conclude that it is in the interests of justice to grant bail

b. If it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of some substantial point of law to be urged and that the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail will exist.

c. The main criteria is that there is no difference between overwhelming chances of success and a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed and the proper approach is the consideration of the particular circumstances and weight and relevance of the points to be argued.

In **Mutua v R, [1988] KLR 497** the Court of Appeal stated thus:

“It must be remembered that an applicant for bail has been convicted by a properly constituted court and is undergoing punishment because of that conviction which stands until it is set aside on appeal. It is not wise to set the applicant at liberty either from the point of view of his welfare or of the state unless there is a real reason why the court should do so.”

In view of the foregoing, the onus is always on the appellant to demonstrate to the court that there are good reasons why he should not be allowed to continue serving sentence but should be allowed to enjoy his liberty pending the hearing and determination of his or her appeal.

I note that the appellant conducted his own case in the trial court and only raised the issue of his mental illness on the date of sentencing. The applicant has not demonstrated that his mental illness cannot be attended to while he is serving sentence. The issue of appellant's mental status at the time of committing the offence is one that cannot be determined in this application. I have personal knowledge of the fact that dates for hearing of appeals are open and I am aware that this appeal is likely to be heard within one year after its admission.

For all the foregoing reasons, I have come to the conclusion that the appellant has not passed the test for grant of bond pending appeal. The Notice of Motion dated 7th April 2017 is not merited and it is accordingly dismissed.

DATED, SIGNED AND DELIVERED THIS 19th DAY OF July 2017

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Clerk - Felix

Appellant - Present

For the appellant - Mr Omoyo holding brief Mr Onsongo

For the State - Ms Wafula