



REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL CASE NO. 118 OF 2015

CHRISTINE JELANG'A BENJAMIN APPELLANT

VERSUS

REPUBLIC RESPONDENT

RULING

1. The appellant *Christine Jelang'a Benjamin* was tried and convicted of the offence of Manslaughter contrary to **Section 202** as read with **Section 205** of the Penal Code.

She was sentenced to serve twelve years imprisonment.

2. She was dissatisfied with her conviction and sentence. She thus lodged an appeal to the High Court. While awaiting the hearing of her appeal, through her advocate *Mr. Geoffrey Kisilia Okara*, the appellant filed a Notice of Motion dated 22nd September, 2015 praying that she be admitted to bond pending the hearing and determination of her appeal.
3. In the grounds supporting the motion and in her deposition dated 22nd September, 2015, the appellant contends that her appeal has overwhelming chances of success as the evidence of four prosecution witnesses was taken by a court without jurisdiction; that she was convicted on the basis of contradictory evidence; that she is an elderly woman of good character; that she's sickly and if granted bond, she will not abscond. She pledged to abide by any conditions that may be set by the court.
4. At the hearing of the motion, learned counsel *Mr. Okara* submitted that the motion is premised on three main grounds;- First, that the appeal has overwhelming chances of success in view of the appellant's claim that part of the trial was conducted by a court which did not have jurisdiction to try the offence of manslaughter. Secondly, that the appellant after her arrest was arraigned in court beyond the time prescribed by the Constitution and lastly that there are exceptional circumstances that would entitle the appellant to be released on bond as she was 62 years old and was sickly.
5. The motion is contested by the state. Learned state counsel *Ms oduor* submitted that the appeal did not have any chance of

success since all the elements of the offence had been proved beyond reasonable doubt; that age is not an exceptional circumstance; that the fact that the appellant was arraigned in court outside the constitutionally prescribed time does not entitle her to an automatic acquittal and that no evidence was availed to the court to prove that she was sickly.

6. On the issue of jurisdiction, counsel submitted that *Hon. Rose Ndombi* had jurisdiction to conduct the appellant's trial; that at the time she took the evidence of the witnesses in question, she was an

- Ag. Senior Resident Magistrate and that in law, an officer discharging duties in an acting capacity is presumed to be occupying the substantive post.
7. Under Section 357 of the ***Criminal Procedure Code*** , this court is empowered to release a convicted person on bond pending the determination of an appeal on terms the court deems just.
 8. The legal parameters within which this power and discretion should be exercised were well settled by the Court of Appeal in ***Dominic Karanja V Republic (1986) KLR 612*** where the court stated as follows;-

“The most important issue was that if the appeal had such overwhelming chances of success, there is no justification for depriving the applicant his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances.

The previous good character of the applicant and the hardships, if any facing his family were not exceptional or unusual factors. His health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners.

A solemn assertion by an applicant that he will not abscond if released, even if it is supported by sureties, is not sufficient ground for releasing a convicted person on bail pending appeal....”

See also ***Jivraj Shah V Republic (1986) KLR 605; Somo V Republic (1972) EA 476.***

9. I have considered the evidence presented before the lower court and the rival submissions made by the parties. In view of the pending appeal, it would not be appropriate for me at this stage to discuss the evidence adduced in the lower court at length or comment on its veracity as doing so might prejudice the hearing of the appeal.
10. It is however worth noting that the learned trial magistrate convicted the appellant mainly on the basis of her admission in her defence that she had committed the offence. The prosecution case was based solely on circumstantial evidence but contrary to the contention made by the appellant, I cannot say that the evidence was contradictory. The question of whether the evidence presented to the trial court was sufficient to sustain a safe conviction is one which can only be determined by the judge who will hear the appeal.
11. The appellant has claimed that the trial was a nullity as it was partly conducted by a magistrate who did not have the requisite jurisdiction. This claim is vehemently denied by the state. The state maintains that *Hon. Rose Ndombi* then an Ag. Senior Resident Magistrate who took the evidence of the first four witnesses had jurisdiction to conduct the trial.
12. The ***Criminal Procedure Code*** in its first schedule provides for the court that has jurisdiction to try the offence of manslaughter. It enacts that the offence should be tried by the subordinate court of the first class presided over by a Chief Magistrate, a Senior Principal Magistrate, a Principal Magistrate or a Senior Resident Magistrate. The issue of whether a magistrate who discharges his or her duties in an acting capacity possesses the same jurisdiction donated to a Magistrate occupying the substantive post or rank is a substantial point of law which is arguable but it is one which this court cannot determine at this stage. It is an issue which can only be properly determined by the appellate court. On my part, prima facie, I am not satisfied that the issue of jurisdiction in the circumstances in which it is raised in this appeal is sufficient to prove that the appeal has overwhelming chances of success.
13. Turning now to the claim that after her arrest the appellant was arraigned in court outside the Constitutional timelines, it is my finding that even if that were so, this is not a fact which would be material in considering whether or not the appellant’s appeal has good chances of success. I say so because as correctly pointed out by *Ms Odour*, the establishment of this fact cannot entitle the appellant to an automatic acquittal. Her remedy would lie in an action for the recovery of damages in a civil suit. See: ***Julius Kamau Mbugua Vs Republic Criminal Appeal No. 50 of _____ 2008.***
14. Though it is not contested that the appellant is elderly being 62 years old, age or the previous good

character of an appellant is not an exceptional circumstance. And although it was alleged that the appellant was sickly, no evidence was availed to the court to substantiate that allegation.

15. The appellant was sentenced to twelve years imprisonment on 3rd September, 2015 which is about four months ago. There cannot be any doubt therefore that she will not have served a substantial part of her sentence before her appeal is heard. In view of the foregoing, I am satisfied that no special or exceptional circumstances have been shown to exist in this case to entitle the appellant to bond pending appeal.

16. For all the above reasons, I am persuaded to find that the application dated 22nd September, 2015 is devoid of merit. It is accordingly dismissed.

It is so ordered.

C. W. GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 4th day of March 2016

In the presence of:-

The appellant

Ms. Oduor for the Republic

Mr. Okara G.K for the accused

Mr. Chelanga – Marakwet interpreter