



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 46 OF 2014

(An appeal from the Judgment of the Senior Resident Magistrate, Embu in CMCR. Case No. 1259 of 2013 dated 6/8/2014)

DICKSON MUCHANGI GUTETA..... APPELLANT/APPLICANT

VERSUS

PROSECUTION.....RESPONDENT

RULING

1. This is an application for bail pending appeal dated 3/2/2016. It is supported by the the affidavit of the applicant Dickson Muchangi Guteta. In the affidavit the applicant states that his appeal has high chances of success and will be rendered nugatory if he is not released on bond. He states that he will attend court and present himself voluntarily when he is required to do so.
2. The counsel for the applicant Mr. Mogusu submitted orally that the appeal has overwhelming chances of success as the language of the court was not recorded. The appellant stated that he understood Kiembu during plea taking but this was not followed during the hearing. There was no interpreter in court during hearing yet pw1,pw4 and pw5 used kiswahili. He further submitted that Section 200 of the Criminal Procedure Code was never complied with after the hearing was taken over by another magistrate and the rights of the accused under the law were never explained to him. The prosecution will not be prejudiced if the application is allowed.
3. The state counsel Ms. Nandwa submitted that the appellant was provided with an interpreter for Kiswahili/Kiembu on 11/11/2013. On 25/11/2013 there was an interpreter for English and Kiswahili and on 20/12/2013 the magistrate indicated the language used in court. On 3/1/2013 the magistrate indicated that the language used was English/Kiswahili/Kiembu.
4. It was further argued that the language used on that day was kiembu and appellant cross-examined all the witnesses showing he understood everything. The record indicates that the magistrate complied with the provisions of Section 200 of the Criminal Procedure Code. The applicant has not demonstrated that the appeal has high chances of success.
5. It is important to note that unlike bail pending trial which is a constitutional right, bail pending appeal is granted on the discretion of the court and upon meeting certain conditions.
6. The conditions for granting bail pending appeal were discussed in the following cases;

In the case of ***Dominic Karanja v. Republic [1986] KLR 612*** the court of Appeal listed the conditions which an Applicant for bail pending appeal should satisfy before the application can be granted.

7. The court held that:

- *The most important issue was that if the appeal had such overwhelming chances of success, there*

is no justification for depriving the Applicant of 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. Ill 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.

8. Section 200 of the CPC provides that;

(1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may—

(a) deliver a judgment that has been written and signed but not delivered by his predecessor; or

(b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resubmit the witnesses and recommence the trial.

(2) Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.

(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right.

(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.

9. The proceedings at page 15 of the record of appeal indicate that the magistrate only indicated that he would take over the matter under Section 200 of the Criminal Procedure Code. It appears that the court did not explain to the appellant his right to re-summon any witnesses and to commence the trial afresh. Whether this omission is fatal to the prosecution's case will be considered at a later stage in the appeal.

10. In the case of **JOSEPH KAMORA MARO VS REPUBLIC [2014] ECLR** the court held that:-

"the position in law is that a trial magistrate taking over a case that is partly heard must be mandatorily obligated to inform an accused person of his right to recall witness. After an accused has been informed of his right, he/she may elect to have the witnesses recalled."

11. The applicant stated that he was not provided with an interpreter in accordance with Article 50 of the Constitution and that he did not follow the proceedings due to the language barrier.

12. Article 50(1) of the Constitution provides that an accused person has the right to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial.

13. In the case of **JOHN OUMA AWINO & ANOTHER VS REPUBLIC [2014] eCLR** the court held:-

The mandatory requirements under the law were to inform the appellants the nature of the offence

in a language they understood, and to provide an interpreter if they did not understand the language of the court. In this case they expressly chose the language themselves and never complained about any change of it or their failure to follow the proceeding. We find and hold in the circumstances that there was compliance with the constitution and we decline the invitation to declare the trial a nullity.

14. During the taking of the plea, the court record indicates that the court used English/Kiambu interpretation. The accused replied to the charges in Kiambu. The record is therefore clear that preferred language of the appellant was Kiambu from the beginning of the trial.
15. On 6/12/2013 there was interpretation of English and Kiswahili languages to Kiambu. On 20/12/2013 there was interpretation in the same language from English and Kiswahili. The same case applies to 3/1/2014. The appellant cross-examined PW1, PW2 and PW4 on that day. PW3 testified in Kiambu language and was also cross-examined.
16. On 24/6/2014 when PW5 the investigating officer testified in Kiswahili but the record does not indicate that there was interpretation in Kiambu. The appellant did not complain of not understanding the language. He said he had no questions in cross-examination. On 22/7/2014 the appellant gave his unsworn statement in Kiswahili.
17. It was held in the case of **JOHN OWINO & ANOTHER VS REPUBLIC [2014] eKLR** that the accused chooses his language at the beginning of the trial and that where a witness testifies in another language and the accused does not complain, then it will be construed that he understood the language used.
18. The appellant was accorded an interpreter in the language he chose during the hearing of the case. Its only in regard to evidence of PW5 that it is not indicated whether there was an interpreter from Kiswahili to Kiambu.
19. However, the fact that the appellant did not raise the issue with the court and said he had no questions shows he understood and followed the proceedings.
20. I have considered all the ground relied on and find that the appeal has some chances of success. I therefore allow the application for bail on the following terms:-

(a) The appellant may be released on bond of Kshs.200,000/= with one surety or cash bail of Kshs.100,000/=.

(b) He will attend monthly mentions before the Deputy Registrar pending disposal of the appeal.

DELIVERED, DATED AND SIGNED AT EMBU THIS 12TH DAY OF APRIL, 2016.

F. MUCHEMI

JUDGE

In the presence of:-

Appellant

Mr. Mwaniki for Mr. Mogusu for appellant