

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO. 91 OF 2016

JACINTA ACHIENG OCHIENG.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Jacinta Achieng Ochieng was convicted by the trial court for causing **grievous harm** to the complainant contrary to **Section 234** of the **Penal Code**. She was sentenced to serve two (2) years imprisonment. The Applicant was aggrieved by her conviction and sentence. She has filed an appeal to this court. Pending the hearing and determination of the appeal, she has applied to be released on bail pending appeal pursuant to **Section 357** of the **Criminal Procedure Code**. The Applicant avers that if she is not released on bail pending appeal, by the time the appeal will be heard, it is likely that she will have served the sentence. She urged the court to take into consideration the fact that she is a single mother of three young children, and at the time of her incarceration, the said children were left under the care and custody of a neighbour. She stated that, at the time she filed the application, one of her children was ailing and has been admitted to hospital. She urged the court to take into account the best interest of the children when determining the application. She was of the view that the appeal that she has filed has a high probability of success. The application is supported by the annexed affidavit of George Gilbert Otieno, the Advocate of the Applicant. Mr. Otieno amplified these grounds during the hearing of the application.

Although the prosecution did not file any papers in opposition to the application, Ms. Akunja for the State opposed the application. She submitted that the Applicant had been convicted and sentenced. The chances of her appeal succeeding were remote. She urged the court not to be persuaded by the submission made by the Applicant that she was a single parent. She explained that the fact that the Applicant was a single parent did not amount to exceptional circumstances that will persuade this court to grant bail pending appeal. To address the Applicant's concern that her appeal would not be heard before completion of her sentence, she stated that the court should admit the appeal to hearing and fix the case for hearing. She urged the court to dismiss the application.

This court has carefully considered the rival submission made by the parties to this application. The principles to be considered by this court in deciding whether or not to release the Applicant on bail pending appeal were set out by the Court of Appeal in **Jivraj Shah –vs- Republic [1986] KLR 605** at page 606:

“There is not a great deal of local authority on this matter and for our part such as we have seen and heard tends to support the view that the principal consideration is if there exist exceptional or unusual circumstances upon which this court can fairly conclude that it is in the interest of justice to grant bail. 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 in law to be urged, and that the sentence or a substantial part of it, will have been served by the time the appeal is heard, conditions for granting bail will exist. The decision in Somo –vs- Republic [1972] E A 476 which was referred to by this court with approval in Criminal Application No.NAI 14 of 1986, Daniel Dominic Karanja –vs- Republic where the main criteria was stated to be the existence of overwhelming chances of success does not differ from a set of circumstances which disclose substantial merit in the appeal which could result in the

appeal being allowed. The proper approach is the consideration of the particular circumstances and the weight and relevance of the points to be argued. It is almost self-defeating to attempt to define phrases or to establish formulae. There is a helpful passage in Archbold, Criminal Pleading Evidence and Practice, 41st Edition page 783, paragraph 7 – 86.”

In the present application, the Applicant argued that her appeal had high chances of success. However, the Applicant did not annex the petition of appeal to the application neither did she set forth the grounds that she considers would make the court find in her favour in the appeal. This court is therefore unable to determine whether or not the appeal lodged by the Applicant will have high chance of success. As regard the second aspect of her submission, this court is of the view that the Applicant is on firmer ground. She stated that she is a single mother of three young children. The said children were left under the custody of a neighbour when she was incarcerated. One child is sick. At the time the application for bail pending appeal was filed, the child had been admitted to hospital. The Applicant was sentenced to serve a term of two (2) years in prison. This court agrees with the Applicant that by the time the appeal shall be heard, it is more likely than not that she will have served her sentence. Her appeal would thus be rendered nugatory. This court holds that these two factors constitute exceptional circumstances that persuades this court to release the Applicant on bail pending appeal.

In the premises therefore, the Applicant is granted bail pending appeal on condition that she deposits in court cash bail of Kshs.20,000/-. The Applicant shall also be required to prepare, file and serve the record of appeal within sixty (60) days of today's date. The case shall be mentioned on **7th June 2016** when the court shall fix the date for the hearing of the appeal. The Applicant shall be required to be in court. It is so ordered.

DATED AT NAIROBI THIS 5TH DAY OF APRIL 2016

L. KIMARU

JUDGE