



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

CRIMINAL APPEAL NO. 80 OF 2013

BENARD KIMANI NTHUSA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant was convicted of the offence of incest contrary to section 20(1) of the Sexual Offences Act by the Chief Magistrate's Court at Machakos in CMCC Criminal Case No 1424 of 2012 and sentenced to life imprisonment. The Applicant subsequently filed this appeal against the judgment of the trial Court by way of a petition of appeal filed in Court on 9th May 2013. He also filed an application by way of a Chamber Summons filed in Court on 4th September 2014 in Miscellaneous Criminal Application No. 164 of 2014 seeking grant of bond/bail pending the hearing of his appeal. The said application was consolidated with the appeal for purposes of hearing and determination.

The Applicant in his supporting affidavit to the application relied on Article 49(1)(h) of the Constitution, and stated that his grounds of appeal are cogent and have a high chance of success, and that he is ready and willing to abide by an conditions imposed by the Court. His learned Counsel, Paul Kisongoa & Company Advocates, filed submissions in Court dated 17th March 2016 wherein he argued that the criteria for granting bond is whether the Appellant will appear in Court, and whether there is a possibility of him absconding. It was contended that the Appellant is the only person taking care of his home and livestock, and that since he was born he has never left his home area. Further, that he cannot therefore escape and will provide security. It was also submitted that the Applicant intends to apply for amendment of his petition on the ground that the charge was defective for duplicity which is fatal.

The Prosecution opposed the application in a replying affidavit sworn on 2nd March 2016 by Rita Chelangat Rono, a prosecution counsel in the Office of the Director of Public Prosecutions. The prosecution averred that the Applicant has not demonstrated that his appeal has high chances of success, and that Article 49 of the Constitution no longer applies to the Applicant since he was tried and convicted in a Court with competent jurisdiction. Further, that the Applicant's assertion 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.

The prosecution counsel also filed submissions dated 12th March 2015, wherein it was urged that the presumption of innocence no longer applies to the Applicant as he has been tried and convicted by a competent court. The prosecution relied on the decisions in **Some vs Republic, (1972) E.A 476** and **Dominic Karanja vs Republic (1986) KLR 612** for the position that the Applicant has not advance any

grounds to demonstrate his appeal has high chances of success, and has not advanced any exceptional circumstances to warrant the grant of bail pending appeal .

I have considered the pleadings and submissions by the parties. I note that unlike an application for bail pending trial where the Applicant has a constitutional right to be considered innocent until proved guilty, an Applicant for bail pending appeal stands on the premise that he has already been found guilty of the offence. In **Mutua vs 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 or 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.”

A different test from that applied in bail pending trial is therefore applied in bail pending appeal. When considering an application for bail pending appeal, the court has discretion in the matter which must be exercised judicially taking into consideration various factors as follows:

- a. Whether the appeal has overwhelming chances of success. See **Ademba vs Republic (1983) KLR 442, Somo vs R [1972] E.A 476, Mutua vs R [1988] KLR 497** in this regard;
- b. There are exceptional or unusual circumstances to warrant the court's exercise of its discretion. In this regard see **Ragbir Singh Lamba vs R [1958] E.A 337; Somo vs R (supra.); Mutua vs R (supra.)**
- c. There is a high probability of the sentence being served before the appeal is heard as held in **Chimabhai vs R, [1971] E.A 343.**

In the instant application, I have perused the charge in the trial Court which is alleged to be duplicitous, and I do not note any obvious fatal errors. This allegation will in any event have to await amendment of the Petition of Appeal and be subjected to further argument and analysis. The Court also notes that the Applicant was sentenced on 29th April 2013 to life imprisonment, and it is therefore unlikely that he might serve a substantial part of his prison term before the appeal is heard and determined.

Given the above circumstances, I am satisfied that this is not a proper case in which to exercise this court's discretion in favour of the Applicant. I accordingly find that the Applicant's application for bail/bond pending appeal has no merit and it is accordingly denied.

There shall be no order as to costs.

It is so ordered.

DATED AT MACHAKOS THIS 7th DAY OF JUNE 2016.

P. NYAMWEYA

JUDGE