



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NUMBER 35 OF 2016
JEREMIAH WACHIRA MUCHIRI...APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

RULING

On 20th May 2016 the appellant was convicted of the offence of sexual assault contrary to Section 5 (1) (a) (i) of the Sexual Offences Act^[1] and sentenced to serve ten years imprisonment in Magistrates Court Criminal Case number 30 of 2014- Nyeri. Aggrieved by the said finding, the appellant appealed to this court on 24th May 2016 seeking to set aside the said conviction and sentence arguing *inter alia* that the conviction was based on unreliable evidence.

On 3rd June 2016, the Appellant moved this court by way of chamber summons expressed under Sections 356 & 357 of the Criminal Procedure Code^[2] seeking orders that he be released on bail pending the hearing of his appeal. The grounds in support of the application are that the appellant is aged 65 years old and suffers from hypertension, diabetes, and ulcers, that he is likely to serve a substantial part of the sentence before the appeal is heard and determined and that his appeal has got high chances of success.

The application is supported by the annexed affidavit of the appellant in which he reiterates the above grounds and has exhibited medical reports in support of his averments. He avers that if his condition is not well managed it may deteriorate. He avers that if released on bail he will comply with bail terms.

Counsel for the DPP Miss Chebet opposed the application and submitted that the appeal has no chances of success, that the prosecution proved its case to the required standard, and that the evidence tendered by the defence including his *alibi* were considered but found to be untruthful.

Section 357 (1) of the Criminal Procedure Code^[3] which provides for admission to bail or suspension of sentence pending appeal provides that:-

357 (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:

The principles for granting bail pending hearing of an appeal were reiterated in the case of *Jivraj Shah vs Republic*^[4] which laid down the said principles as follows:-

(i) *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.*

(ii) *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 argued and that the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail exists.*

(iii) *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.*

I find also useful guidance in the words of **Harris J** in the case of *Chimambhai vs Republic*^[5] where the learned Judge rendered himself as follows:-

“The case of an appellant under sentence of imprisonment seeking bail lacks one of the strongest elements normally available to an accused person seeking bail before trial, namely, the presumption of innocence, but nevertheless the law of today frankly recognizes, to an extent at one time unknown, the possibility of the conviction being erroneous or the punishment excessive, a recognition which is implicit in the legislation creating the right of appeal in criminal cases.”

The Supreme Court of Uganda in the case of *Arvind Patel vs Uganda*^[6] cited with approval the above decision by **Harris J** and set out the consideration which should generally apply in applications for bail pending hearing of an appeal as follows:-

(i) *the character of the applicant.*

(ii) *whether he/she is a first offender.*

(iii) *whether the offence of which the applicant was convicted involved personal violence.*

(iv) *the appeal is not frivolous and has reasonable possibility of success.*

(v) *the possibility of substantial delay in the determination of the appeal.*

(vi) *Whether the applicant has complied with bail conditions granted after the applicant's conviction and during the pendency of the appeal (if any)*

Justice Oder in the above cited case had the following to say:- *“In my view it is not necessary that all these conditions should be present in every case.”* (Emphasis added)

Numerous court decisions^[7] are in agreement that the above conditions are guidelines and are not exhaustive or mandatory and that they need not all be present. A combination or two or more of the said conditions will suffice. The court further added that the main purpose of granting bail especially bail pending appeal is that while the applicant is set free pending trial or appeal, the court must be satisfied that the applicant shall in compliance with the bail conditions be available to attend trial or appeal. The court must therefore be satisfied that the applicant will not abscond.

There is no denying the fact that the liberty of an individual is precious and is to be zealously protected by the courts. Nonetheless, such a protection cannot be absolute in every situation. The valuable right of liberty of an individual and the interest of the society in general has to be balanced. Liberty of a person accused of an offence would depend upon the exigencies of the case. It is possible that in a given situation, the collective interest of the community may outweigh the right of personal liberty of the

individual concerned.[8]

Further, the supreme court of India in the case of *Krishnan vs The People*[9] stated the conditions to be satisfied in an application for bail pending hearing of an appeal as follows:-

(i) Bail is granted at the discretion of the court.

(ii) The court must be satisfied that there are exceptional circumstances that are disclosed in the application.

(iii) The fact that the appellant due to delay in determining the appeal may, have served a substantial part of his sentence by the time his appeal is heard, is one such exceptional circumstance. Each case is considered on its merits, depending on what may be presented as exceptional circumstances.

(iv) It is important to bear in mind that in an application for bail pending appeal, the Court is dealing with a convict, and sufficient reasons must therefore exist before such a convict can be released on bail pending appeal.

(v) It is not for the court to delve into the merits of each ground. But it suffices that all the grounds are examined, and a conclusion is made that prima facie the prospects of success of the appeal are dim.

(vi) The fact that the applicant did not breach the bail conditions in the court below, is not an exceptional circumstance which can warrant to admit an application to bail; pending appeal.

Article 49 (1) (h) provides that “an arrested person has the right to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.” The **Bail and Bond Policy Guidelines**[10] provide at that with respect bail pending appeal, the burden of proof is on the convicted person to demonstrate that there is an “overwhelming probability” that his or her appeal will succeed.

Granting bail entails the striking of a balance of proportionality in considering the rights of the applicant, and the public interest on the other. On the one hand it is the duty of the court to ensure that crime where it is proved, is appropriately punished, this is for the protection of society; on the other hand it is equally the duty of the court to uphold the rights of persons charged with criminal offences, particularly the human rights guaranteed under the constitution. This position was expressed by the court of appeal in *Gerald Macharia Githuka vs Republic*.[\[11\]](#)

The cornerstone of the justice system is that no one will be punished without the benefit of due process including the right to exhaust the right to appeal. Incarceration before trial or pending hearing of an appeal cuts against this principle. The need for bail is to assure that the accused person will appear for trial and not to corrupt the legal process by absconding. Anything more is excessive and punitive.

Further I have examined the grounds of appeal and in my view they are not frivolous. In an application of this nature, an applicant is required to satisfy the existent of one or a combination of the conditions mentioned in the earlier cited authorities. The applicant has exhibited medical reports showing that he is sickly and that his condition if not well managed can deteriorate and possibly put his life into a risk. This has not been disputed. Should his appeal ultimately succeed, then he will have been subjected to great suffering. To me these are exceptional circumstances which the court cannot ignore. I find that the applicant has demonstrated that the existence of exceptional circumstances to warrant him to be admitted to bail pending hearing of his appeal. There is also a possibility that by the time the appeal is heard and determined, he may have served a substantial portion of his sentence which may be a great punishment should the appeal succeed.

It has not been demonstrated that there are compelling reasons to warrant this court to deny the appellant

bail. It has not been demonstrated that the appellant if released on bail will not attend court if and when required.

Accordingly, I find no reason to refuse the application before me. I order that:--

- (i) The appellant be released on a bond of **Ksh. 200,000/=** plus one surety of a similar amount; **OR**
- (ii) Alternatively the appellant may be released upon payment of a cash bail of **Ksh. 200,000/=** plus one surety of **Ksh. 200,000/=**.
- (iii) That the sureties shall be approved by the Deputy Registrar of this court.
- (iv) That the appellant must attend mention before the Deputy Registrar of this court at least once per month during the pendency of this appeal or when required by the court and must be present during the hearing of this appeal unless such attendance is dispensed with by the court.

Signed, Delivered and Dated at Nyeri this 15th day of September 2016.

John M. Mativo

Judge

[1] Act No. 3 of 2006

[2] Cap 75, Laws of Kenya

[3] Ibid

[4] {1986} KLR 605

[5] (No 2) {1971}E.A.343

[6] Criminal Application No. 1 of 2003

[7] Igamu Joanita vs Uganda Criminal Application no. 0107 of 2013

[8] See Gulabrao Baburao Deokar v. State of Maharashtra and Others Criminal Appeal 2113 of 2013 & Masroor v. State of Uttar Pradesh and Anor (2009) (14) SCC 286

[9] {SCZ 19 of 2011}, {2011} ZMSC 17

[10] March 2015, National Council on the Administration of Justice

[11] Criminal Appeal No. 119 of 2004