



REPUBLIC OF KENYA

IN THE HIGH COURT

AT ELDORET

CRIMINAL APPEAL CASE NO. 75 OF 2016

EDWIN KIPROP LAIBONGOTI LEKAKENY.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

RULING

1. The appellant *Edwin Kiprop Laibongoti Lekakeny* was convicted on own his plea of guilty with the offence of causing death by dangerous driving Contrary to *Section 46* of the *Traffic Act*. He was sentenced to three years imprisonment. The trial court also made an order cancelling the appellant's driving licence and disqualifying him from obtaining a driving licence for a period of three years from the date of his conviction.
2. The appellant was aggrieved by the sentence imposed on him by the trial court. In his petition of appeal dated 5th July, 2016, he challenged the sentence mainly on grounds that the learned trial magistrate erred in law and fact in failing to consider his plea in mitigation and the circumstances surrounding occurrence of the accident when passing sentence; and, that the sentence was harsh and excessive considering that he was a first offender.
3. Whilst awaiting the hearing of the appeal, the appellant through his advocates *Ms Maritim & Company Advocates* presented a Notice of Motion dated 5th July, 2016 seeking that he be admitted to bond or bail pending the determination of his appeal.
4. At the hearing, the appellant's learned counsel *Mr. Maritim* urged the court to allow the application on grounds that the appeal has high chances of success; that the appellant had fallen sick when in prison and that he is not a flight risk.
5. The state contests the application. Learned prosecuting counsel *Ms Oduor* disputed the appellant's claim that his appeal had high chances of success. She contended that the appellant was not entitled to bond pending appeal as he had failed to prove his claim that he was unwell or that there were exceptional and unusual circumstances that would justify his admission to bond pending appeal.
6. Under *Section 357* of the *Criminal Procedure Code*, the High Court has wide and unfettered discretion to admit an appellant to bond or suspend his sentence pending determination of an appeal. Like all judicial discretions, this discretion must be exercised judiciously taking into account the particular circumstances of each case.

7. The legal parameters for application of this nature have been the subject of many judicial pronouncements.

See for instance Somo V Republic (1972) EA 476; Dominic Karanja V Republic (1986)KLR 612 ; Jivraj Shah V Republic (1986)KLR 605.

The common thread that runs through these authorities is that for the court to exercise its discretion in favour of an appellant, he must demonstrate that his appeal has high or overwhelming chances of success. The other secondary consideration is whether the applicant had established that there were exceptional or unusual circumstances that would entitle him to bond pending appeal.

8. In this case, the appellant has only appealed against his sentence. He stands convicted of a traffic offence as opposed to a criminal offence. True, the offence of causing death by dangerous driving is a serious offence but because it is committed in the course of an accident as opposed to a premeditated action, it is one in which courts more often than not consider a non-custodial sentence as appropriate. This is not to say or to suggest that the appellant's appeal is going to be successful. There is no doubt that the impugned sentence is lawful given the penalty prescribed by *Section 46* of the *Traffic Act* but it will be upon the appellate court to re-evaluate the circumstances leading to the occurrence of the accident and the appellant's plea in mitigation to arrive at its own independent conclusion whether the sentence meted out against the appellant in this case was reasonable; or whether it was harsh and manifestly excessive as contended by the appellant.

9. I am mindful of the fact that there is a pending appeal. I cannot prejudge it. But I think that I can safely say that considering that the appellant was convicted of a traffic offence and he was said to be a first offender, there is a probability that his appeal was likely to succeed. In the circumstances, it would be unjust to decline to grant the orders sought in the event that the appeal is eventually allowed.

10. On this ground alone, it is my view that the interests of justice would be better served in this case if the application was allowed. I accordingly allow the application on the following terms;

The appellant shall be released upon executing a personal bond of Kshs.500,000 together with one surety of a similar amount. The surety shall be approved by the Deputy Registrar of this court.

It is so ordered.

C. W. GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 10th day of November, 2016

In the presence of:-

The appellant

Mr. Maritim for the Appellant

Miss Naomi Chonde court clerk

No appearance for the state