



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO.43 OF 2011

PETER CHERUYOIT RUGUTT

***alias* CHERU.....APPLICANT/APPELLANT**

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The applicant/appellant was charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code before the Chief Magistrate's Court in Kericho. He was tried and convicted of the offence, and sentenced to death. He appealed against his conviction and sentence in this appeal, and in a judgment by a two judge bench of this Court, his appeal was dismissed and the conviction and sentence upheld. He has preferred an appeal against the dismissal of his appeal to the Court of Appeal.

2. By his undated application which was filed in Court on 5th November 2014, the applicant now seeks to be released on bail pending his appeal to the Court of Appeal. His application is in the following terms:

1. That the appellant/applicant be released on bail with or without sureties pending the determination of the appeal in the Court of Appeal against the conviction and sentence.

2. That there be stay of the sentence passed against the appellant herein.

3. The application is expressed to be premised on the grounds that the sentence imposed is inordinately excessive and his appeal has high chances of success.

4. The applicant also filed a supporting affidavit together with the application in which he deposes that he is a suspect and ought to be given bond or bail. He also deposes that he is entitled to protection of fundamental rights under the Constitution, is a Kenyan with a known place of residence, and is ready to abide by the terms and conditions of bail.

5. His application was canvassed before me by his Counsel, Mr. Migiro, on 21st November 2016. Ms. Keli appeared for the State.

6. Mr. Migiro reiterated the orders sought in the applicant's application for his release on bail pending hearing and determination of his appeal before the Court of Appeal, noting that the application was lodged under section 6 of the Appellate Jurisdiction Act which gives the High court power to grant bail pending appeal to the Court of Appeal. He noted further that the applicant was appealing against both his conviction and sentence. Mr. Migiro submitted that the Court has the discretion to grant the orders that

the applicant was seeking, and it was his submission that the appeal had high chances of success. No authorities were cited in support of the application.

7. Ms. Keli opposed the application on behalf of the State. Her submission was that the application is misconceived and bad in law and has no legal basis. In her view, this court has no jurisdiction to entertain the application as section 379 (4) of the Criminal Procedure Code is clear that an application for bail before the High Court or the Court of Appeal pending an appeal lodged in the Court of Appeal can be granted in all cases except cases in which the appellant has been sentenced to death. The applicant had been sentenced to death by the trial court, his appeal was dismissed by a two judge bench of the High Court which upheld the conviction and sentence of the lower court, and that the sentence of death under section 296 (2) of the Penal Code was upheld. Her submission therefore was that the applicant is not allowed by law to make the present application. She prayed that the application be dismissed.

8. In response, Mr. Migiro submitted that the applicant has the constitutional right to seek bond under Article 22 of the 2010 Constitution. In his view, constitutional rights are superior to the sections of the Criminal Procedure Code relied on by the provisions of the Constitution override the provisions of the Criminal Procedure Code.

9. I have considered the application before me and the relevant constitutional provisions cited. Article 22 allows a party to lodge a petition in court alleging that his rights or fundamental freedoms under the Bill of Rights have been infringed or are threatened with infringement. As the applicant was tried and convicted by a court of competent jurisdiction under provisions of the law, and his appeal was heard and dismissed in accordance with the law, he does not have a basis for alleging a violation of rights under Article 22.

10. He alleges that he is entitled to be released on bond as he is a suspect. However, having been tried and convicted, he is no longer a suspect. He is a person convicted of a serious offence. Is there a constitutional right to bail or bond for a convicted person? In my view, there is none.

11. Article 49, which contains the constitutional guarantee to bail or bond, applies only to arrested persons who have not yet been tried and convicted. It provides as follows:

49. (1) An arrested person has the right—

....

(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.”

12. It is evident that this provision does not apply to persons who have already been tried and convicted. They do not have a right to bail or bond. With respect to persons who have been sentenced to death, section 379(4) of the Criminal Procedure Code bars the release of such persons on bail pending appeal. It provides as follows:**(4) Save in a case where the appellant has been sentenced to death, a judge of the High Court, or of the Court of Appeal, may, where an appeal to the Court of Appeal has been lodged under this section, grant bail pending the hearing and determination of the appeal.** (Emphasis added)

13. In the circumstances, I am constrained to find that the present application has no merit. It is hereby dismissed.

Dated, Delivered and Signed at Kericho this 5th day of December 2016.

MUMBI NGUGI

JUDGE