



REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

HIGH COURT CRIMINAL APPEAL NO.55 OF 2013

STEPHEN KIPROP KIPSANG APPELLANT

VERSUS

REPUBLIC RESPONDENT

RULING

1. The appellant **Stephen Kiprop Kipsang** was tried and convicted with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual offences Act**. He was sentenced to life imprisonment.
2. The appellant was aggrieved by the conviction and sentence. He lodged an appeal to the High Court through his petition of appeal filed on 22nd March, 2013.

On 16th December 2014, the appellant through his advocates **Mburu Okara and Co. Advocates** filed a Notice of Motion dated on even date praying that he be admitted to bond pending the hearing and determination of his appeal.

3. The application is premised on grounds stated on its face the main ones being that his appeal has overwhelming chances of success; that he suffers from Hypertension and other complicated diseases; that he is of good character and that he never jumped bail during his trial; that there may be delay in the hearing of his appeal and that it is in the interest of justice that his application be allowed.

In his supporting affidavit sworn on 16th December 2014, besides reiterating the grounds supporting the application, the appellant deposed that his medical condition needed constant medication and that his continued incarceration would greatly affect his health.

4. The application was argued before me on 17th February 2016. Learned counsel **Mr. Okara** appeared for the appellant while the state was represented by the Assistant Director of Public Prosecutions in Eldoret Learned Counsel **Mr. Omwenga**.

In his submissions, **Mr. Okara** relied on the grounds supporting the application, **Article 49** of the **Constitution** and the applicant's supporting affidavit. He emphasized that the appellant's appeal had high chances of success and that there was no good reason to keep him in prison while awaiting the conclusion of his appeal.

5. The state contests this application. Learned counsel **Mr. Omwenga** in opposing the application submitted that bond pending appeal is not a constitutional right as **Article 49** of the **Constitution**

deals with bond pending trial and not bond pending appeal; that the appellant has not demonstrated that his appeal has high chances of success or that exceptional circumstances existed to warrant his admission to bond; that sickness does not qualify to be an exceptional circumstance. Counsel further argued that good character or the fact that an appellant did not jump bail in the lower court are not considerations that would guide the court in determining an application for bond pending appeal. He invited the court to look at the evidence adduced before the trial court particularly the evidence of the complainant and that of the doctor and find that the appeal did not have chances of success.

6. Having considered the application, the evidence on record, the rival submissions by learned counsel for the appellant and the state, the grounds of appeal as well as the authorities cited by **Mr.Omwenga**, I take the following view of the matter.

It is trite law that the court has wide and unfettered discretion in determining whether or not to admit an appellant to bond pending appeal- See **Section 357** of the **Criminal Procedure Code**. That discretion must however be exercised judiciously in accordance with the law with the aim of advancing the course of justice.

7. The two main principles which guide the court in the exercise of the aforesaid discretion are firstly, whether the applicant has established that his appeal has high or overwhelming chances of success and secondly, whether exceptional circumstances exist which would justify the admission of the appellant to bond pending appeal.

The other ground upon which bond pending appeal may be granted is where there is an anticipated delay in the hearing of the appeal which ground should be considered together with the other factors which constitute good grounds for granting bond pending appeal.

8. In **Somo V Republic [1972] EA 476**, the court held that;

“...The most important ground is that the appeal has overwhelming chances of being successful: in that case there is no justification for depriving the application of his freedom...”.

In **Dominic Karanja V Republic 1986 [KLR] 612**, the Court of Appeal held as follows:-

1. ***“The most important issue was that if the appeal had such overwhelming chances of success, there is no justification for depriving the applicant his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances.***
2. ***The previous good character of the applicant and the hardships, if any facing his family were not exceptional or unusual factors. His health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners.***
3. ***A solemn assertion by an applicant 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.....”***.

9. From the above authorities, it is clear that an applicant for bond pending appeal has the onus of proving that his appeal has overwhelming chances of success or that special or exceptional circumstances exist which would justify his admission to bail. This is so because once convicted by a competent court, an accused person loses the constitutional right to be presumed innocent until proved guilty and is presumed to have been lawfully convicted unless and until his conviction is quashed or set aside on appeal . See:**Mutua V Republic (1988) KLR 497**.
10. In this case, upon considering the evidence adduced before the trial court and the judgment of the learned trial magistrate , in order not to prejudice the pending appeal, I can only say at this stage that the appellant may have an arguable appeal but I am not satisfied that the said appeal has overwhelming chances of success.

Regarding the claim that the appellant suffers from Hypertension and other complicated diseases, the appellant did not avail any evidence to substantiate that claim. But even if he did, ill health per se does not constitute an exceptional circumstance considering that there is no evidence to suggest that the medical facilities in our prisons are incapable of managing the appellant's alleged illness.

11. The appellant has urged me to consider that he is of good character and that in the same way he did not jump bail in the lower court, he would not abscond if granted bond pending appeal.

However, as pointed out by the Court of Appeal in *Dominic Karanja V Republic (Supra)*, the previous good character of an appellant and his solemn assertion that if granted bond he will not abscond is not sufficient ground for allowing an application for bond pending appeal.

12. Lastly, learned counsel **Mr. Okara** in his submissions also relied on **Article 49 (1)** of the **Constitution**. This Article reads as follows;

“An arrested person has the right-

a)...

(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”.

As I recently held in *Stephen Cheruiyot Melly V Republic Eldoret HC Criminal Appeal No. 102 of 2014*, **Article 49 (1) (h)** of the **Constitution** only applies to arrested persons who have either not been charged with a criminal offence or have been charged but are awaiting trial. It does not apply to persons who have already been convicted.

I therefore agree with **Mr. Omwenga** that this provision only guarantees a right to bond/bail pending trial and not to bond pending appeal. It cannot therefore benefit the appellant in this case.

13. In view of all the foregoing reasons, I am convinced that the application dated 16th December 2014 is not merited. It is accordingly dismissed.

C. W. GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET THIS 11th DAY OF MARCH 2015

In the presence of:-

The Appellant

Mr. Okara for the Appellant

Ms. Mwaniki for the state