



REPUBLIC OF KENYA

IN THE HIGH COURT

AT ELDORET

HIGH COURT CRIMINAL APPEAL NO 102 OF 2014

STEPHEN CHERUIYOT MELLY.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

RULING

1. The Appellant *Stephen Cheruiyot Melly* was tried and convicted with the offences of defilement Contrary to **Section 8(1) as read with Section 8(3) of the Sexual Offences Act (the Act)** and attempted defilement Contrary to **Section 9(1) (2) of the Act**.

He was sentenced to thirty years imprisonment for the offence of defilement and 20 years imprisonment for the offence of attempted defilement.

2. The appellant was aggrieved by the conviction and sentence. He lodged an appeal to the High Court on 2nd July 2014.

On 16th December, 2014, the appellant filed an application by way of a Notice of Motion dated 15th December, 2014 seeking to be admitted to bond on terms the court deems fit pending the hearing and determination of his appeal.

3. The application is premised on several grounds the key ones being that that appellant's appeal has overwhelming chances of success; that the appellant was ready and willing to abide by any terms the court may impose as a condition to his release on bond; that under Article 49 (h) and 50 (q) of the Constitution of Kenya 2010, it was the appellant's constitutional right to be released on bond; that the appellant is a career teacher who had been out on bond during his trial and as he did not abscond then, he will not abscond if granted bond pending his appeal.

4. The application is supported by an affidavit sworn by the Appellant/Applicant on 15th December, 2014 in which the Applicant reproduced most of the grounds supporting the application. He further deposed that if the application was not allowed, he was likely to serve a substantial part of his sentence before his appeal could be

reached for hearing as he was aware that the court was giving priority to the hearing of old appeals which compromised his right to enjoy his liberty as his appeal had overwhelming chances of success; that he had been convicted on the basis of manipulated and fabricated evidence and that the evidence on record was insufficient to sustain his convictions in the two counts.

5. The application was argued before me on 24th February 2015. Learned counsel **Mr. Omboto** represented the Applicant while learned prosecuting counsel **Mr. Mulati** appeared for the state.

Briefly, Learned counsel **Mr. Omboto** in his submissions relied on the grounds supporting the application and the supporting affidavit. In a bid to demonstrate that the appellant's appeal had high chances of success, he discredited the evidence adduced by the prosecution during the trial claiming that it was full of inconsistencies and was not sufficient to sustain a safe conviction. He further asserted that the evidence particularly the medical report was a product of manipulation and that the charges were fabricated against the appellant by PW2 a fellow teacher who had a grudge against him. He invited the court to find merit in the application and allow it as prayed.

6. The state through learned prosecuting counsel **Mr. Mulati** conceded to the application. He agreed with **Mr. Omboto** that the appellant's appeal had high chances of success as in his view, the medical evidence adduced during the trial did not incriminate the appellant and his conviction was unsafe.

7. I have considered the application, the evidence adduced before the trial court, the submissions made by counsel for the respective parties alongside the grounds of appeal.

Under **Section 357 of the Criminal procedure code**, this court is empowered to admit an appellant to bond pending appeal on terms the court deems just. This court therefore has unfettered discretion in deciding whether or not to admit an applicant to bond pending appeal. This discretion however being a Judicial one must be exercised in accordance with the law and established legal principles the main one being that the applicant must demonstrate that his appeal has high or overwhelming chances of success or that special or exceptional circumstances exist to warrant his admission to bail pending appeal.

See: ***Dominic Karanja vs Republic (1986) KLR 612;***

Ogondo & 2 others V Republic (1993) 567;

Raghibir Singh Lamba V Republic (1958) EA 337.

8. Having analysed the evidence adduced before the trial court, I find that the appellant has an arguable appeal but I am unable to share Mr. Omboto's and Mr. Mulati's optimism that prima facie, the appellant's appeal has overwhelming chances of success. I use the word prima facie deliberately because in my view, an appellate court considering an application for bond pending appeal is not required to carry out an in depth analysis of the evidence and make findings of fact regarding whether the evidence on record was either manipulated or fabricated and whether or not the appellant was properly convicted.

That is the task of the judge who will eventually hear the appeal on its merits. And on an evaluation of the evidence on record, and without making any finding regarding the merits or otherwise of the appeal, I am not satisfied that there are any major contradictions in the prosecution's case that would warrant a finding that the appellants appeal has high chances of success.

9. Regarding the appellant's claim that he is likely to serve a substantial part of his sentence before his appeal is heard, it should be remembered that the appellant stands convicted by a court of competent jurisdiction and he is serving sentence as punishment because of that conviction. The law is that he is presumed to have been lawfully convicted and that conviction stands until it is quashed or set aside on appeal – See ***Mutua v Republic (1988) KLR 497.***

Consequently, the mere fact that it may take time before the appeal is heard is not a good reason to allow an application for bond pending appeal unless special or exceptional circumstances are proved to exist to warrant the exercise of the court's discretion in the appellant's favour. No such circumstances have been shown to exist in this case.

10. Besides, the record in the lower court shows that the terms of imprisonment imposed upon the appellant in the two counts in respect of which he was convicted were not ordered to run concurrently.

This means that the appellant was sentenced to serve a total of 50 years imprisonment. Even with the backlog of appeals waiting to be heard, given the length of the appellant's imprisonment it cannot be correct for him to argue that he will have served a substantial part of his sentence before his appeal is heard.

11. Learned counsel **Mr. Omboto** also urged the court to consider that the appellant had been on bond during the trial and that he never absconded; that if granted bond pending appeal he will not abscond. I agree with Counsel that this is a relevant factor the court should take into account when considering an application for bond pending appeal. This is so because if it is proved that the appellant was out on bond during the trial and he never breached any of his bond terms, this fact would put him in good stead as a suitable candidate for bond pending appeal but taken on its own, it cannot form the basis of allowing an application for bond pending appeal.

12. Lastly, one of the grounds that the appellant had premised his application was that under **Article 49 (h) and 50(q)** of the **Constitution of Kenya 2010**, he has a right to be admitted to bond.

Article 49(1) of the **Constitution** 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”.

In my opinion, this provision only applies to arrested persons who have either not been charged with an offence or have been charged but are awaiting trial. I take the view that the provision does not apply to persons who have been tried and convicted. The appellant cannot therefore benefit from this provision since he is seeking bond pending appeal as opposed to bond pending trial which is the right guaranteed under **Article 49 (1) (h)** of course subject to absence of compelling reasons.

13. Article 50 (q) cannot also come to the aid of the appellant as it provides for the right of a convicted person to appeal to or apply for review to a higher court. Needless to say, by filing this appeal, the appellant is already exercising that right. The provision does not however provide for an automatic right to bond pending appeal.

14. For all the foregoing reasons, I have come to the conclusion that the appellant's application for bond pending appeal is not merited. It is accordingly dismissed. Let parties take date for hearing of the appeal.

C. W. GITHUA

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 6TH DAY OF MARCH 2015

In the presence of:-

The Appellant

Mr. Omboto for the Appellant

Mr. Mulati for the state

Paul Court Clerk