



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 55 OF 2015

KUMOLOHA DETE.....1ST APPELLANT
SIMAYU NTOKOTE.....2ND APPELLANT
NATEYA NANYU.....3RD APPELLANT
SAIRE TATUYA.....4TH APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

RULING

INTRODUCTION

1. The Appellants' Notice of Motion application dated and filed on 18th September 2015 was brought pursuant to the provisions of Section 356 and 357 of the Criminal Procedure Code Cap 75 (Laws of Kenya). The said Application was supported by the Affidavit of Fredrick Mwawasi that was sworn on the same date. The Appellants had sought that they be admitted to bail pending appeal.
2. When the court heard the arguments by counsel for both the Appellants and the State during the Bail Hearing on 1st October 2015, it became clear that it would require Pre-Bail report to enable it make an informed decision on the said application. It therefore directed that the Probation Office prepare and file Pre-Bail Reports for the hearing that was scheduled for 8th October 2015.
3. The Pre-Bail Reports in respect of the four (4) Appellants dated 8th October 2015 were filed on even date.

THE APPELLANTS' CASE

4. The brief facts of their case was that they were convicted of the offence of entering into a National Park contrary to Section 102(1)(a) of the Wildlife Conservation and Management Act 2013 and sentenced to a fine of Kshs 200,000/= each or to serve two (2) years imprisonment.
5. They contended that there were serious errors on the face of the record of the lower court which were likely to lead to their Appeal being allowed. They based their reason for being granted bail pending appeal as they were breastfeeding mothers and that they were not flight risks. They were apprehensive that it would take time for the appeal to be heard and determined.
6. Their Written Submissions and List and Bundle of Documents were filed on 28th September 2015.

THE RESPONDENT'S CASE

7. In opposition to the Appellants' application, on 22nd September 2015, the Respondent filed Grounds of Opposition dated 21st September 2015. The same were as follows:-
1. **The Affidavit in support of the Application was incurably defective and ought to be struck out.**
 2. **There was no existence of any exceptional or unusual circumstances to warrant the grant of the Orders sought.**
 3. **The Appellants had not demonstrated a *prima facie* arguable appeal to warrant the grant of the Orders sought or that the appeal is likely to be successful on an account of some substantial point of law and the sentence or substantial part of it will have been served by the time the appeal is heard.**
 4. **Dates for hearing of appeals are open and therefore the appeal was likely to be heard timeously.**
8. The Respondent's List and Bundle of Authorities were also dated 21st September 2015 and filed on 22nd September 2015.

LEGAL ANALYSIS

9. The Appellants relied on several cases which were listed both in their Written Submissions and the List of Authorities to demonstrate that in this case herein:-
- a. **There were Exceptional or unusual circumstances and that it was in the interest of justice that bail be granted.**
 - b. **The appeal had a *prima facie* high chances of appeal.**
 - c. **The sentence or a substantial part or it will have been served by the time the appeal was heard and determined.**
10. They argued that they had during the mitigation informed the trial court that they were mothers with young children and that although they did not have the children in court, the Learned Trial Magistrate ought to have sought a clarification of the same before she meted the sentence upon them.
11. It was also their contention that the Wildlife Conservation and Management Act 2013 had not set down a minimum sentence in which case the Learned Trial Magistrate ought to have considered that their action of collecting firewood in the park was a minor offence.
12. They urged the court not to accept the holding in the case of **Kamlesh Mansukhlal Damji Pattni vs Nasir Ibrahim Ali & 2 others [2005] eKLR** that had been relied upon by the Respondent as the same was a civil case as there was no basis or foundation for importing civil practise and procedure thereof in Criminal Law. It was their argument that an advocate who could not readily find his client and who had sources of the information could disclose and state the reasons for believing the information.
13. The issue of the defective affidavit was in respect of Paragraphs (2) to (7) of the Supporting Affidavit herein which the State urged the court to consider as heresay and opinions and which ought to be excluded from affidavits. The court deemed it prudent to address the said issue at the first instant as the same was a preliminary point of law.
14. The court carefully considered the Respondent's submissions on this issue and found the same did not seem to hold water. The assertions in the said Paragraphs could be made by counsel as they were facts relating to the proceedings in the court in the lower court. Indeed, counsel did disclose in Paragraph (4) of the said Supporting Affidavit that he perused the lower court record. The court does not see any other source of information he could have disclosed to demonstrate where he obtained the information he had deposed to.
15. The court also agreed with the Appellant's submissions that the procedures of the Civil Procedure Rules, 2010 relating to affidavits cannot be imported in criminal proceedings. The above notwithstanding, as the issue was raised, the court referred to Order 19 Rule 7 of the Civil Procedure Rules that provides that a court may receive any affidavit for the purpose of being used in any proceedings despite any other irregularity of form or on any technicality. In addition, under

Order 19 Rule 6 of the Civil Procedure Rules, the court can only strike out from an affidavit any part that is scandalous, irrelevant or oppressive.

16. In a nutshell, the court did not find that the averments that were deposed to by counsel on behalf of the Appellants who were by the time the application was being filed in prison to have rendered the said Supporting Affidavit defective. The court also found the case of **Kamlesh Mansukhlal Damji Pattni vs Nasir Ibrahim Ali & 2 others** (Supra) not to have been relevant in the circumstances of the case herein. In any event, Article 159(2) (d) of the Constitution of Kenya, 2010 mandates the courts to administer justice without undue regard to procedural technicalities.
17. Turning to the more substantive issues, the court noted from the Pre- Bail Reports that all the Appellants were related, they were married with young children and that 1st, 2nd and 4th Appellants had their children with them at the prison. The 3rd Appellant was also said to have had a child who was not in court. Mr Mwanyumba who was representing the Appellants had argued that these were exceptional circumstances, which Miss Mukangu vehemently opposed.
18. Mr Mwanyumba placed reliance on the provisions of Article 53 (1)(d) and (f) and (2) of Constitution of Kenya, 2010 that provides as follows:-

“Every child has the right to-

- a. ...
- b. ...
- c. ...
- d. **be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour;**
- e. ...
- f. **not to be detained, except as a measure of last resort, and when detained, to be held—**
- i. **for the shortest appropriate period of time; and**
- ii. **separate from adults and in conditions that take account of the child’s sex and age.**

2. A child’s best interests are of paramount importance in every matter concerning the child.”

19. He was emphatic that the fact that the Appellants had children in prison with them amounted to unusual and exceptional circumstances. The Respondent was categorical that the children did not need to stay with the Appellants in prison as they had a choice to give them to their families not and that in any event, the Appeal could be heard in the coming week which would mean that the children would not be separated from the Appellants for a long time.
20. Without belabouring the point, the court wholly concurred with the State that the Appellants did not need to stay with their children in prison. They could give them to their families, which from the Pre-Bail Report appeared to have been very close knit. There were also dates available for the hearing appeals. The Appellants did not therefore demonstrate that there existed unusual or exceptional circumstances herein and/or that a substantial amount of the sentence would have been served by the time their Appeal was concluded.
21. Having said so, it is important to state that Article 49 of the Constitution of Kenya provides that every accused person has a right to be to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released. This emphasises the accused person’s right to liberty.
22. The prerequisites of granting bail pending appeal must also balance the rights of the Appellant and the interest of justice more so where there appears to be a *prima facie* case of success- **See Jivraj Shah vs Republic [1986] KLR 605, Samuel Macharia Njagi vs Republic [2013] eKLR amongst others.**

23.The importance of demonstrating there is overwhelming probability can be seen in Clause 4.30 of the Bail and Bond Policy Guidelines June 2015 that provides that:-

“With respect to 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.”

24.Without getting into the merits of the appeal, the court notes that the Appellants raised an important issue regarding the language that was used at the time of the proceedings in the lower court. Perusal of page 2 of the proceedings shows that the Charge was read to the Appellants but they did not appear to have pleaded to the same. Instead Accused 5 and 6 were taken for age assessment at Taveta District Hospital. Later, the same day at 3.30 pm, the Charge was read to the Appellants. There was no indication whether the same was read in a language that they understood. The question of the sentence that was meted to the Appellants was also a point of law to be argued.

25.Having considered both the oral and written submissions and the case law that was relied upon by both the Appellants and the Respondent and the Pre-Bail Report which was extremely favourable to the Appellants, the court was of the view that it would be important to balance the rights of Appellants herein and the interest of justice in view of the legal issues they had raised for determination on appeal.

26.While there may be dates for the hearing of the appeal, it would be a contravention of the Appellants’ right of liberty if they were to remain in prison while their appeal was being heard.

27.The court took cognisance of the fact that all the Appellants were related and the security for all of them would have to be given by one (1) family. The security consists of a herd of thirty (30) cattle and land with a title deed which was 6.8 ha. The court also took note that Miss Akinyi, the Probation Officer who presented the Pre-Bail Report had indicated that the Appellants and their family members are ignorant of procedures of having the land valued which would then mean that the Appellants would continue remaining in prison as they process any bond.

DISPOSITION

28.Accordingly, bearing in mind that the Appellants are pastoralists who are based at Salaita Taveta, having been born and bred there and therefore not a flight risk, the fact that the processing of the title deed as security could also take long thereby negating the very fact that the court wants to protect their right to liberty and the fact that their appeal has raised arguable points of law, doing the best it can, the court considers that admitting the Appellants to bail pending appeal will be in the interests of justice.

29.The Appellants may be released upon signing a personal bond of Ksh.50,000/= each before the Deputy Registrar of this court with one surety of similar amount as the court views the same to be reasonable in the circumstances that the Appellants find themselves in.

30.As the Appellants had already been convicted, the court further directs that the Appellants shall report to the Probation Office, Taveta once a month, the date to be agreed upon between them and the Probation Office, Taveta pending the hearing and determination of the appeal herein and/or until further orders of the court.

31.In the event any Appellant shall not abide by the conditions of the court, her *bond shall be cancelled immediately and the surety called to account and warrants of arrest shall be issued forthwith.*

32.It is so ordered.

DATED and DELIVERED at NAIROBI this 8th day of October 2015

J. KAMAU

JUDGE

In the presence of:-

Mwanyumba for Appellant

Miss Mukangu for State

Simon Tsehlo– Court Clerk