



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
CRIMINAL APPEAL NO. 131 OF 2015

BENTA ACHIENG OPONDO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal from the judgment and sentence of the Principal Magistrate's Court at Winam (Hon. B. Kasavuli SRM) dated the 25th August 2015 in Winam PMCCR No. 06 of 2013]

RULING

The applicant was arraigned in the Principal Magistrate's Court at Winam on a charge of grievous harm Contrary to Section 234 of the Penal Code the particulars being that on 30th October 2012 at about 7.30pm at Kajulu area in Kisumu East District she unlawfully did grievous harm to Moureen Achieng Omolo.

She pleaded not guilty to the charge but after considering the evidence by both sides the Trial Magistrate convicted her and sentenced her to four years imprisonment. Being aggrieved she has appealed and has by the Notice of Motion dated 6th October 2015 approached this Court for bond pending appeal. The application is premised on grounds that:-

- "1. The Applicant has been tried, convicted and sentenced to a total of 4 years in prison by the Hon. Kasavuli SRM sitting at the Magistrate's Court at Winam in Cr. Case 06 of 2013.**
- 2. The applicant being dissatisfied with the judgment and sentence has lodged an appeal vide High Court Criminal Appeal No. 131/2015.**
- 3. The Appeal has overwhelming chances of success and due to the backlog of pending cases in the High Court, the Applicant fears serving her entire sentence before determination of her Appeal.**
- 4. The offence with which the Applicant was tried by the lower Court and convicted is bailable and is ready, able and willing to comply and abide by any conditions which might be imposed by this Honourable Court to ensure her appearance in Court until the Appeal is heard and determined.**
- 5. This Honourable Court has jurisdiction and judicial powers to issue/grant the orders sought herein.**
- 6. Given the time it will take to hear the appeal and the nature of the sentence, if successful the appeal will be rendered nugatory.**

7. The applicant has four young children the youngest who is only 1 year old who are greatly suffering if she continues to remain in prison."

These grounds are reiterated in the supporting affidavit sworn on 6th October 2015 by Ben Aduol Nyanga, Advocate.

The office of the Director of Public Prosecution opposed the application vide a replying affidavit sworn on 19th October 2015 by Mary Osoro, Prosecution Counsel.

The application was orally canvassed before me on 21st October 2015. Mr. Nyanga Advocate submitted that the Applicant had a right to bond under Article 49(1)(h) of the Constitution, that his client was apprehensive that because of backlog she may serve sentence before her appeal is heard; that the appeal has high chances of success and that the accused has four children who currently have nobody to fend for them. He urged this Court to look at the term reports and other documents annexed and told the Court that his client undertakes to attend Court whenever required to do so.

In opposing the application Ms Osoro relied on the replying affidavit and further submitted that the applicant had not demonstrated that her appeal has high chances of success or that exceptional circumstances exist in her case as the prison is able to accommodate her and her one year old child. She also took issue with the fact that the supporting affidavit was sworn by an Advocate. She prayed that the same be struck out, to which Mr Nyanga's response was that it was in order for an Advocate to swear an affidavit based on information given to him and more so as the applicant is in custody.

To succeed the applicant must demonstrate that her appeal has overwhelming chances of success – (**Somo V. Republic [1972] E.A. 476**) and to discharge this burden the applicant ought to raise some critical issue of law or an issue as to the mode of the application of the evidence. This issue was also discussed in **Dominic Karanja V. Republic [1986] KLR 612** where the Court held:-

"(a) The most important issue was that if the appeal had such overwhelming chances of success, there is no justification for depriving the applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances.

(b) The previous good character of the applicant and the hardships, if any facing his family were not exceptional or unusual factors. Ill health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners.

(c) 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."

Applying the aforesaid principles to the present case, I find that the application has no merit. The Applicant has not demonstrated that her appeal has high chances of success. She has not either in the grounds on the face of the application, in the replying affidavit or Advocate's submissions raised any issue of law that would persuade this Court to find that this appeal is so meritorious that it will favour an acquittal. To the contrary her allegation is that she is apprehensive that due to backlog she may have served her sentence by the time her appeal is heard. I do however assure her that that will not be the case and that measures that have now been put in place that enjoins this Court to hear the appeal within the shortest time possible. As for the hardship likely to be faced by her children and her solemn affirmation to attend Court whenever required, I have shown that the same are no grounds for granting bail pending appeal.

The application is therefore dismissed.

Counsel to prepare the record at once and once that is done the Deputy Registrar to bring up the appeal for admission and thereafter fix it for hearing.

Signed, dated and delivered at Kisumu this 5th day of November 2015

E. N. MAINA

JUDGE

In presence of:-

N/A for the State

Mr. Nyanga for the Appellant

CA: Felix Magutu