



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: POTTER, KNELLER & HANCOX JJA)

CRIMINAL APPEAL NO 70 OF 1983

MICHAEL OTIENO ADEMBA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

We have before us what purports to be an appeal from an order of May 18 this year from the High Court (Schofield J) in Kisumu refusing an application by summons in chambers of May 12 under section 379 (4) of the Criminal Procedure Code (cap 75) by Michael Otieno Ademba (the appellant) for his release on bail pending the hearing and determination of his appeal from his conviction on May 3 for personating a Public Officer contrary to section 105(b) of the Penal Code (cap 63) and sentence of twelve months' imprisonment on the same date by the second class district magistrate, Nyando.

It is said that he is (or was?) employed by Ministry of Health, Ahero as a health officer and when he was charged with this alleged offence he was convicted on his unequivocal plea of guilty to it.

He asked a Kisumu advocate, Mr Omondo, to apply for his release on bail after his conviction and sentence and before his appeal was heard and Mr. Omondo did this urging on these grounds. The offence is a misdemeanour with a maximum sentence of three years' imprisonment, the appellant would lose his job if he did not turn up for work for seven consecutive days, the appellant's wife was in hospital and their children at home without parental care. The appellant would ask the High Court in his appeal to replace the custodial sentence with some different one, which would keep him out of gaol.

No appeal has been filed yet and we have not been shown a draft to the memorandum of appeal. The learned judge wrote:

“The appeal proper has not been argued before me, but, on the face of the record, I do not consider the appeal has a probability of success, or even a likelihood of success.

Bail pending appeal may only be granted if there are exceptional or unusual circumstances.

Whilst the affidavit shows serious family and personal difficulties, in view of the unlikelihood of success in this appeal I do not grant the application.”

Mr Omondo has not added anything new to all that has been set out in this judgment so far.

It is not for this court to indicate what the result might or should be in this intended appeal in the High Court. The judge had the right principles in mind when he rejected the application. Mr Omondo selected the wrong section and subsection of the Criminal Procedure Code for his application to the High Court for bail pending appeal to that court. He chose section 379(4) which empowers a High Court or Court of Appeal judge in the exercise of this discretion to grant bail pending the hearing and determination of an appeal from the High Court to this court save where the appellant has been sentenced to death. The application should have been under sections 356 or 357 according to whether the appellant has or has not entered his appeal in the High Court.

The former Court of Appeal for Eastern Africa held it had no jurisdiction to grant bail pending an appeal to the Supreme Court of Kenya. *Nemchand Govindi v Reginam* (1954) 21 EACA 266. This court is the Court of Appeal of Kenya and the Supreme Court is now the High Court. Rule 5 of this Court's Rules deals with bail pending the hearing and determination of an appeal before it. No decision, reported or unreported, and no legislation has been brought to our notice to persuade us this court has jurisdiction in an appeal from a refusal of the High Court to grant bail to a convicted man pending an appeal of that court.

Accordingly, this appeal must be and is dismissed.

Dated and Delivered at Kisumu this 24th June, 1983

K. D. POTTER

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JUDGE OF APPEAL

A.A. KNELLER

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JUDGE OF APPEAL

A.R.W. HANCOX

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JUDGE OF APPEAL