



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

CRIMINAL APPEAL NO. 78(B) OF 2015

PETER KAGOTHO.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

HIGH COURT CRIMINAL APPEAL NO. 78B OF 2015

PETER KAGOTHO -VS - REPUBLIC

RULING

The application dated 8/12/2015 is made pursuant to provisions of Section 359 of the Criminal Procedure Code that seeks admission of the appellant to bail pending appeal. Two supporting affidavits, one sworn by the appellant and filed on the 8/12/2015, a brother to the appellant. The sum total of the two affidavits is that:

1. That the appeal is arguable and has very many chances of success.
2. That it will be prejudicial if the appellant serves a substantial part of the 8 years jail term in the event that the appeal succeeds.
3. That the appellant is not a flight risk and undertakes to abide by all bail conditions that the court may impose.
4. That the appellant has special needs, that he is chronically asthmatic test he has recently lost his wife and the small children are now left with either parent.
5. That he did not jump bail during the trial and will attend court at all times when required to do so.

In opposing the bail application, the DPP through Ms Ngori,

It is stated that:

1. That the appellant has only been in custody for one month.
2. That the offences of stealing of a motor vehicle and forgery of documents are serious and may graduate to more serious offences if applicant is released on bail.
3. The appeal maybe heard sooner even in January 2016, have no purpose for the bail application.

4. That no special circumstances of the appellant have been demonstrated save for the loss of the wife.

The appellant was convicted for the offence of stealing of motor vehicle

C/S 278 (A) of the Penal Code, and obtaining M/V registration book by false pretence C/S 357(a) of the Penal Code. He was sentenced to serve a total of 8 years without option of a fine of both counts on the 19/11/2015.

The court has considered the principles and guidelines upon which bail pending appeal may be granted as stated in the case *JIVRoiji Shah –vs- R (1986) KLR 605*. These are

1. Existence of exceptional or unusual circumstances which the court may fairly conclude that it is in the interest of justice to grant bail.
2. It appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of points of law.
3. That the applicant may have served substantial part of the sentence before the appeal is heard.
4. That the right to bail as provided under Article 49 (1) of the Constitution is at the discretion of the Court and is not absolute.
5. Strength of the evidence.
6. Character and behavior of the accused/appellant.

The court has considered the applicants record of the proceedings and

judgment in the trial court. He had been admitted to bail and dutifully complied with the terms and conditions imposed by the court.

I have also seen a medical report prepared by Dr. Onyango from the Provincial General Hospital, Nakuru that states that the applicant has been attending the specialist clinic for four years and is or a referral hospital as the attacks may be fatal and if not attended to urgently.

I have considered the application in its totality and the opposing sediments expressed by the Learned Counsel Ms. Ngori.

For avoidance of doubt, Bail is only constitutional when one is awaiting trial. After conviction, it is at the court's discretion. The applicant may not have been a flight risk when he was awaiting trial. He has been convicted and sentenced to serve a long prison jail of 8 years. He has appealed against both conviction and sentence.

I have also considered the issues in the case *Harish Jetha –vs- R – Criminal Appeal No. 936/68* to whether the appellant is likely to attend court where the sentence imposed may tempt him to flee from the court's jurisdiction. Previous good character alone is sufficient to grant of bail though a factor to be considered while weighting arguments for bail.

I have also considered the special circumstances that the applicant lost his wife leaving his young and school going children alone. I have also considered that the appeal, having been filed only on 23/11/2015 may take a while to be heard.

In the court's opinion, the most important aspect of the application is whether there are overwhelming chances of success and whether the appeal raises substantial points of law to be argued. I have looked at the petition of appeal. On the face of the record, there are substantial issues of law to be argued and therefore chances of success evident.

The length of sentence may be a reason for the applicant to abscond. This is a genuine concern. I however note that during the trial he dutifully complied with the terms imposed. Circumstances are now different and the temptation is even higher.

After considering all the circumstances in their totality, I shall exercise my discretion in his favour and give him the benefit of doubt upon the following terms:

1. That the applicant shall be admitted to a cash bail of Kshs.300,000/= or a personal bond of Kshs.1,000,000/= (shillings one million only) with two sureties of a similar amount.
2. That the Deputy Registrar of this court shall approve afresh the said sureties if they are the same.
3. That the applicant shall attend court for mention of the appeal once every month or as the court may determine subsequently until the appeal is heard and determined.
4. That in default of any one of the terms alone without reasonable and excusable reasons shall be conceded.
5. The appeal shall be listed down for mention on the 29/1/2016.

Dated this 30/12/2015

J. MULWA

JUDGE

30/12/15

Ruling delivered in the presence of the applicant his advocate and the state counsel.

J. MULWA

JUDGE

30/12/15



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