REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO.205 "B" OF 2017

GEOFFREY NJOGU GACHANJA……APPLICANT

V E R S U S

REPUBLIC……..……...……..……..RESPONDENT

R U L I N G

Before me is the amended Notice of Motion dated 16/10/2018 in which **Geoffrey Njogu Gachanja (applicant)** seeks an order that this court do release him on bond pending appeal on such terms as the court deems sufficient. The application is brought under Section 357 of the Criminal Procedure Code and the Constitution 2010.

The applicant was convicted for the offence of rape contrary to Section 3 of the Sexual Offences Act and was sentenced to serve 10 years imprisonment. He is aggrieved by both conviction and sentence and has preferred an appeal to this court.

In the grounds in support of the application and the supporting affidavit, the applicant contends that the offence for which he was convicted is bailable; that in the trial court, he was on bond and he attended court faithfully; that he is sickly and needs to seek medication; that if not released on bond, he is likely to serve the whole or a substantial part of the sentence before the appeal is heard and lastly that the appeal has over whelming chances of success.

M/S. Rugut, counsel for the State opposed the application for reasons that the appeal has no chances of success and having been sentenced to 10 years imprisonment, he is unlikely to serve the sentence before the appeal is heard. Counsel also submitted that the applicant's right to bail disappeared when he was committed.

As for medical treatment, counsel submitted that the prison has medical facilities and if it becomes necessary to take him to a hospital, the prison personnel will do so.

I have considered the application and the rival submissions made by both counsel.

This application is made pursuant to Section 357(1) of the Criminal Procedure Code which provides as follows:

"After the entering of an appeal by a person entitled to appeal, the High Court, or the subordinate court which convicted or sentenced that person, may order that he be released on bail with or without sureties, or, if that person is not released on bail, shall at his request order that the execution of the sentence or order appealed against shall be suspended pending the hearing of his appeal:

Provided that, where an application for bail is made to the subordinate court and is refused by that court, no further application for bail shall lie to the High Court, but a person so refused bail by a subordinate court may appeal against refusal to the High

Court and, notwithstanding anything to the contrary in sections 352 and 359, the appeal shall not be summarily rejected and shall be heard, in accordance with such procedure as may be prescribed, before one judge of the High Court sitting in chambers."

From the above provision, it is clear that the grant of order under that section are an exercise of the court's discretion the word being ***'..may order that he be released***.'

The issue of grant of bail pending appeal has been discussed in several decisions, the leading one being the case of ***Jivraj Shah v Republic 1986 KLR 605*** where the Court of Appeal set out principles that the courts should take into account in such an application.

The court said:

"(1). The principle consideration in an application for bail pending appeal is the existence of exceptional or unusual circumstances upon which the Court of Appeal can fairly conclude that it is in the interest of justice to grant bond;

(2). If it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on an account of some substantial point of law to be argued and the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail will exist."

The primary consideration in such an application is therefore whether the appeal has overwhelming chances of success and whether there are exceptional circumstances warranting the release of the applicant on bail pending appeal. This is unlike an application for bail by a person awaiting trial under Article 49 of the Constitutionm, where the accused is presumed to be innocent until proved guilty. In this case, a competent court of law has already arrived at a decision which is deemed to be a proper judgment until the contrary is proved.

It is therefore the duty of the applicant to demonstrate that his case has overwhelming chances of success on appeal and therefore invoke the exercise of the court's discretion. In the case of ***Chimanbhlai v Republic 1971 EA 343*** J. Haris Said "***The case of an appellant under sentence of imprisonment seeking bond lacks one of the strongest elements normally available to an accused person seeking bond before trial, namely, the presumption of innocence, but nevertheless the law of today frankly recognizes to an extent at one time unknown, the possibility of the conviction bail erroneous, a recognition which is implicit in the legislation creating the right of appeal in criminal cases…"***

The applicant contends that he will abide by any bond terms the court may impose because he complied with all the bond terms in the lower court. In ***Dominic Karanja v Republic 1986 KLR 618*** the court said:

"….

(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."

The applicant complaints that he is sickly. However that is not a ground for release on bail because there are medical facilities provided by the prison and if the disease is serious, the convict can be taken to the available Government Hospitals. Besides the applicant did not provide any evidence to confirm that he was so sickly and that illness cannot be handled by the prison facilities.

That issue was considered by J. Mumbi in ***Cliff Biken Mokua & another v Republic CRA 268 and 269/2012*** where she held that ill health is not a basis for granting bail to a convicted person. J. Mumbi followed that decision in ***CKT v Republic CRA.34/2017***.

In any event, the applicant did not even attempt to demonstrate to this court that his appeal has overwhelming chances of success. I have had a cursory look at the proceedings and judgment of the trial court and they do not show that the decision of the court is without basis and that the appeal will result in an automatic acquittal.

The last ground raised by the applicant is that he is likely to serve a substantial part of the 10 years sentence before the appeal is

heard. In ***Chimambhai (Supra)*** the court held:

"anticipated delay in the hearing of the appeal together with other factors constitute good grounds for getting bond pending appeal."

In this case, the applicant was sentenced to 10 years imprisonment on 16/11/2017. If the record of appeal is prepared, there is no reason why the appeal should not be heard in a few months.

I find no merit in the application. Let the record of appeal be prepared and the matter be set down for hearing. The applicant will remain in prison until his appeal is heard and determined.

Dated, Signed and Delivered at NYAHURURU this 18th day of December, 2018.

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R.P.V. Wendoh

JUDGE

Present:

Mr. Mutembei State Counsel

Mr. Ndwiga for applicant

Applicant – present

Soi – Court Assistant