



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CRIMINAL APPEAL NO. E039 OF 2021**

**JOSEPH KIMWEA MAINA.....APPLICANT/APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The applicant was convicted of five counts of forgery contrary to Section 349 of the Penal Code and was sentenced as follows:

Count 2: -to serve 2 years imprisonment.

Counts 3-6:-to serve one-year imprisonment on each of the counts.

The sentence was ordered to run consecutively.

The applicant was aggrieved by the conviction and the sentence and filed an appeal that is pending hearing before this court. He has consequently filed an application dated 10<sup>th</sup> November 2021 seeking to be granted bond pending the hearing and determination of his appeal.

The application is based on the grounds that the appeal has a very high chance of success. That the sentence is excessive and he stands to suffer prejudice if part or the whole of the sentence is executed while his appeal is pending hearing and determination. He states that he is the sole bread winner to his family. That he was convicted and sentenced together with his wife, Ruth Nyambura Kiama, who was expectant at the time of sentencing and gave birth while at Nyeri Women's Prison. That they have three other children whom they left without basic protection and care as the eldest is only twelve years old. He adds that he is willing to abide by such terms and conditions that the court may grant on bail/bond.

The respondent did not oppose the application. The prosecution counsel stated that there are no compelling reasons to oppose the prayer for bond pending appeal as the applicant was out on bond during the trial before the magistrate's court.

The court has discretion under section 357(1) of the Criminal Procedure Code to grant a convicted person bond pending the hearing and determination of an appeal.

The principles for granting bond pending appeal were reiterated in the case of **Jivraj Shah vs Republic [1986] KLR 605** which laid down the principles as follows:-

**a) The principal consideration in an application for bond 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 bail.**

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

**c) The main criteria is that there is no difference between overwhelming chances of success and a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed and the proper approach is the consideration of the particular circumstances and weight and relevance of the points to be argued.**

In **Dominic Karanja vs Republic [1986] KLR 612** the Court of Appeal considered as to what amounts to exceptional or unusual

circumstances and held that:-

**(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 exceptional circumstances 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;**

Similarly in **Peter Hinga Ngotho vs Republic [2015] eKLR** it was held that the fact that the applicant did not breach the bail conditions in the court below, is not an exceptional circumstance which can warrant a decision to admit an applicant to bail pending appeal.

In the instant case, the applicant together with the respondent argue that the applicant complied with the bail conditions granted in the trial court. The applicant states that he was convicted together with his wife and that there is no one to look after their children if he is not granted bail. He states that his wife gave birth at Nyeri Women's Prison. Taking into consideration the holdings in the cases mentioned above, the reasons being advanced by the applicant do not constitute any unusual or exceptional circumstances to warrant him being granted bond pending appeal. Hardships faced by his family and the fact that the applicant did not breach the bail conditions in the trial court have been demonstrated as not falling within the ambit of unusual or exceptional circumstances.

The applicant was however sentenced to serve a consecutive sentence of 6 years imprisonment without an option of a fine. It is an arguable point of appeal whether the sentence ought to have run consecutively or concurrently. It is also an arguable point of appeal whether the applicant should have been given an option of a fine.

The applicant was sentenced on 22/10/2021. I have perused the record and noted that the proceedings and judgement have been typed but the record of appeal has not been prepared. Three months have now lapsed since when the applicant was sentenced and yet the record of appeal is not ready. It is thus likely that the hearing of this appeal will be delayed and the applicant will serve a substantial part of his sentence before the appeal is heard and determined. This, coupled with the finding alluded to above that there are arguable points to the appeal on the severity of the sentence, is sufficient reason for this court to grant the applicant bond pending appeal.

I thus find that the application is merited and allow for bail pending appeal. The applicant is granted bond of Kshs. 500,000/- with one surety of similar amount.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 27TH DAY OF JANUARY 2022.**

**J. N. NJAGI**

**JUDGE**

**IN THE PRESENCE OF:**

**MISS MWANIKI FOR RESPONDENT**

**APPLICANT:- IN PERSON**

**COURT ASSISTANT: MR. KINYUA**

**30 DAYS R/A.**