



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. E29 OF 2020

MORRIS NZIOKA KATHUMA.....APPLICANT/APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

1. Before me is an application brought by way of Notice of Motion dated 14th December 2020 filed under section 356 and 357 of the Criminal Procedure Act (*Cap* 75) seeking that the Applicant/Appellant be released on bail pending hearing and determination of the appeal herein.

2. The application was filed with a Supporting Affidavit sworn on 14th December 2020 by Hithcliff O. Ngete advocate for the Applicant in which it is deponed that an appeal has already been filed which is not frivolous, that by the time the appeal is determined the Applicant will have served a substantial portion of the sentence and that the Applicant is a student at a local college and denial of bond will deprive him of the education opportunity.

3. The application is opposed by the State and the Director of Public Prosecutions filed a Replying Affidavit sworn by Ann Penny Gakumu Senior Prosecution Counsel on 5th March 2021 in which it is deponed that the Applicant had not demonstrated that the appeal had overwhelming chances of success.

4. The application proceeded by filing written submissions and both the Appellant's counsel and the Director of Public Prosecutions filed their written submissions which I have perused and considered. Both sides relied on a number of legal authorities.

5. This being an application for bail pending appeal, it is not covered by the constitutional presumption of innocence applicable in the case of bail pending trial. The presumption after conviction is that the conviction is proper. Thus an Applicant for bail pending appeal has to demonstrate that there exist exceptional circumstances or that appeal filed has overwhelming chances of success, in order to persuade the court to grant bail pending the determination of appeal.

6. There are consistent decisions of courts in this regard such as **Chimambhai –vs- Republic (1971) E.A 343, Somo –vs- Republic (1972) E.A, and Jivraj Shah –vs- Republic (1986) KLR 605 and Dominic Karanja –vs- Republic (1986) KLR 612. In Dominic Karanja –vs- Republic (1986) KLR 612, the courts specifically held as follows –**

a) The most important issue was that if the appeal had such overwhelming chances of success, thus there is no justification denying the Applicant of his right to liberty and the minor relevant consideration would be whether there were exceptional circumstances.

b) The previous good character of an Applicant and the hardships, if any facing him or his family are not exceptional or unusual factors. Ill health per se would not constitute an exceptional circumstance where there existed medical facilities.

c) A solemn assertion by the Applicant that he will not abscond if released, even if sureties support it, is not sufficient ground for releasing a convicted person on bail pending appeal.

7. Having perused the record of proceedings, the judgment, the memorandum of appeal and considered the submissions on both sides, I am of the view that this is an arguable appeal with high chances of success.

8. Both the Appellant and the Complainant being fairly young people and considering the circumstances of the case, I come to the conclusion that the interests of justice will be best served if the Appellant is released on bail pending appeal. I note that the Appellant was on bail pending trial. I thus order that he be released on bail pending determination of appeal on the following terms –

1) The Appellant may be released on bail pending appeal on signing his own bond of Kshs.200,000/= with one surety of similar amount.

2) In the alternative, he will be released on payment of cash bail of Kshs.100,000/=.

3) He will attend all mentions of the appeal and the hearing until the final determination of the appeal herein.

Dated Signed & Delivered, this 24th day of March 2021, in open court at Makueni.

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GEORGE DULU

JUDGE