

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO.E077 OF 2021

JUSTUS MUTUA NZIOKIAPPELLANT/APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

1. Before me is an application dated 12th August 2021 for bail pending appeal brought under section 357(1) of the Criminal Procedure Code (cap.75) and Article 49(h) of the Constitution of Kenya 2010.
2. The application has grounds on the face of the Notice of Motion that the appeal has high chances of success, and that the sentence imposed by the trial court is extremely harsh and punitive and that the appellant will suffer prejudice if the application is not allowed.
3. The application was filed with a supporting affidavit sworn by Samuel Kasyoka advocate, in which it was deponed that the applicant was sentenced to pay a fine of Kshs.700,000/= or to serve 7 years imprisonment and that a Notice of Appeal had now been filed; and further that the appeal had high chances of success.
4. The application was canvassed through filing of written submissions, and I have perused and considered the written submissions of both counsel for the applicant and the Director of Public Prosecutions.
5. Though the applicant’s counsel has relied on the provisions of Article 49(h) of the Constitution of Kenya, in my view, those provisions relate to bail pending trial where the presumption of innocence operates. Once someone has been convicted, that presumption of innocence is replaced by the conviction and thus Article 49(h) of the Constitution no longer applies, but section 357(1) of the Criminal Procedure Code which states –

357(1) After the entering of an appeal by a person entitled to appeal, the High Court, or the subordinate court which has convicted and sentenced him, 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 his sentence or order appealed against shall be suspended pending the hearing of his appeal.”

6. Bail pending appeal is thus anchored in statute, and its considerations are different from those of bail pending trial. The requirements for courts considering bail pending appeal have been dealt with in several cases, including the case of **Dominic Karanja –vs- Republic (1989) KLR 612**. The main consideration is that the applicant for bail pending appeal has to demonstrate unusual or special circumstances or a high probability of success of the appeal.
7. In the present case, there is no demonstration by the applicant that the trial court imposed an illegal sentence. Nor is there a demonstration that the trial court admitted hearsay evidence or relied on the same, to found the conviction. In my view, the apparent severity of a sentence *per se* is not an unusual circumstance. Also, though the intended appeal is arguable, I do not find that it has high probability of success.
8. Thus the applicant not having demonstrated any unusual circumstance, or high probability of success of the appeal, I find that the application is unmerited. I dismiss the application and decline to grant bail pending appeal.

DELIVERED, SIGNED & DATED THIS 30TH DAY OF NOVEMBER, 2021, IN OPEN COURT AT MAKUENI

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GEORGE DULU

JUDGE