



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCRA NO. 32 OF 2019

MIKE MURIMI MUTEGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being appeal from original conviction and sentence in the Chief Magistrate's Court at Chuka in Criminal Case No. 548 of 2018 delivered by M. SUDI - (Senior Resident Magistrate (S.R.M) on 23rd October, 2019).

RULING

1. **MIKE MURIMI MUTEGI**, the Appellant/Applicant herein was charged with the offence of obtaining by false pretences contrary to **Section 313** of the **Penal Code** vide **Chuka Chief Magistrate's Criminal Case No.548 of 2018**. He was found guilty upon trial and convicted. he was sentenced to pay a fine of Kshs.200,000/- or 12 months in default. He was also directed to refund Kshs.220,000/- to the complainant. He felt aggrieved and filed the appeal which is now pending.

2. The Appellant has now moved this court for bail pending appeal vide a notice of motion dated 8th January 2019 which is the subject of this ruling. The grounds of this application are;

i. That the Applicant has been convicted and that he had been admitted to bail in the lower court during trial in that court.

ii. That he shall abide by the bond and bail terms set and he is not a flight risk.

iii. That his appeal has high chances of success and that its in the interest of justice if he is released on bail.

3. In his supporting affidavit sworn on 8th November 2019, the Applicant has reiterated the above grounds and added that when he was tried at the lower court he was out on bond and that he diligently complied and abided by the terms of the bond.

4. He further adds that he is not a flight risk and that the disposal of his appeal may take long. He has relied on the case of **George Wambugu Thumbi -vs- Republic [2018] eKLR**.

5. The state through the office of Director of Public Prosecution has opposed this application through a Replying Affidavit of Erick Momanyi learned counsel from Director of Public Prosecution sworn on 12th November 2019. Mr. Momanyi has deposed that the applicant has not demonstrated if any grave error by the trial court or show that the appeal is arguable or demonstrate high chances of success. He has also contended that the fact that the Appellant was out on bond in the lower court is not a ground for bond pending appeal.

6. The State further contends that conviction of the Appellant and the finding of guilt is compelling to deny him bond. It asserts that the power to grant bond pending appeal is discretionary and insists that the applicant has not met the threshold for bond pending appeal.

7. This court has considered this application and the response made. I have looked at the grounds of appeal entertained in the petition herein the gist of the grievances by the applicant is that the trial magistrate failed to appreciate the inconsistencies in the evidence tendered and that it did not consider the relationship between the Appellant and the complainant. he has also faulted the trial court for applying **Section 178(1)** of the **Penal Code** on restitution.

8. The position of the law on bond pending appeal is provided for under **Sections 356** and **357** of the **Criminal Procedure Code**. **Sections 356** applies to bond pending entering of an appeal and **Section 357** refers to an application for bail after entry of an appeal. The applicant has correctly invoked the provisions of **Section 357** of **Criminal Procedure Code** because he has already lodged the appeal herein. **Section 357** provides as follows:

(1) " After 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."

9. The power to grant bond pending appeal is discretionary and the main factors to be considered in the exercise of that discretion are:

- i. That the appeal has high or overwhelming chances of success.
- ii. Existence of an exceptional or unusual circumstance in the case warranting the release of the Appellant on bond pending appeal.

In ***Daniel Dominic Karanja -vs- Republic [1986] eKLR*** the Court of Appeal held as follows:

" The most important issue here is if the appeal has such overwhelming chances of success that there is no justification for depriving the applicant of his liberty. The relevant considerations would be whether there are exceptional or unusual circumstances. The previous good character of the applicant and the hardships, if any, facing the wife and children of the applicant are not exceptional or unusual factors: see Somo -vs- Republic [1972] E A 476. A solemn assertion by an applicant that he will not abscond if he is released is not sufficient ground, even with support of sureties, for releasing a convicted person on bail pending appeal."

10. In an application pending of bond appeal, what should not be lost to a judicial mind is the fact that the presumption of innocence does not apply because an appellant is presumed to have been properly convicted until found otherwise by an appellate court. The sentence meted out is presumed proper unless it can be shown that the same is illegal or not backed by law. The consideration for bond pending appeal is therefore different as seen from the above cited decision.

11. In the cited case of ***George Wambugu Thumbi -vs- Republic*** by the Appellant the main factor considered by that court was that the appeal had exhibited high chances of success given the manner in which the plea had been taken. In this instant case, the issue is different because the matter went for full trial and the issue of plea taking is not faulted. The Appellant was convicted by the trial court after finding that the prosecution had proved its case to the required standard.

12. The appellant has not demonstrated how his appeal has high chance of success. He has not demonstrated that the application of **Section 178(1)** of **Criminal Procedure Code** by the trial court was illegal. These two issues are matters to be determined on the merits if this appeal proceeds to full trial after admission if at all.

13. This court has also considered the Bail and Bond guidelines 2015 with regard to bail pending appeal and notes at page 27 the policy provides;

" With respect to bail pending appeal the burden of proof is on the convicted person to demonstrate that there is an overwhelming probability that his or her appeal will succeed."

14. The applicant from the foregoing has not met the threshold to warrant bail pending appeal. The application dated 11th November 2019 is disallowed for lacking in merit.

Dated, signed and delivered at Chuka this 28th day of January 2020.

R.K. LIMO

JUDGE

28/1/2020

Ruling dated signed and delivered in the open court in presence of Ngari for Applicant and Momanyi for Respondent.

R.K. LIMO

JUDGE

28/1/2020