



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**HCCRA NO. 70 OF 2020**

**SIMON KINYUMU MUTUKU.....APPELLANT/APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. Before me is a Notice of Motion dated 10<sup>th</sup> August 2020 brought under Article 22, 48, 50, 51 and 159 of the Constitution of Kenya and Section 123 and 124 of the Criminal Procedure Code (Cap 75), seeking the release of the Appellant/Applicant on bond/bail terms pending the hearing of the appeal.

2. The grounds of the application are that the Applicant has already filed an appeal, that the appeal raises serious points of law and has overwhelming chances of success, that the Applicant will be in a better position to prepare for the appeal if released on bond/bail, that the Applicant had tried all means to raise the fine imposed by the trial court in vain, that he has a family which fully depends on him, and that he has a constitutional right to be released on bond/bail, that he complied with conditions of bail during trial, and that he will comply with conditions attached to his being admitted to bond/bail pending appeal.

3. The Applicant's counsel M/s Mwangangi and Associates filed written submissions in which they cited a number of decided cases such as **Tom Omare Ongutu -Vs- Republic [2017] eKLR**, **George Wambugu Thumbi -Vs- Republic [2018] eKLR**, **Stephen Ngui Kyalo -Vs- Republic [2019] eKLR** and **Jivraj Shah -Vs- Republic [1986] KLR 605**, which I have considered.

4. I have perused the application, and the judgment, as well as the Memorandum of Appeal filed.

5. Though the Applicant's counsel contends that bail pending appeal is a constitutional right, in my view it is not as the provisions on bail in the Constitution of Kenya 2010, in my view, relate to pre-charge, and pre-trial stages when someone is presumed to be innocent.

6. Bail pending appeal is a statutory right and the parameters to be considered are different, as a court's conviction and sentence are presumed to be regular unless set aside on appeal or revision.

7. Thus in considering bail pending appeal, the courts have set certain determinable principles to be applied as exemplified in the case of **Jivraj Shah -Vs- Republic [1986] KLR 605**, relied upon by the Applicant's counsel. In the above case the Court of Appeal gave the following principles for consideration by the court in applications for bail pending appeal:-

*i. The existence of exceptional or unusual circumstances.*

*ii. 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 exist.*

*iii. 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 the weight and relevance of the points to be argued.*

8. It should be stated here that the burden is on the Applicant for bail pending appeal to demonstrate the exceptional/unusual circumstances and the overwhelming chances of success of the appeal.

9. In the present case, Applicant's counsel has not stated for example that the charge was defective, or that the sentence is unlawful which would show overwhelming chances of success of the appeal. Failure of a convict to raise the money to pay a fine is not an exceptional or unusual circumstance.

10. The only relevant matter that has been raised in this application for bail pending appeal as exceptional is the sentence, of which a substantial part might be served before the appeal is heard. However, the shortness of sentence alone cannot be sufficient. The fact that an appeal is an arguable appeal, that is that it may or may not succeed, is not a basis for granting bail pending appeal. There must be exceptional or unusual circumstances demonstrated, which the Applicant has not demonstrated.

11. Though the appeal herein is an arguable appeal, I am not satisfied that exceptional circumstances have been demonstrated to justify this court release the Appellant on bail pending appeal.

12. I thus find no merits in the application for bail pending appeal and dismiss the same. I however order that the appeal filed herein be fast tracked in its hearing and disposal. Orders accordingly.

**Delivered, signed & dated this 15<sup>th</sup> day of December 2020, in open court at Makueni.**

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**HON. G. DULU**

**JUDGE**

**IN THE PRESENCE OF:-**

Mr. Mwiwa – Court assistant.

Mr. Muthiani holding brief for Mr. Mwangangi for Applicant.

Mr. Muriuki for DPP