



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CRIMINAL APPEAL NO.52 OF 2018

(Appeal Originating from Nyahururu CM's Court

Cr.No.1368 of 2015 by: Hon. J. Wanjala – C.M.)

DAVID WAWERU MUGURE.....APPELLANT

- V E R S U S -

REPUBLIC.....RESPONDENT

J U D G M E N T

The applicant herein, **David Waweru Mugure** was convicted for the offence of robbery with violence contrary to Section 296(2) of the Penal Code.

He was sentenced to suffer death.

The applicant is aggrieved by the decision of the trial court and filed this appeal. The applicant has filed a Notice of Motion on 25/3/2019 seeking to be released on bond pending the hearing of his appeal.

The application is based on grounds found in the supporting affidavit. He purports to bring this application under Article 49(h) of the Constitution. He contends that he is sickly and will comply with the terms of bond that the court will impose. It is his view that his appeal has high chances of success.

The application was opposed by **Mr. Maroro**, learned counsel for the State who urged that Article 49(1)(h) of the Constitution only guarantees the right to bond of arrested persons but not those who are convicted; that the applicant was sentenced to death on 8/10/2018; that he has not provided any evidence to prove that he is sickly and in any case, prisons have good medical facilities that can take care of his needs.

I have considered the application. Applications for bail pending appeal are brought under Section 357(1) of the Criminal Procedure Code which provides as follows:

“Section 357(1)

After the 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.”

Article 49(1)(h) of the Constitution guarantees right to bond of an arrested person unless the prosecution can demonstrate that there are compelling reasons to deny an accused bond. The applicant having been convicted lost an automatic right to bond because a competent court of law has found him guilty and he no longer enjoys the presumption of innocence until proven guilty. Since the applicant has already been found guilty, section 357(1), Criminal Procedure Code places on him a duty to satisfy this court that he is deserving of an order of bond. By this same section, the law still recognizes the fact that the conviction may have been made in error or sentence is excessive but it is the duty of the applicant to demonstrate that.

The principles that guide the court in such applications for bond pending appeal were set out in the case of ***Jivraj Shah v Republic (1986) KLR 608*** and are as follows:

“(1) The principle consideration in an application for bail 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;

(2) If it appears prima facie from 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;

(3) 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 the case Arvind Patel v Uganda S.C.Cr.App.1/2003, the court listed the following as issues for consideration:

(1) The character of the applicant;

(2) Whether he/she is a first offender;

(3) Whether the offence involved personal violence;

(4) Whether the appeal is frivolous and not likely to succeed;

(5) The possibility of substantial delay in the determination of the appeal;

(6) Whether the applicant complied with bond terms in the trial court.

In the case of Dominic Karanja v Republic (1986) KLR 612, the court held as follows:

“(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 an exceptional circumstance 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 bond pending appeal;

(d).....”

Flowing from the above decisions, it is clear that grant of bail pending appeal is an exercise of the court’s discretion and grounds for grant of bond may vary from case to case save for the key considerations as espoused in the **Jivraj case**; that the appeal has high chances of success and that exceptional circumstances exist, to warrant the release of the applicant on bond.

As to the allegations of illness, the applicant did not provide any evidence to support his contention. For ordinary illnesses, there are medical facilities at the prison where the appellant can be attended to.

Whether the appeal has high chances of success, this court has had an opportunity to casually look at the proceedings and judgment of the trial court and I am of the view that the judgment is not so hopeless that the appeal will automatically succeed.

The court need not delve into the merits of the appeal at this stage. The appellant was sentenced to suffer death on 8/10/2018, less than a year ago. It is unlikely that he will serve a substantial period before the appeal is heard.

For the above reasons, I find no merit in the application. It is dismissed. The applicant will await the hearing of his appeal.

It is so ordered.

Dated, Signed and Delivered at NYAHURURU this 28th day of June, 2019.

.....

R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Rugut for State

Soi – Court Assistant

Applicant – present