



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 65 OF 2019

DAVID MUSAU KYALO.....APPELLANT/APPLICANT

VERSUS

REPUBLICRESPONDENT

RULING

1. The Appellant has filed an application dated 25/07/2019 seeking for an order that he be granted bond/bail pending the hearing and determination of the Appeal. The application is supported by the grounds on the face thereof as well as a supporting affidavit of the Appellant sworn on even date.

2. The Appellant's case is that his Appeal has high chances of success. Further it was his case that he did not clearly understand the proceedings and in particular did not comprehend that the trial court would record that he was guilty. The Appellant averred that he is of good antecedents and high moral standing and will abide by the conditions to be imposed by the court. The Appellant also claimed that he is unwell and needs frequent medical intervention to mitigate those health issues. Finally the Appellant maintained that he is likely to serve a substantial part of the sentence before the appeal could be determined and hence the quest for release on bond pending appeal.

3. The Respondent did not file a response to the application. However, Learned Counsel for the Respondent submitted that the trial court did not indicate the language used by the Applicant in the proceedings. Counsel added that the Appellant might serve a substantial part of the sentence before the appeal is heard and determined and thus conceded to the application.

4. The Appellant's Counsel submitted that as the Respondent is not opposed to the application this court should proceed to grant reasonable bond terms with alternative cash bail.

5. I have considered the Appellant's application as well as the sentiments of learned counsels. It is not in dispute that the Appellant was convicted on his own plea of guilty. It is also not in dispute that the Appellant has since filed a Memorandum of Appeal challenging the conviction and sentence. The issue for determination is whether the Appellant's Application has met the threshold for the grant of bail pending appeal.

6. The guiding provision regarding bail pending appeal is found in Section 357 (1) of the Criminal procedure Code which provides as follows:-

“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.”

7. An applicant seeking to be released on bail pending appeal is under obligation to satisfy certain threshold as set out in the case of **Jivraj Shah =Vs= Republic [1986] KLR 605** where the court pointed out certain salient considerations namely:-

“1. The principal 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 interests of justice to grant bail.

2. 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 urged and the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail will exist.”

8. A perusal of the record of the lower court reveals that the language of interpretation of the proceedings has not been indicated. Indeed the space meant for the language opted and or suggested by the Appellant is blank. Hence it is not known what language was used by the

Appellant to communicate with the court. The Appellant has already challenged the conviction and sentence in the memorandum of appeal which has pointed out the trial court's failure to adhere to the threshold and laid out procedure in respect of obtaining a guilty plea resulting in a plea which was not unequivocal. On that ground alone, I find the appeal has overwhelming chances of success. Again it is noted that the Appellant was sentenced to twelve (12) months imprisonment which would imply that the Appellant might serve a substantial part of the said sentence before the appeal is heard and determined. It would be unfair and unjust to have the Appellant in custody when the circumstances point to a situation where the appeal has high chances of success. If the appeal subsequently succeeds, then the Appellant will have suffered injustice and prejudice. I am satisfied that the appeal herein is arguable. In the case of **Dominic Karanja =Vs= Republic [1986] KLR 612** the court held that if an appeal has such overwhelming chances of success, then there is no justification for depriving an Applicant of his liberty and the minor relevant consideration would be whether there were exceptional or unusual circumstances.

9. Applying the above test, I am satisfied that this is a fit case to warrant an order for a grant of bail pending Appeal. Consequently, the Appellant's application dated 25/7/2019 is allowed in the following terms:-

(a) The Appellant is released on bond of Kshs.100,000/= plus one surety of like sum or an alternative cash bail of Kshs.20,000/=.

(b) The surety to be approved by the Deputy Registrar of this court.

(c) The Appellant once released must attend court at all scheduled dates without fail until the final determination of the appeal or until further orders and in default the bond shall stand cancelled and he together with his surety called to account.

It is so ordered.

Dated and delivered at Machakos this 2nd day of August, 2019.

D.K. Kemei

Judge