



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 138 OF 2017

KENNETH MUTUGI.....APPELLANT

-Versus-

REPUBLIC.....RESPONDENT

RULING

BAIL

[1] I have before me a Notice of Motion Application dated 14th November 2017. The application is expressed to be brought under Section 123 of the Criminal Procedure Code CAP 75 of the Laws of Kenya and Article 49 (1) (h) of the Constitution of Kenya. the significant order sought therein is that the Applicant be released on bond pending the hearing of this appeal.

[2] The gist of the application is that, for the 7 months the hearing took place, the Applicant never absconded. He now undertakes to attend court religiously and faithfully should he be released on bond pending appeal. He stated that, under Article 49 (1) (h) of the Constitution, the court has authority to grant him bail/bond.

[3] Mrs. Mwachu, the legal counsel for the State opposed the application. She took the view that, in granting bail pending appeal, the court must consider;

- a. Whether there are exceptional circumstances to release the Appellant,
- b. Whether he will serve substantial part of the sentence before the Appeal is heard and
- c. Whether there are overwhelming chances of success.

She contended that the Application had been brought inter alia under Article 49 (1) (h) which deals with rights of accused persons. In a rejoinder counsel for the appellant contended that failure to cite the correct provision was not a fatal omission.

DETERMINATION

[4] I will not re-invent the wheel. The Appellant has already been convicted by a competent court and may not enjoy the presumption of innocence upon which he can claim automatic right to bail. The Applicant seemed to believe that he is entitled to bail as a matter of right under article 49(1) (h) of the Constitution. I suspect this explains why he did not attempt to argue the known grounds for bail pending appeal. See the case of MUTUA V REPUBLIC (1988) KLR 497, where the Court of Appeal stated thus;

“It must be remembered that an applicant for bail has been convicted by a properly constituted court and is undergoing punishment because of that conviction which stands until it is set aside on appeal. It is not wise to set the applicant at liberty either from the point of view of his welfare or of the state unless there is a real reason why the court should do so.”

[5] Therefore, for his Application for bond pending appeal to succeed, he must meet the test, to wit:

1. Whether the Appeal has overwhelming chances of success. See the case of SOMO V REPUBLIC (1972) EA 476, or
2. Whether there are exceptional or unusual circumstances to warrant the court’s exercise of discretion. See RAGHBIR SINHG

3. Whether he will have served substantial part of the sentence by the time appeal is heard.

[6] Applying the test, and without prejudice to the potency of the appeal, it was not shown that the appeal has high chances of succeeding. Again, no exceptional or unusual circumstances were shown to exist in this case. There is also no possibility of him serving substantial part of the sentence herein before the appeal is heard. Therefore, taking into account the totality of all the circumstances in is case; I find that the Appellant has not met the conditions precedent for the grant of bail pending appeal, to warrant the court to exercise its discretion in his favour. Accordingly, the Appellant's Application is without merit and is hereby dismissed in its entirety. The Appellant shall remain in custody pending the hearing and determination of this Appeal. In view of this order, the appeal be fast tracked. The DR should call for the typed proceedings as well as the original record of the trial court.

Date, signed and delivered in open court at Meru this 21st day of February 2018

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F. GIKONYO

JUDGE

In the presence of:

M/s. Waigwa advocate for Mugo advocate for appellant

Appellant absent

M/s. Murithi for Respondent

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F. GIKONYO

JUDGE