



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL APPEAL NO. 158 OF 2017**

**MARTIN MUKIRA.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**RULING**

1. Before me is a Chamber Summons Application brought pursuant to Section 358 of the Criminal Procedure Code CAP 75 of the Laws of Kenya in which the Applicant seeks to be released on bond pending the hearing of his appeal.

2. The gist of the application is that the Appellant was sentenced for 2 years without the option of a fine; that he had appealed against the conviction and sentence and that the Appeal has overwhelming chances of success as he never committed the alleged offences.

3. The Application was opposed by Mr. Mungai for the State who contended that the Appellant had no right to be released on bond as he had already been convicted and that he had not demonstrated that the appeal had overwhelming chances of success.

4. I have carefully considered this application and the rival contentions by the parties. This is an application for bond pending appeal where the Appellant has already been convicted by a competent court. It is unlike an application for bail pending trial where the provisions of Article 49 (1) (h) of the Constitution provide that an arrested person may be released on bond or bail on reasonable conditions pending trial unless there are compelling reasons not to be released. It therefore follows that bail pending appeal is not an automatic right as opposed to bail pending trial.

5. In the case of *Mutua v. Republic (1988) KLR 497*, the Court of Appeal held:-

***“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.”***

6. The test to be applied in applications such as this one are; first, whether the appeal has overwhelming chances of success as was stated in the case of *Somo v. Republic (1972) EA 476* and secondly, whether there are exceptional or unusual circumstances to warrant the court’s exercise of discretion. See *Raghibir Singh Lamba v. Republic (1958) EA 337*.

7. The applicant did not state in his application the charge which he was facing for which he was convicted to serve two years imprisonment. However, a perusal of the trial court record shows that the applicant was charged with the offence of forcible entry contrary to **section 90 of the Penal Code**. It was alleged that on 1<sup>st</sup> October, 2013, at Ngeyu Village in Tigania East District, in order to take possession thereof, the applicant entered on a farm of Bosco Gatuma in a violent manner by brandishing a “panga” and uprooting kai apple that was used as a fence. I have carefully considered the proceedings of the trial court, its judgment and the Petition of appeal. There is no allegation that either the conviction or sentence was unlawful.

8. The applicant did not demonstrate that the appeal has overwhelming chances of succeeding. The court cannot at this stage delve into the merits and demerits of the appeal.

9. Taking into totality all the circumstances in is case; I find that the appellant has not met the condition precedent for the grant of bail pending appeal, to warrant the court to exercise its discretion in his favour.

10. Accordingly, the application is without merit and the same is hereby dismissed in its entirety. The applicant shall remain in custody pending the hearing and determination of this Appeal.

It is so ordered.

**DATED and DELIVERED at Meru this 15<sup>th</sup> day of February, 2018.**

**A. MABEYA**

**JUDGE**