



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

HCRA NO. 34 OF 2017

BONIFACE MWENDWA MUSYIMI...APPLICANT/APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Appellant/Applicant approached this court by way of Notice of Motion seeking to be released on bail pending appeal and also sought an order staying execution of the sentence imposed by the Lower Court.
2. The Application is premised on grounds that the Appellant was **charged, convicted and sentenced to 3 years imprisonment with no option of fine**. He has appealed and the appeal has a high chance of succeeding. That it may take time before the appeal is heard therefore he deserves to be released on bail and he will not abscond.
3. The application is supported by an affidavit sworn by the Applicant where he deposes that he was **charged with the offence of being in possession of Cannabis Sativa** and after trial he was **convicted and sentenced to 3 years imprisonment with no option of fine**. That he will not jump bail as he has been out on bond of 50,000/= with a surety during trial before the subordinate court and there are no compelling reasons to have him denied bail.
4. In response, the state filed a replying affidavit deposed by **Mr. Vincent Mamba**, the prosecution counsel. He averred that bail at the stage of appeal is not automatic as envisaged in **Article 49 (1) (h) of the constitution**. That the appeal has no high chance of succeeding and if released the Appellant/Applicant will abscond.
5. The Application was canvassed by way of oral submissions where the Appellant's Learned Counsel **Mr. Mulonzya** and the Learned State Counsel **Mr. Vincent Mamba** basically reiterated what is in the application and the replying affidavit.
6. I have duly taken into consideration rival submissions by both counsels.
7. This court has the jurisdiction to release an appellant on appeal and stay execution of the sentence imposed by the Lower Court (**Vide Section 357 of the Criminal Procedure Code**).
8. It is averred that there are no compelling reason to deter the Appellant/Applicant from being released on bail under **Article 49 (1) (h) of the Constitution**. I must point out that at this point in time the Applicant having been convicted by a Court of Law cannot be deemed innocent therefore bail is not automatic.
9. The principles of whether or not to grant bail pending hearing of an appeal were considered in the case of **Jivraj –Vs. Republic (1986) KLR 605**, where the court stated that:

(i) "...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.

(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 in the consideration of the circumstances and weight and relevance of the points argued".

10. In the Case of **Somo V. R (1972) EA 476** the court held that;

“The most important ground is that the appeal has an overwhelming chance of being successful. In that case there is no justification for depriving the appellant of his freedom”.

11. The applicant herein being an offender, the burden lies upon him to demonstrate conditions favouring his release on bail pending appeal. I have perused a copy of the proceedings and judgment of the Lower Court. There is nothing to suggest that the appeal may have a high chance of succeeding.

12. In Paragraph 5 of the affidavit the applicant averred that it might take time before the appeal is heard and determined. In the case of **Chimambai Versus Republic 1971 EA 343** it was held that:

“anticipated delay in the hearing of the appeal together with other factors constitute good grounds for granting bail pending appeal”.

13. The applicant was not sure if the appeal will take time to be determined. He was only speculating without any basis. Therefore this allegations does not hold any water. It is well within his knowledge that had he chosen to have the admission process done the matter would have been listed for hearing of the main appeal as opposed to the instant application.

14. Having considered the application, I find the applicant having failed to establish conditions that necessitate his release on bail. Consequently the **application fails and is dismissed.**

15. It is so ordered.

Dated, signed and delivered at Kitui this 20th day of March, 2018.

L.N. MUTENDE

JUDGE