



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL APPEAL NO. 59 OF 2015**

**PATRICK MUTUA MUTUNGI.....APPELLANT/APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING OF THE COURT**

1. The Appellant's notice of motion dated 28<sup>th</sup> May, 2015 has been brought under section 356 (1) of the Criminal Procedure Code seeking orders that:

*a) Dispensed with.*

*b) That this court be pleased to grant the appellant bond pending the hearing and determination of this appeal.*

2. The application is based on the grounds on the body of the motion and the supporting affidavit of Faith Katunga the advocate in conduct of this matter on behalf of the appellant. The grounds are that the appellant was charged and convicted of the offence of grievous harm contrary to section 234 of the Penal Code in Machakos Chief Magistrates' Court Criminal Case No. 942 of 2014 and was imprisoned to life on 10<sup>th</sup> April, 2015. Aggrieved by the said judgment he filed this appeal. She stated that the appeal is arguable and has high chances of success. That the offence for which the appellant was convicted is bailable according to Article 49 (1) (h) of the Constitution. That the appellant is willing to subject himself before this court at any time so required. That the appellant is willing to comply with orders of this court and no prejudice shall be occasioned to the respondent in the event the orders sought are granted. That if the orders are not granted, the appellant stands to suffer irreparable loss and injustice without any cause at all.

3. In response thereto, the respondent through the affidavit of Cliff O. Machogu the prosecuting counsel in the Office of Director of Public Prosecution contended as follows. That the appellant has not demonstrated that the appeal has chances of success. That the assertion that this appeal has chances of success can only be proved at and upon the full hearing of this appeal. That the solemn assertion by the appellant that he will not abscond if released on bond, even if he supported by sureties is not sufficient ground for releasing a convicted person on bail or bond pending appeal. That in any event, the appellant has failed to satisfy the extreme high standard for bail or bond pending appeal per the Cardinal principle of Criminal law. That in order to strike a balance between the competing interest of the public and that of the Appellant to be released on bond pending appeal, the Application be dismissed and the matter be set down for hearing.

4. Submissions tendered on behalf of the appellant were that the appellant is a law-abiding citizen without any previous criminal records or convictions and very willing and ready to attend court whenever required to do so or when the need arises and will abide by all the conditions that this court may order or impose on him. That the grant of bail and bond will enable him to take care of his family. That it is his Constitutional right to be admitted to bail or bond unless compelling reasons are shown as to why the right should not be available to him. That there is no compelling reason and or ground as to why he should not be admitted to bail or bond.

5. The respondent on the other hand submitted that while the grant of bail is a Constitutional right it is worth noting that the appellant is now a person convicted and sentences in accordance with the Laws of Kenya after standing trial in a competent court. It should therefore not be lost that the threshold for an application and or grant of bail pending appeal is much higher than that of an accused person and that there ought to be sufficient grounds advanced for the same. That the presumption of innocence no longer applies. The respondent cited **Jeremiah Mwangi Ngatia v. Republic Criminal Appeal No. 110 of 2011** in support thereof. It was submitted that the appellant is prima facie a convict and his Constitutional freedoms and rights are significantly circumscribed by his conviction. That he no longer enjoys the absolute presumption of innocence available to persons facing trial at the first instance. That in admitting such a person to bail, the court ought to, in addition to principles governing admission to bail pending appeal, bear in mind the possible dilemma of resending such a person to prison in event that his appeal fails. In this regard, the respondent cited **Somo v. Republic (1972) E.A. 476, Dominic sibi Peter v. Republic [2014] eKLR** and **Dominic Karanja v. Republic [1986] KLR 612**. It was finally submitted that the appellant has not demonstrated that there are any exceptional circumstances that would warrant this court to exercise its jurisdiction in his favour.

6. The substantive law on grant of bail is found under Article 49 (1) (h) of the Constitution which states:

***“An arrested person has the right-***

***h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.”***

7. It is worth noting that the aforesaid provision is applicable to bail pending trial in which case such an applicant is normally considered innocent until proved guilty. On the other hand, in an application for bail pending appeal, an applicant is one who has already been found guilty in which case the principle for consideration is whether; the appeal is arguable and has a chance to succeed, there is an anticipation of delay in hearing of the appeal and there exists exceptional and unusual factors. See: **Chimambai v. Republic [1971] E.A. 343** where the court held that:

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

And **Dominic Karanja v. Republic [1986] KLR 612** where the Court of Appeal held:

***“(a) The most important issue was that if the appeal had such overwhelming chances of success, there is no justification for depriving the Applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances.***

***(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 bail pending appeal.***

***(d) Upon considering the relevant material in this case, there was no overwhelming chance of the appeal being successful.”***

8. I have taken the liberty to peruse the petition of appeal, the proceedings and judgment of the trial court. Without preempting the outcome of the appeal, I find that there may be no absolute success in the appeal. Secondly, I note that although it is alleged that the applicant is the bread winner of the family, such evidence has not been tendered. I find that the applicant has not satisfied the conditions set for granting bail pending appeal and has not established any exceptional or unusual circumstances. I am in the circumstances reluctant to grant him bail. The application is dismissed. The Applicant shall remain in custody until this appeal is heard and determined. Parties herein are directed to set down the appeal for hearing on priority basis.

Orders accordingly.

**Dated, Signed and Delivered at Machakos this 8<sup>th</sup> day of March, 2018.**

**D.K.KEMEI**

**JUDGE**

In the presence of:-

Ngolya for Nzau - for the Appellant/applicant

Machogu - for the Respondent

Kituva – Court Assistant