

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 50 OF 2017

BONIFACE MUEMA NGITI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Original conviction and sentence in **Kitui Chief Magistrate's Court Criminal Case No. 337 of 2015** by **M. Murage C M** on **09/10/17**)

R U L I N G

1. The Appellant approached this Court by way of Notice of Motion seeking to be released on bail pending the outcome of Appeal. The application is premised on grounds that the Appeal lodged has overwhelming chances of success. That the Appellant is aged **60 years** and resides less than **5kms** away from the Court. He will abide with bail/bond terms and conditions to be imposed by the Court.
2. The Applicant swore an affidavit in support of the application where he deposed that he was convicted of the offence of fraud on sale of property and sentenced to **two (2) years imprisonment**. That evidence tendered to the Court by the Prosecution was at variance with the particulars of the offence therefore he was convicted on a defective charge.
3. The State through the Prosecuting Counsel **Mr. Mamba Vincent** did not oppose the application. **Mr. Mamba** deposed an affidavit stating that he had taken note of the age of the Appellant and his averment of poor health.
4. In a supplementary affidavit the Applicant stated that he has been diagnosed with Pulmonary Tuberculosis (TB).
5. At the hearing, **Mr. Mwalimu**, learned Counsel for the Appellant stated that due to the poor health of the Appellant he may be admitted to bail.
6. **Mr. Mamba** did not oppose the application.
7. In the case of **Jivraj Shah vs. Republic (1986) KLR 605** the Court of Appeal stated thus:

“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 interest of justice to grant bail. 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 that the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail will exist. 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 is the consideration of the particular circumstances and weight and relevance of the points to be argued.”

8. The exceptional circumstances in this case is the fact that the Appellant is not just ailing but he suffers from Pulmonary Tuberculosis. This kind of disease is contagious as the bacteria easily spreads from one person to another. The continued incarceration of the Appellant/Applicant with other inmates is risky as he may spread it to others. In the circumstances it is in the interest of justice for the Appellant to be released on bail pending hearing and determination of the Appeal.
9. Therefore he is granted bond of **Kshs. 200,000/=** with a surety in a similar sum.
110. It is so ordered.

Dated, Signed and Delivered at Kitui this 22nd day of May, 2018.

L. N. MUTENDE

JUDGE