



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAHURURU**

**CRIMINAL APPEAL NO.209 OF 2017**

**(Appeal Originating from Nyahururu CM's Court**

**Cr.No.930 of 2015 by: Hon. S.N. Mwangi – S.R.M.)**

**ELIJAH KAMAU NGIGI.....APPELLANT**

**V E R S U S**

**REPUBLIC.....RESPONDENT**

**R U L I N G**

By the Notice of Motion dated 27/2/2018, the applicant, Elijah Kamau Ngigi, prays that this court do release him on bond pending the hearing and determination of his appeal. The application is brought under Section 357 of the Criminal Procedure Code.

The application is premised on grounds found in the body of the application and the applicant's affidavit. The applicant was convicted for the offence of defilement under Section 8(1) as read with Section 8(4) of the Sexual Offences Act, on 17/11/2017 and was sentenced to serve 15 years imprisonment. Being aggrieved by the said conviction and sentence, the applicant filed Cr.A.209/2017 and this application. He contends that he is a teacher by profession; that he was out on bond in the Lower Court during the trial of this case and he attended court without fail; that therefore, he is not a flight risk; that he had no previous criminal records and is ready to abide by any bond terms that the court might impose. The applicant also deposes that his appeal has very high chances of success as disclosed in his petition of appeal.

Ms. Rugut, learned counsel for the State opposed the application on grounds that, having been sentenced to 15 years imprisonment, there are no chances that the appeal will not be heard before the said period lapses; that there is no record of appeal for the court to determine whether or not the appeal has high chances of success; that even if the applicant faithfully attended the Lower Court, bond can only be granted in special circumstances.

The principles for granting bond pending an appeal were reiterated in the case of *Jivraj Shah v Republic (1986)KLR 605* which laid down the principles as follows;

***(1) The principal consideration in an application for bond 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.***

***(2) If it appears prima face 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 exists.***

***(3) 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."***

In the case of *Chimambhai v Republic 1971 EA 343*.

J. Harris made another observation in such an application when he said "*The case of an appellant under sentence of imprisonment seeking bond lacks one of the strongest elements normally available to an accused person seeking bail before trial, namely, the presumption of innocence, but nevertheless the law of today frankly recognizes, to an extent at one time unknown, the possibility of the conviction being erroneous or the punishment excessive, a recognition which is implicit in the legislation creating the right of appeal in criminal cases.....*"

Under Article 49 of the Constitution an accused person who is facing a criminal charge has a right to bond because he is presumed to be innocent till proved guilty, unlike a case where one is already convicted.

In the above cases, the courts also held that anticipated delay in the hearing of the appeal, together with other factors may be grounds for grant of bail pending appeal.

In ***Dominic Karanja v Republic (1986) KLR 612***, the Court of Appeal stated in alia:

***(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) .....***

Having considered the above decisions, I must point out that grant of bail is the discretion of this court guided by the above principles and the discretion must be exercised judicially.

In the Bond and Bail policy in such an application, the burden lies with the applicant to establish that the appeal has high chances of success or that he is likely to serve a substantial part of the sentence before the appeal is heard.

In this case, only the judgment of the trial court was availed to this court but the proceedings were not. I believe that the Lower Court record is not yet typed, the judgment having been delivered in November, 2017. The court has not had the benefit of perusing the said record to determine whether the grounds of appeal disclose an arguable appeal with high chances of success.

As noted above, the judgment was delivered on 17/11/2017. The applicant was sentenced to 15 years imprisonment and it is unlikely that he will serve a substantial part of the sentence before the appeal is heard.

The fact that the applicant was out on bond during the trial in the Lower Court does not justify grant of bond. A sentence hangs on his life and likelihood of absconding cannot be wished away.

In the end, I find that the application lacks any merit and I dismiss it.

**Dated, Signed and Delivered at NYAHURURU this 18<sup>th</sup> day of May, 2018.**

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**R.P.V. Wendoh**

**JUDGE**

**PRESENT:**

Ms. Kirui - Prosecution Counsel

Ms. Wanjiru holding brief for Mr. Waichungo for applicant

Soi - Court Assistant

Appellant – Present