



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KAKAMEGA**

**CMCC NO. 80 of 2017**

**FREDRICK MUCHERE MUDIALO.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**R U L I N G**

1. The applicant herein was on the 18<sup>th</sup> July 2017 convicted of the offences of intimidation contrary to section 238(1) of the penal code and malicious damage to property contrary to section 339(1) of the penal code.
2. On the 28<sup>th</sup> July 2017 the trial court placed the applicant on two years probation. On the 2<sup>nd</sup> August 2017, the applicant filed an appeal against the judgment of the learned trial magistrate. On the 17<sup>th</sup> may 2018 while the appeal was pending the applicant was sentenced to serve 16 months imprisonment over the offences. The proceedings that led to the probation orders being cancelled and the applicant being sentenced to imprisonment have not been forwarded to this court.
3. The applicant has now filed an application dated 23<sup>rd</sup> May 2018 seeking to be granted bond pending appeal. The grounds for bond pending appeal are contained in the applicant's supporting affidavit sworn on the same day, 23/5/2018. The grounds are that during the trial in the lower court, the applicant was not given adequate time and facilities to enable him prepare for his defence which thereby caused serious miscarriage of justice in the case.
4. The applicant says that though he was issued with copies of witness statements on the date of plea, they got lost in remand prison. That his attempts to thereafter obtain the same from the prosecution and from the court were unsuccessful. That he was forced to conduct the case without the documents. That on 15/6/2017 when the case came up for hearing, he applied for adjournment to enable him get copies of the same but the trial court did not heed to his request. That on the same day his bail was revoked. On the 30/6/2017 he was produced in court for mention of the case on an application for review of bond revocation but the court changed a mention date into a hearing when he was not ready to proceed with the case.
5. The applicant says that on 23/6/2017 he filed with Kakamega High Court Misc Application No.56 of 2017 contesting cancellation of his bond by the lower court. However that the trial court despite request by the High Court failed to forward the lower court's file to the High Court for consideration of his application. That the file was only forwarded to the High Court after he was convicted.
6. He further says that by a letter dated 1/7/2017 he wrote to the trial court requesting for copy of proceedings and a re-call for the prosecution witnesses to enable him properly cross examine the witnesses but that on the 5/7/2015 the court did not consider his application but proceeded to order him to proceed to offer his defence.
7. The applicant says that the conviction and the sentence were arrived at in contravention of the fundamental rights enshrined in the constitution. He pleaded with the court to grant him bond pending appeal.
8. The application was opposed by the state. The prosecution counsel **Mr. Juma** submitted that the applicant has not shown that there are exceptional circumstances that warrants the granting of the application. Further that the applicant has not shown that the appeal has any chance of success. He urged the court to dismiss the application.
9. Section 357 (1) of the criminal procedure code provides that:

***“After the entering of an appeal by a person entitled to appeal, the High Court, or the subordinate court which convicted or sentenced that person, may order that he be released on bail with or without sureties, or, if that person is not released on bail, shall at his request order that the execution of the sentence or order appealed against shall be suspended pending the hearing of his appeal.”***

10. Article 50(2) of the constitution of Kenya 2010 stipulates that:

**Every accused has the right to a fair trial, which includes the right:**

**(c) to have adequate time and facilities to prepare a defence;**

**(d) to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence.**

11. The principles applicable for bond pending appeal are that the applicant must demonstrate to the court that:-

(i). There exist exceptional circumstances to warrant grant of bail/bond.

(ii). The appeal has overwhelming chances of success.

These principles were cited in **Jivraj Shah Vs Republic (1980) eKLR** where it was held that :

*i. The principle 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.*

*ii. If it appears prima facie from the totality of the circumstance 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.*

*iii. The main criteria is that there is no difference between overwhelming chances of success and a set of circumstances 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.*

Also see **Mundia Vs Republic (1986) KLR 623**.

12. The court record indicates that on the date the plea was taken on the 24/4/2017, the applicant was provided with copies of witness statements for 3 witnesses. On the first day of the hearing on 15/6/2017, the applicant sought for an adjournment on the grounds that he had not been provided with copies of witness statements. The court referred to its record of 15/6/2017 and found that the applicant had been provided with the same. It then proceeded to hear the evidence of 2 of the witnesses.

13. The court record also indicates that on the 3/7/2017 the court received a letter by the applicant dated 1/7/2017 where he explained that the witness statements issued to him on the 24/4/2017 had gotten lost in prison remand. He requested to be issued with copies of the same and for the witnesses to be recalled for further cross examination.

14. The court record also indicates that on the 30/6/2017, the case was coming up for mention when the court converted a mention date into a hearing date. The applicant says that he was not ready with the hearing on that day.

15. The right to a fair trial is one of those fundamental rights that cannot be limited as stipulated under the provisions of article 25 of the constitution. On the 3/7/2017 the trial court received a letter from the applicant explaining that the copies of witness statements that had been issued to him had gotten lost in prison remand. The letter was copied to the office of the DPP Mumias. The trial court did not consider his application to have the witnesses recalled for further cross-examination. Neither did the court comment on the applicant's letter as to why his request could not be granted. The applicant was in the circumstances denied the right to a fair trial.

16. On 30/6/2017, the case was coming up for mention apparently to find out whether some earlier orders made by the court to take the applicant to hospital for treatment had been complied with. It is not stated why the trial court converted a mention date into a hearing date. The applicant was not asked whether he was ready to proceed with the case. The applicant was not on that day coming for the hearing of the case. The case could only have proceeded with his consent which was not sought. The applicant was thereby denied adequate time to prepare for his case.

17. The state did not make a reply to the averments by the appellant that he was denied a fair trial due to the failure to be provided with witness statements. In **POO (A minor) Vs Director of Public Prosecutions & Another (2017) eKLR**, where witness statements were not provided to the minor before hearing of the case commenced, the High Court declared that failure to do so violated the minor's right to a fair hearing. The applicant herein was denied witness statements after the ones provided to him got lost. He had a right to be informed in advance the evidence that the prosecution intended to rely on in the case. The applicant has established that his appeal raises triable issues with an overwhelming chance of success.

18. The applicant was sentenced to serve 16 months imprisonment. There is danger that he might serve a substantial part of the sentence before the appeal is heard and determined. This will prejudice him in case the appeal succeeds. The application is thereby merited I and will grant him bond.

19. It emerged during the evidence that the appellant has a residence in Uganda. He is therefore a flight risk. Taking that into consideration his bond is fixed at Kshs. 200,000/= with one surety of similar amount.

Delivered, dated and signed in open court at Kakamega this 31<sup>st</sup> day of July, 2018.

J.NJAGI

JUDGE

In the presence of :

Applicant.....Appearing in person

Mr. Juma.....for respondent/state

George.....court assistant

14 days Right of Appeal.