



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 29 OF 2018

NYAGA KAREKO.....APPLICANT/APPELANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

1. The applicant in his notice of motion dated 17/09/2018 seeks for orders of release on bail pending appeal relying on the grounds on the face of the application and in the supporting affidavit sworn by the applicant's counsel Muthoni Ndeke.
2. The counsel deposes that the appeal has overwhelming chances of success and that the applicant is an old man of over 80 years and sickly. He was on bond of Kshs. 100,000/= during the pendency of the trial and is ready and willing to abide by the terms that this Honourable Court will set.
3. It is further stated that the applicant has a fixed abode at Mufu sub-location and will attend court when required to do so.
4. The respondent opposed the application relying on the affidavit of Leah Mati the prosecution counsel. She deposes that the applicant's conviction was supported by cogent evidence that was devoid of any inconsistencies. In meting out sentence, the learned magistrate considered the mitigation of the applicant.
5. The respondent states that the applicant has not satisfied the requirement for an application for bail pending appeal. It was pointed out that it has not been shown that the appeal has high chances of success. No extra-ordinary circumstances have been shown to exist to justify granting bail pending appeal.
6. In the further affidavit of the applicant's counsel she deposes that the applicant suffers from an asthmatic condition and attaches a medical report from Dr. Muriithi MS of Runyenjes Level IV hospital dated 22/10/2018. It argued that the asthmatic condition is a special circumstance that should justify the granting of bail pending appeal.
7. The applicant was convicted of the offence of defilement contrary to **Section 9(1) and (2) of the Sexual Offences Act** and sentenced to serve ten (10) years imprisonment.
8. In determining this application, it is important to look at the provisions of **Section 357(1) of the Criminal Code** which provides for bail where an appeal has been preferred. It provides: -

Section 357(1)

(1) 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:

(2) Provided that, where an application for bail is made to the subordinate court and is refused by that court, no further application for bail shall lie to the High Court, but a person so refused bail by a subordinate court may appeal against refusal to the High Court and, notwithstanding anything to the contrary in sections 352 and 359, the appeal shall not be summarily rejected and shall be heard, in accordance with such procedure as may be prescribed, before one judge of the High Court sitting in chambers.

9. In the case of **JIVRAJI VS REPUBLIC [1986] KLR 605** it was held that the applicant must establish the following: -

"1. The principles 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.

2. 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, condition of granting bail will exist.

3. The main criteria is that there is no difference between overwhelming chances of success and 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."

10. Similar principles were set out in the case of **DOMINIC KARANJA VS REPUBLIC [1985] eKLR.**

11. On perusal of the supporting affidavit, the affidavit, the applicant has not cited any substantive point of law or alluded to weakness of evidence that may favour this appeal with overwhelming chances of success.

12. Neither has it been shown that the sentence or a substantial part of it may have been served by the time this appeal is heard.

13. On the second requirement, the applicant has produced a medical report by Dr. Muriithi to confirm that the applicant has been admitted to hospital and treated for an asthmatic condition on 13/04/2012 and on 10/12/2016. He had a schedule of clinic appointments which went on till April 2017 when he stopped attending.

14. The reason for stopping attendance of the follow up appointments has not been given.

15. The prosecution did not comment on the existence of the medical condition as to whether it amounts to a special or extraordinary circumstance.

16. With a medical report to confirm that the applicant has an existing medical condition, and that he is almost clocking 80 years of age, I am of the view that this is a special circumstance that would justify granting bail.

17. For the foregoing reason, I hereby allow the application subject to a home inquiry report which may guide this court in setting the conditions that the applicant may be required to abide with.

18. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 28TH DAY OF NOVEMBER, 2018.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mati for Respondent

Ms. Muthoni for Applicant

Applicant present