



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 124 OF 2018**

**JOSEPHAT KITONGA KIMOLO.....APPELLANT/APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**R U L I N G**

1. The Appellant/Applicant herein filed an application dated 28/11/2018 seeking for the following reliefs namely:-

***(a) That the Honourable court be pleased to admit the Applicant to bail on such conditions as it deems fit and suspend the carrying out of the sentence pending hearing and determination of the appeal lodged by the Appellant/Applicant.***

***(b) That the court be pleased to make such orders as the ends of justice may require.***

2. The application is supported by the annexed affidavit of the Appellant/Applicant sworn on even date and further by the grounds on the face of the application. The Appellants' case is that he was convicted and sentenced to serve four (4) years imprisonment on the 23/11/2018 vide Kithimani **SRM Cr. No. 298 of 2016** for the offence of Arson contrary to Section 332 of the Penal Code which conviction and sentence he is not satisfied. It is the Applicant's case that he has already lodged an appeal which has high chances of success. It is further the Appellant's case that his appeal will be rendered nugatory if he continues to serve sentence and his appeal succeeds in the end. The Appellant further states that he is willing to abide by any other conditions that may be imposed by this Honourable court. Finally it was the Appellant's case that he is a senior citizen aged 66 years old and desirous of clearing his name and is ready to follow up his appeal to conclusion.

3. The Respondent did not oppose the application. It was the view of the learned counsel for the Respondent that the Appellant had been convicted and sentenced together with other persons who are yet to lodge appeal. It was the submissions of the learned counsel that the appeal might take time to be finalized and further that the other Appellants might delay thereby forcing the Appellant herein to serve a substantial part of the sentence.

4. The Principles upon which bail pending appeal is to be granted were stated in the case of **Dominic Karanja =Vs= Republic [1986] KLR 612** where the court of Appeal held thus:-

***“(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 consideration 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 circumstances 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.”***

5. As the Appellant has already been convicted and sentenced by a court of competent jurisdiction, I find he does not now have the benefit of a presumption of innocence unlike one who seeks bail pending a charge or trial. Hence the Appellant's quest for bond pending appeal is not automatic. He has to furnish sufficient reasons to warrant such a release on bond pending the determination of his appeal.

6. The Appellant has maintained that his appeal has high chances of success. However, the appeal is yet to be set down for hearing in earnest and as such it is too early to establish whether or not it is likely to succeed in the end. It has been shown that the Appellant had been charged with several others who are likely to lodge appeal as well but are yet to do so and hence it might take some time before the appeal is determined. That might be true going by the court's daily workload and which has compelled some Appellants to serve a substantial part of

the sentence before the appeals are heard and determined. The Appellant herein is not an exception to such situations. It has also transpired from the Appellant's affidavit that he is aged about 69 years old. I find the age of the Appellant to be one of the exceptional or unusual circumstances for consideration. It also transpired from the evidence adduced before the trial court that the Appellant did not actively participate in the offence of arson and was only linked as a principal offender through the evidence of an accomplice and it is to be determined during the hearing of the appeal whether or not such evidence of the accomplice was corroborated by an independent witness. I find such issues may swing the scales in favour of the Appellant if established in his favour. The Respondent has also conceded to the Appellant's application on the ground that the Appellant might serve a substantial part of the sentence before the appeal is determined.

7. In the result, I find the Appellant's application merited. The same is allowed in the following terms:-

***(a) The Appellant is released on bond pending appeal in the sum of Kenya shillings five hundred thousand (kshs. 500,000/=) plus one surety of similar amount.***

***(b) The surety shall be approved by the Deputy Registrar of this court.***

***(c) Once released, the Appellant must attend court during the hearing and mention dates without fail until the appeal is heard and determined or until further orders of this court.***

***(d) In default to observe these conditions, the bond shall stand cancelled and both Appellant and Surety called to account.***

***(e) The Appellant and Respondent should proceed to set down the appeal for hearing as a matter of priority.***

Orders accordingly.

Dated and delivered at **Machakos** this **20<sup>th</sup>** day of **December, 2018**.

**D. K. KEMEI**

**JUDGE**