REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO.38 OF 2018

JOSEPH KIRAGU NGANGA.................APPLICANT

V E R S U S

REPUBLIC..RESPONDENT

R U L I N G

Joseph Kiragu Nganga was jointly charged with 2 others, and convicted of the offence of **Robbery with Violence Contrary to Section 296(2) of the Penal Code.** They were sentenced to death.

The appellant has filed the **Notice of Motion dated 5/12/2018,** seeking to be granted bond pending appeal for reasons that he is ailing and requires medical attention; that he was diagnosed with bronchitis for which he require treatment to continue in the hospital he had attended before; that the conditions in custody are not conducive to his state of health and he needs to seek private medical checkup. The applicant further contends that he was granted bond in the lower court and never absconded and he will attend court as will be required of him. The application is also premised on the affidavit sworn by the applicant in which he deposed that based on the grounds, his appeal has high chances of successes. He is ready to abide by any conditions that the court will grant.

Ms. Rugut, Learned Counsel for the State opposed the application on grounds that the appeal has no chances of success; that there are medical facilities in prison where the applicant can be attended to; that the applicant is now a convict and his right to bond has disappeared. Counsel also submitted that the applicant is unlikely to serve a substantial part of the sentence before the appeal is heard.

I have considered the application and submissions by both counsel.

Mr. Maragia, who filed this application did not cite any provisions of law that are applicable to such an applicable. Ordinarily an application for bail pending appeal is made pursuant to **Section 357(1)** of the **Criminal Procedure Code** which provides as follows:

> ***"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:***
>
> ***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."***

From the above provision, it is clear that the grant of an order under that section are an exercise of the court's discretion the word being ***'..may order that he be released**.'*

The issue of grant of bail pending appeal has been discussed in several decisions, the leading one being the case of ***Jivraj Shah v Republic 1986 KLR 605*** where the Court of Appeal set down principles that may guide courts when dealing with such an application.

The court said:

> ***"(1). 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 bond;***
>
> ***(2). 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 argued and 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 primary considerations in such an application is therefore whether the appeal has overwhelming chances of success and whether there are exceptional circumstances warranting the release of the applicant on bail pending appeal. This is unlike an application for bail by a person awaiting trial under Article 49 of the Constitution, where the accused is presumed to be innocent until proved guilty. In this case, a competent court of law has already arrived at a decision which is deemed to be a proper judgment until the contrary is proved.

It is therefore the duty of the applicant to demonstrate that his case has overwhelming chances of success on appeal and therefore invoke the exercise of the court's discretion. In the case of ***Chimanbhlai v Republic 1971 EA 343*** J. Haris 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 bond 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, a recognition which is implicit in the legislation creating the right of appeal in criminal cases…"***

The applicant contends that he will abide by any bond terms the court may impose because he complied with all the bond terms in the lower court. In ***Dominic Karanja v Republic 1986 KLR 618*** the court said:

> **"….**
>
> ***(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."***

The fact that one was on bond in the lower court does not automatically entitle one to bond.

The applicant complaints that he is sickly. However that is not a ground for release on bail because there are medical facilities provided by the prison and if the disease is serious, the convict can be taken to the available Government Hospitals. Besides, the applicant did not provide sufficient evidence to confirm that he was so sickly and that illness cannot be handled by the prison facilities. He produced receipts from Njoro Hospital to show that he was treated for bronchitis in March 2018 but that does not mean that it was not treated. There is no report from a doctor.

That issue was considered by J. Mumbi in ***Cliff Biken Mokua & another v Republic CRA 268 and 269/2012*** where she held that ill health is not a basis for granting bail to a convicted person. J. Mumbi followed that decision in ***CKT v Republic CRA.34/2017***.

The applicant did not even attempt to demonstrate to this court that his appeal has overwhelming chances of success. I have had a cursory look at the proceedings and judgment of the trial court and they do not show that the decision of the court is without basis and that the appeal will result in an automatic acquittal.

The appellant was sentenced to death on 27/11/2018.

He has not even served a year. I note that the proceedings are already typed. It is unlikely that the appeal will take long before it is heard and he will not serve a substantial part of the sentence before the appeal is heard.

I find no merit in the application. Let the record of appeal be prepared and the matter be set down for hearing of the appeal after admission. The applicant will remain in prison until his appeal is heard and determined.

Dated, Signed and Delivered at *NYAHURURU* this *20th* day of December, 2018.

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R.P.V. Wendoh

JUDGE

Present:

Mr. Mutembei for State Counsel

Mr. Chege holding brief for Mr. Maragia for applicant

Soi – Court Assistant

Applicant- present