



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 47 OF 2016

JOHN NTHIGA MUNYI.....APPELLANT/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. This is a ruling on the application dated 28/11/2016 seeking for bail pending appeal following a conviction and sentence of ten (10) years imprisonment in Embu Chief Magistrate's Criminal case No. 925 of 2015 for the offence of administering poison with intent to harm contrary to Section 236 of the Penal Code.
2. The applicant was represented by Njiru Mbogo & Co. Advocates and presented several grounds. Firstly, that his appeal has overwhelming chances of success. The ground is based on the premise that the applicant was not provided with the Government analyst report and has raised this issue in a Constitutional Petition No. 1 of 2016 and that the case against him was not proved against any reasonable doubt.
3. It is also claimed that the applicant's constitutional rights were violated by the trial court for refusal to grant him the opportunity to do an independent analysis of the exhibits by an expert. This violation should lead to the dismissal of the charges as established by the law.
4. This application was argued by way of written submissions which were filed by those parties.
5. The applicant has explained his grounds supporting this application in its submissions. It is contended that the applicant was denied the right to a fair trial upon the refusal to provide him with the samples for examination and with the G.K. Chemist report contrary to Article 50(2) of the Constitution.
6. Some aspects of the evidence have been highlighted and challenged in that all put together did not satisfy the burden of proof. This led to an unsafe conviction.
7. The judgment was said to contain major errors such as limiting the issues for determination and omitting the issues incidental to the ingredients of the offence charged.
8. The application was vehemently opposed by the respondent. Ms. Nandwa in her submissions narrowed down the grounds that the applicant need to satisfy in an application for bail pending appeal:-

1. That the appeal has overwhelming chances of success.

2. That is the first issue is not proved, then the applicant must demonstrate that there is existence

of unusual or exceptional circumstance

The counsel relied on the case of **DOMINIC KARANJA VS REPUBLIC [1986] KLR 612.**

10. It was also argued that the application does not fall within the precincts of Article 49(1) of the Constitution for the applicant was already charged and convicted of an offence.

11. As for the evidence, the respondent contended that the evidence of the prosecution was cogent and supported the conviction as required by the law.

12. I agree with the respondent that this application ought to have been brought under Article 50(2) of the Constitution and not Article 49(1). The other articles cited may be relevant to fundamental rights and freedoms but not directly relevant to this application.

13. The court begins on the premise that the applicant cannot be presumed to be innocent in that he has already been convicted by a court of competent jurisdiction. He has already lost the presumption of innocence.

14. The applicant on appeal bears the burden of proof that he was wrongly convicted by the trial court. The appeal court must not deny the applicant of his liberty if he can prove that his appeal has overwhelming chances of success.

15. If he fails to prove this requirement, the applicant must show that there exists unusual or exceptional circumstances to justify release on bail pending appeal.

16. The existence of a constitutional petition which alleges violation of the right for a fair trial does not amount to unusual or exceptional circumstances.

17. The applicant attacks the way the trial was conducted; the manner the issues for determination were framed and attacks the evidence of the prosecution as falling below the required burden of proof in criminal cases.

18. I have perused the uncertified record of the lower court and form the considered opinion that the appeal is arguable but I am not convinced that it has overwhelming chances of success.

19. There is no likelihood that this appeal will not be heard expeditiously. The applicant should fast-track his appeal for admission and proceed to fix a hearing date. The dates for criminal appeals are available in this court.

20. It is my considered opinion that this application has no merit and it is hereby dismissed.

21. It is hereby so ordered.

DATED, DELIVERED AND SIGNED THIS 29TH DAY OF MARCH, 2017.

F. MUCHEMI

JUDGE

In the presence of:-

Mr. Njiru Mbogo for Applicant

Ms. Manyal for Respondent