



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CRIMINAL APPEAL NO. 29 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

SAMWEL MICHUBU.....ACCUSED

RULING

The appellant herein **Samuel Michubu** filed application for bond pending appeal under certificate of urgency pursuant to **Article 49(1)(h) of the constitution and section 356 of the Criminal procedure code chapter 75 of Laws of Kenya.**

Accused was convicted in Maua Chief Magistrate's Court Criminal Case No. 2035 of 2013 and on 13th March 2017 wherein he was sentenced to serve 2 years imprisonment. His grounds for bail pending appeal are that his appeal has high chances of success and that appeal is likely to take long time before its heard and determined and that he shall have served the whole or substantial part of sentence by the time appeal is heard or determined.

He also raised the ground that he suffers from chronic gastritis/Atopy and Phamatism and requires frequent special treatment. He claimed his health had deteriorated greatly since he was imprisoned. He said he was on cash bail of Kshs 50,000/= during trial and he honoured bond terms and same terms should be granted to him.

Mrs Mwathi for state said they were not opposing application for release of applicant pending appeal but didn't give reasons for conceding to application. The appellant was on 13th march 2017 convicted at Maua SRM Court for the offence of causing grievous harm contrary to section 234 and sentenced to 2 years imprisonment for an offence which maximum penalty life imprisonment.

The appellants application for bail pending appeal is grounded on article 49(i)(h) of the constitution of Kenya 2010 which provides:-

(i) an arrested person has the right to be released on bond on bail, on reasonable conditions pending a charge on trial, unless there are compelling reasons not to be released,"

With all due respect this article of the constitution is not relevant to Applicant/Appellants case because he is already convicted after undergoing due process of trial and therefore the burden/onus to prove he is entitled to bond pending appeal lies on him.

Principles governing the grant of bail pending appeal have been exhaustively discussed in several legal authorities and in the case of **Dominic Karanja vs Republic [1986] eKLR 612** the Court of Appeal

considered conditions which an applicant should satisfy before application can be granted.

The Court Held:-

- a) The most important issue was whether appeal had such overwhelming chances of success.
- b) Whether there are exceptional circumstances to warrant grant of bail pending appeal.
- c) Ill health per se would not constitute an exceptional circumstance where there existed medical facilities for prisoners and
- d) A solemn assertion by an applicant that he will not abscond even if it is supported by surety's, is not sufficient ground for releasing a convicted person on bail pending appeal.

In the case of **Munya Muchubu vs Republic [2014] eKLR** it was held that anticipated delay in hearing appeal is not in itself an exceptional circumstance but might become one when coupled with other factors.

Further in the **Supreme Court of India authority Between Krishnan vs The people** it was held:

1. Bail is granted at the discretion of the court and the discretion is to be exercised judiciously considering all matters material to the trial at the lower court, the grounds submitted in the petition and nature of trial.
2. It is important to bear in mind that court is dealing with a convict and sufficient reasons must therefore exist before such convict can be released.

I have considered the grounds the appellant has submitted as reason why he should be released on bond pending appeal but apart from merely claiming at paragraph 7 of his supporting affidavit that he suffers from chronic gastritis/Atopy and phamatism and requires frequent special treatment there was no evidence annexed to the affidavit to prove this fact. I have also perused the copy of judgment annexed to his application and throughout the trial in the lower court there is no mention or claim of applicant's ill health even at the stage of his mitigation. He also claims that the hearing of appeal may delay and therefore he may serve a substantial part of sentence but the anticipated delay cannot be justified considering that he was convicted and sentenced on 13th March 2017 and the proceedings of the lower court are already typed and lower court file availed for appeal. If that is the only reason for application for bond then I can assure the applicant that his appeal will be heard on priority between now and July 2017 by the visiting Judges.

Whether the appeal has overwhelming chances of success, the court was told the trial court relied on evidence of PW2 and PW3 who were not at scene and that their evidence was contradictory. I have had a casual look at the judgment and even proceedings and without prejudicing the pending appeal, same may be arguable but cannot be said prima facie that it has overwhelming chances of success unless and until submissions are made by both parties substantially. The use of personal violence on the complainant on mere allegation that his cow fed on appellant's shamba as he put it in his mitigation would not support the application for bail pending appeal. This court finds that appellant has not discharged the burden to satisfaction of this court and the application is dismissed.

Ruling Delivered and signed on this 25th day of April 2017.

In the presence of:-

C/A – Peninah

Mrs Mwathi for state

Mr Gitonga Advocate for Appellant/Applicant.

Court

Deputy Registrar to supply records of appeal. Hearing 19.6.2016 before Justice Chilembwe.

HON. A.ONG'INJO

JUDGE