



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL APPEAL O. 87 OF 2017**

**BONIFACE MUTUMA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

[1] By a Notice of Motion Application dated 25<sup>th</sup> September 2017 and brought pursuant to Sections 357,349 of the Criminal Procedure Code CAP 75 of the Laws of Kenya and Article 49 (I) (h) of the constitution of Kenya,the Appellant seeks:-

*(a) To be admitted to bail pending the hearing and final determination of the instant Appeal; or*

*(B)In the alternative, suspension of sentence currently being served by the Appellant, pending the hearing and determination of this appeal.*

[2] As a fact, the Appellant has filed an appeal against the conviction and sentence by the trial court in the Chief Magistrate’s court in Meru Criminal Case No. 902 of 2016. The sentence was 15 years imprisonment. TheAppellant contended that his said appeal is arguable with overwhelming chances of success as demonstrated in the Petition of Appeal filed. Mr. Mulochi, the Learned State Counsel was of a contrary opinion and argued *inter alia* that the Application did show any overwhelming chances of success as the sentence imposed on the Appellant was lawful. He further contended that the evidence was overwhelming and was materially corroborated. Consequently, he asked the court to reject the application as the Appeal had nil chances of success.

**DETERMINATION**

[3] This is an Application for bail pending appeal. The Appellant has already been convicted by a competent court. However, I note the application is premised upon Article 49 (1) (h) of the Constitution which relate to rights of an arrested person. I do not wish to discuss the appropriateness or otherwise of that impleading. Except see what the Court of Appeal stated in the case of **MUTUA V REPUBLIC (1988) KLR 497**,that;

***“It must be remembered that an applicant for bail has been convicted by a properly constituted court and is undergoing punishment because of that conviction which stands until it is set aside on appeal. It is not wise to set the applicant at liberty either from the point of view of his welfare or of the state unless there is a real reason why the court should do so.”***

[4] The foregoing notwithstanding, the legal threshold for bail pending appeal is replete with judicial decisions and I do not wish to multiply them except to state that it should be established that:-

(a) That the Appeal has overwhelming chances of success. See the case of **SOMO V REPUBLIC (1972) EA 476**;and

(b) That there are exceptional or unusual circumstances to warrant the court's exercise of discretion. See **RAGHBIR SINHG LAMBA V REPUBLIC (1958) EA 337**.

[4] Applying this test, a careful perusal of the proceedings herein does not readily reveal overwhelming chances of success of the appeal. But I am mindful that care should be taken not to prejudice this appeal. Similarly, whereas this court is sympathetic to the Appellant, his contention that his health has deteriorated as he suffers from high blood pressure- an illness which is not compatible with prison conditions- was not supported by any evidence. In any event, this court is aware that there are medical facilities in our prisons and the Appellant can always seek medical attention to manage his condition. Courts have said illness *per se* is not an exceptional circumstance for purposes of bail pending appeal unless it is shown the prison establishment may not attend to such condition. This is not the case here. Taking into account the totality of the circumstances in this case, I find that the Appellant has not met the conditions precedent for the grant of bail pending appeal. Accordingly, the Appellant's Application is dismissed in its entirety. The Appellant shall continue to serve the sentence meted out pending the hearing and determination of this Appeal. It is so ordered.

**Dated, signed and delivered in open court at Meru this 20<sup>th</sup> day of November 2017**

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**F. GIKONYO**

**JUDGE**

**In the presence of:**

Mr. Mwanzia advocate for Omari for Appellant

Mr. Namiti advocate for Respondent

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**F. GIKONYO**

**JUDGE**