



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 39 OF 2017**

**KENNETH KIMEMIA KAMAU.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The applicant **Kenneth Kimemia Kamau** was convicted of the offence of grievous harm contrary to **Section 234** of the **Penal Code** in the **Senior Resident Magistrate's Court Gichugu**. He was sentenced to serve five years imprisonment. He filed an appeal against both conviction and sentence. He has filed this present application seeking an order that he be admitted to bail pending the hearing and determination of his appeal.

2. The application is premised on the grounds that he is a student at Kirinyaga University College and is likely to lose his place at the University unless he is released on bond pending appeal as he will be deemed to have absconded classes. That the appeal has overwhelming chances of success. Further that the appeal may take time to be heard and he may serve a substantial part of the sentence. That he was on bond in the lower Court and is willing to abide by such terms as the Court may set.

3. The application was served on the State but when the application came up for hearing, Mr. Sitati, prosecuting counsel did not oppose the application.

4. I have considered the application. Bail pending appeal is provided for under **Section 357 (1)** of the **Criminal Procedure Code**. It is provided:

*“After the entering of an appeal by a person entitled to appeal, the High Court or 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 appeal against be suspended pending the hearing of his appeal.”*

5. The main considerations in granting bail pending appeal are:

- i. Whether the appeal has overwhelming chances of success.
- ii. Whether there are any exceptional or unusual circumstances to warrant the court's exercise of discretion.
- iii. That there is a high probability of the sentence being served before the appeal is heard.

6. I have perused the proceedings before the trial Magistrate. On the face of it, the appeal cannot be said to have overwhelming chances of success. However, the merits of the appeal will be determined at the hearing.

7. The second consideration is whether there are exceptional circumstances. Unlike bail pending trial which is a constitutional right under **Article 49 (1) (h)** of the **Constitution** and based on the presumption of innocence until proved guilty, bail pending appeal is based on the above considerations and is discretionary. This is because the applicant has been tried, convicted and is serving a lawful sentence. In the case of **Somo -V- Republic** it was held that the most important consideration is whether the appeal has overwhelming chances of success and whether there are unusual or exceptional circumstances.

8. The applicant states that he is a student at Kirinyaga University and is likely to lose his place at the University if he is not released on bond pending appeal. The applicant annexed a letter from the University. I have looked at the annexure and to me it has raised doubts on its authenticity. The letter dated March 1, 2017. However the last statement states that they are looking forward to welcome him on January 30 2017 at 8.00 a.m. Even the first paragraph of the letter states that the course will commence on January 30 2017. The question is how the

letter can be dated March 1, 2017 and expect the applicant to report on 30<sup>th</sup> January, 2017. The long and short is that this letter is not authentic. It falls short of proving that there are exceptional or unusual circumstances to warrant the Court to exercise discretion in favour of the applicant.

The student identity card shows that the student is on Certified Public Accountants (CPA) programme. However, the letter states that he is admitted in the school of computing and information technology to pursue a course leading to compute applications. The student card and the letter do not agree. The Registration number on the student card shows that the registration was in 2015. A further scrutiny shows that the address on the student card is not the same as the one given on the admission letter for Kirinyaga University. The card is no doubt fake.

9. The other consideration is whether the applicant is likely to serve the sentence before the appeal is heard and determined. The applicant is serving a sentence of five (5) years. He was sentenced in May, 2017 and the record of appeal is ready. There is no way the applicant can serve five years before the appeal is heard and determined. The appeal is likely to be heard and determined by June, 2018. I am of the view that this ground is not proved.

10. Though the State did not oppose the application, the granting of bail pending appeal is the exercise of discretion by the judge. The discretion of the Court must be exercised judiciously. The Court has a duty at all times to consider the merits or otherwise of the application before exercising its judicial discretion. I find that this application is without merits. The case of **Somo -V- R (supra)**, the Court refused to grant bail pending appeal where the applicant failed to prove the above ground. The applicant has not shown any exceptional circumstances nor is he likely to serve the sentence before the appeal is heard. The appeal cannot be said to have overwhelming chances of success. I find that the application is without merits and is dismissed.

I further direct that the documents purported to be from Kirinyaga University, that is, the letter and student card shall be investigated to determine whether an offence was committed. The Deputy Registrar to hand over the documents to the Criminal Investigations Officer Kirinyaga for investigation.

*Dated and delivered at Kerugoya this 21<sup>st</sup> day of December, 2017.*

**L. W. GITARI**

**JUDGE**

Ruling read out, appellant present, Mr. Sitati for the State, court assistant Naomi Murage, this 21<sup>st</sup> day of December, 2017.

**L. W. GITARI**

**JUDGE**

**21.12.2017**