



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 36 OF 2017**

**PETER KIMANI MUNENE.....APPLICANT/APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The appellant **Peter Kimani Munene** was convicted for the offence of causing grievous harm contrary to **Section 234** of the **Penal Code** and sentenced to serve five (5) years imprisonment by the **Principal Magistrate Gichugu Criminal Case No. 136 of 2016**. He filed this application for an order that he be released on bail pending the hearing and determination of this appeal.

2. The application is based on four grounds namely:-

***(a) That the appellant was convicted and sentenced to serve 5 years imprisonment on 9<sup>th</sup> May, 2017 vide the Principal Magistrate Criminal Case No. 136 of 2016.***

***(b) That the appeal has high chances of success.***

***(c) That the applicant suffers from acute asthmatic attacks.***

***(d) That the appellant will have served a substantial part of his sentence by the time this appeal is heard and determined.***

It is also supported by the affidavit of the applicant sworn on 28<sup>th</sup> September, 2017. He avers *inter-alia* that the appeal has high chances of success, he suffers from asthmatic attacks and has to undergo monthly check-up which he does not get while in prison and that he will have served a substantial part of the sentence before the appeal is heard and determined.

3. I have considered the application and the submissions. Bail pending appeal is provided 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 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.”***

4. There are various factors to be considered in granting bail pending appeal. These are:

***(i) Whether the appeal has overwhelming chances of success.***

***(ii) There are exceptional or unusual circumstances to warrant the court’s exercise of its discretion.***

***(iii) There is a high probability of the sentence being served before the appeal is heard.***

The granting of bail pending appeal is an exercise of discretion as unlike bail pending trial it is not a constitutional right. The presumption of innocence is removed and there is a presumption that the sentence being served is lawful unless or until the contrary is proved. In the case of **Somo -V- Republic** which is a leading authority in this area of granting bail pending appeal, the Court held that the most important ground in deciding whether or not to grant bail is whether the appeal has overwhelming chances of success and there were exceptional or unusual circumstances to justify the grant of bail.

5. Granting bail entails the striking of a balance of proportionality in considering the rights of the applicant, and the public interest on the other. On the one hand it is the duty of the court to ensure that crime where it is proved, is appropriately punished, this is for the protection of society; on the other hand it is equally the duty of the court to uphold the rights of persons charged with criminal offences, particularly the human rights guaranteed under the constitution.

6. In order to ascertain whether the appellant's appeal has chances of success, one needs to go through the evidence adduced before the trial court and the judgment delivered by the learned trial magistrate but without going into any detail in order not to prejudice the court which will eventually hear the appeal. At this stage one cannot delve deep into the merits or otherwise of the grounds of appeal and that in determining the application before court, one only needs to examine an overview of the grounds that have been presented.

7. In an application of this nature, an applicant is required to satisfy the existent of one or a combination of the conditions mentioned in the above cited authorities. The applicant has faulted the fact that there were discrepancies regarding evidence adduced, failing to carry out *voire dire* inquiry of the complainant, complainant's testimony was not supported by medical evidence and sentence was harsh and excessive.

8. In this case, *voire dire* examination was duly conducted on the complainant, P.W. 5 duly produced P3 form and treatment notes from Kerugoya Hospital. Having gone through the evidence adduced and the judgment delivered, I am not satisfied that the Appellant's appeal has high chances of success. There is also no evidence to demonstrate that exceptional or special circumstances exist in the appellant's case to justify his admission to bail pending appeal. He was sentenced to five (5) years imprisonment and will not have served a substantial part of his sentence until his appeal is heard and determined since the record of appeal is ready.

**9. Conclusion.**

Having considered the application, and the proceedings before the lower court and the grounds of appeal, I am of the view that the applicant has not put forward a case to warrant his release on bail pending appeal. The application is dismissed.

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

**L. W. GITARI**

**JUDGE**

Ruling read out, Mr. Mwangi holding brief for Mr. Ngigi for appellant, Appellant present, court assistant Naomi Murage this 21<sup>st</sup> day of December, 2017.

**L. W. GITARI**

**JUDGE**

**21.12.2017**