



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 45 OF 2015**

**STEPHEN NJUE NYAGA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. By his notice of motion filed in court on 6th January 2016 supported by a supporting affidavit, the appellant has applied for bail pending the hearing of his appeal. He says that he shall abide by all conditions of the court and more importantly, he says that he is suffering from asthma and that his stay in prison has made his asthmatic condition worse. He was sentenced to seven years imprisonment in respect of the offence of stealing by servant contrary to section 281 Penal Code by the court of the Senior Resident Magistrate on 22<sup>nd</sup> May 2015.
2. The state opposed his application.
3. In supporting affidavit, the appellant has stated that he has filed an appeal in the High Court being Criminal appeal No 63 of 2015, which is yet to be heard. According to him, he suffers from asthma which is worsened by the conditions in prison. He also says he has been admitted severally in Embu General Hospital. Furthermore, he has stated that the doctor who examined him advised that he should avoid cold, dust and smoke. According to him it is very hard to avoid this as long as he is in prison, because they sleep on the floor. He also states that his appeal has got high chances of success.
4. Finally he has stated in his affidavit that his children whom he had left in the care of his mother do not have any person to look after them, because her mother died and was buried on 24th December 2012.
5. The report of the Clinical Officer in charge of Embu Prison Dispensary has stated that the appellant's is a known case of diagnosed chronic obstructive pulmonary disease maintained on prednisolone, ventolin tabs and inhaler. The Clinical Officer has stated that the appellant's condition is properly managed as the appellant is exempted from dusty environment and cold exposures.
6. Ms Mbae has opposed his application. She has stated that one of the main grounds raised in support of the application is the asthmatic condition of the appellant. In this regard she has stated that the report of the clinical officer has clearly indicated that the condition of the appellant is manageable. The Clinical Officer has also added that the appellant is exempted from dusty environment and cold exposures.
7. Furthermore, she referred the court to the case of *Munjia Michubu v. R Criminal Appeal No. 100 of 2013* (High Court at Meru). According to that case, there must exist exceptional circumstances to warrant the release of an applicant on bail pending appeal. Again in that case the court stated that the fact that the applicant was suffering from TB and other related illness did not constitute exceptional circumstances to warrant his release on bail pending appeal.
8. Furthermore, she also submitted that the appellant has not demonstrated that there are

overwhelming chances of success in his appeal. According to her the prosecution had proved the case beyond reasonable doubt and that the appeal of the appellant cannot succeed. She therefore urged the court to dismiss the appellant's appeal.

**Evaluation Of The Affidavit Evidence Findings And The Law**

9. I have considered the affidavit evidence appellant. I find as a fact that he is suffering from an asthmatic condition and that he has been in and out severally in Embu level five hospital. I also believe that his mother died and that his children are not now being taken care of properly. I also find that he is being attended to by the medical staff in the prison dispensary. In this regard I accept the report of the Clinical Officer that the condition of the appellant is properly being managed. Furthermore, I also find that the appellant is exempted from dusty environment and cold exposures. I accept the principle of law in the case of *Munjia Muchubu v. R, supra* that personal hardships such as bad health do not constitute exceptional circumstances to warrant the release of the appellant on bail pending appeal.
10. Finally I find from the submissions of the State and the appellant that the appellant has not demonstrated that his appeal has overwhelming chances of success. He has also failed to demonstrate that there are exceptional circumstances in his appeal.
11. The upshot of the foregoing is that the appellant's application is hereby dismissed.

**RULING DATED, SIGNED and DELIVERED in open court at EMBU this 25th day of FEBRUARY 2016**

In the presence of Ms Mbae for the State and the applicant/appellant.

Court clerk Njue

**J.M BWONWONGA**

**JUDGE**

**25.02.16**