

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. 19 OF 2016

JAMES GITIYE NKARACHIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in TR 305 of 2015 at

Embu Chief Magistrate's Court by R. O. OIGARA - PM on 29th MAY, 2015)

RULING

1. The appellant has applied for bail pending the hearing and determination of his appeal in respect of his conviction and sentence on charges of causing death by dangerous driving (count 1) and failing to report an accident (count 2). He had been convicted on his own plea of guilty and sentenced to 5 years in count 1 and 6 months in count 2, which sentences were ordered to run concurrently. Additionally, his driving licence was suspended for an unspecified period. His application is brought by way of notice of motion under section 357 of the Criminal Procedure Code.

2. The application is anchored in his supporting affidavit dated 13/04/201. According to his affidavit, he has filed an appeal against both conviction and sentence. He has also deponed that his appeal has overwhelming chances of success. Furthermore, he has stated that unless bail is granted his appeal may be rendered nugatory, because he will have served his sentence before his appeal is heard and determined. He has also stated that he is the sole bread winner of his family and many other beneficiaries.

3. It is his further affidavit evidence that he suffers from a medical condition that requires specialist attention in addition to a special diet and the same facilities are not available at the prison. He also adds that his health is likely to deteriorate if continues to be incarcerated. Finally, he has also stated that there are no compelling reasons to deny him bail.

4. In his submissions in court, counsel for the applicant submitted that the applicant is a resident of Njoro in Tigania West and is willing to abide by any bail terms that the court may impose. According to counsel, the procedure used in taking his plea of guilty is wanting. He further submitted that the language used in the trial proceedings was not understood by the applicant. Finally, he has submitted that the court failed to inform him of his right to counsel and he also pointed out that the applicant has injuries in the neck.

5. The state through Ms Mbae has opposed the applicant's application. Ms Mbae submitted that the right to bail pending appeal is not absolute. Furthermore, she also submitted that the applicant is a flight risk. She pointed out that the accident occurred on 2/03/2014 and the applicant escaped from the scene of the accident and was arrested on 26/09/2015. In response to the submission that the applicant is in need of specialized treatment counsel for the respondent submitted that the applicant did not disclose the nature of his illness that cannot be catered for by the prison authorities. And finally, in response to the applicant's counsel that she did not file a replying affidavit, she pointed out that she was not raising any new matter and was merely relying on Article 159(2)(d) of the 2010 Constitution of Kenya.

6. I have considered the affidavit evidence of the applicant, and his counsel's submissions. I have also considered the submissions of counsel for the respondent. I find that this applicant is likely to abscond if he is granted bail pending appeal. The reason for this is that he caused the accident on 2/03/2014 and proceeded to escape from the scene of the accident until he was arrested on 26/09/2015 in Tigania West in Meru. I agree with the counsel for the respondent that the applicant is a flight risk. I also find that the applicant has not demonstrated that his appeal has overwhelming chances of success. In this regard, I find that the case of *Munjia Michubu V. R. Criminal Appeal 100 of 2013* (filed in the High Court at Meru) is persuasive. The applicant has also not demonstrated that there are exceptional circumstances in his appeal.

7. In the light of the foregoing matters, I find that the application is without merit and is hereby dismissed.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this**31st** day of
....**May**.....**2016**

In the presence of Ms Njuguna holding brief for Mr. Otieno for the Applicant and Ms Mbar for the Respondent.

Court clerk Njue

J.M. BWONWONGA

JUDGE

31/05/ 2016