



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MERU**  
**CRIMINAL APPEAL NO. 3 OF 2016**  
**CHRISTOPHER KABURU.....APPELLANT**  
**V E R S U S**  
**REPUBLIC.....RESPONDENT**

**RULING**

The applicant herein, Christopher Kaburu was on 10<sup>th</sup> February 2016 convicted and sentenced for the offences of assault causing actual bodily harm contrary to section 215 of Penal Code and malicious damage to property contrary section 339 (1) of Penal Code respectively. The applicant was sentenced to serve one year imprisonment on count 1 and count II and 6 months imprisonment on count IV. The sentences were ordered to run concurrently, meaning that the accused will serve one year imprisonment. The appellant is aggrieved by the said conviction and sentence and preferred the instant appeal via a petition of appeal filed in court on 23<sup>rd</sup> February 2016.

By a Notice of Motion application filed in court on 5<sup>th</sup> April 2016, the appellant seeks to be released on bail pending the hearing and determination of the appeal. The gist of the application is that the appellant has become very sick while in prison; that the appeal has high chances of success and that he is likely to serve the entire sentence if he is not released on bail.

The application was opposed by Mr. Mulochi, Learned Counsel for the State who submitted that the evidence on record was overwhelming as the offence was committed in broad day light and the appellant has not demonstrated that his appeal has high chances of success.

This is an application for bail pending appeal. The applicant has already been found guilty by the trial court and is serving sentence. It is unlike an application for bail pending trial where the applicant has a constitutional right to be considered innocent until proved guilty. The primary consideration in such an application is whether the appeal has high chances of success.

There is a wealth of authorities on the conditions precedent to the grant of bail pending appeal some of which I will refer.

In *Abdi V. Republic (1991 KLR 171)* the court held.

1. ***“An application for bail pending appeal is to be granted in rare and exceptional circumstances.(Emphasis mine)***

**2. To admit an applicant to bail is the discretion of the court which must be judicially exercised keeping in sight all the facts relating to the application, all the matter material to the trial at the lower court, the grounds submitted in the petition and the chances of success and the nature of the trial.**

**3. The time it would take for appeal to be prosecuted and determined is by itself not a sufficient ground.**

In **Jivraj Shah v. Republic (1986) KLR 605**

The court considered another ground to be.

**“If it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on an account of some substantial point of law to be urged and the sentence or substantial part of it will have been served by the time the appeal is heard.”**

The Appellant has deposed that he has become very sick in prison. He however did not tell this court where he was ailing from and neither has he availed any evidence to substantiate these claims. The court is aware that there are medical facilities in prison where prisoners can seek medical attention. If every prisoner were to come up with allegations of being sick in prison and therefore should be released, it would mean emptying our prisons of all the inmates because every other one would complain of illness. Whereas I sympathize with the applicant's condition if any, he has not shown that his condition exceptional or unusual.

In such an application, one of the principle considerations is whether the appeal has a likelihood of success. See **Ademba V. Republic (1983) KLR442**. The applicant had deposed that his appeal has high chances of success. In **Some V. Republic 1972 EA 476** court held:

**“iii) the most important ground is that the appeal has an overwhelming chance of being successful; in that case there is no justification of depriving the applicant of his freedom.”**

In **Dominic Karanja V. Republic 1986 KLR 612**, the court of appeal said:

**(a) The most important issue was that if the appeal had such overwhelming chances of success, there was no justification for depriving the applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances.**

**(b) The previous good character of the applicant and the hardships, if any, facing his family were not exceptional or unusual factors. Ill health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners.**

**(c) A solemn assertion by an applicant that he will not abscond if released, even if it is supported by sureties, is not sufficient ground for releasing a convicted person on bail pending appeal.**

The onus rests on the applicant to demonstrate that his appeal has high chances of success. In this case, the applicant did not attempt to discharge that burden. A cursory perusal of the proceedings and judgment of the trial court does not show that the decision of the trial court was without basis and the appeal may result in an outright acquittal. The fact that he says that he was on bond in the trial court and that he will abide by the court's order is not sufficient to have him released on bond pending appeal. The applicant was only convicted in February 2016 and has only served slightly 3 months.

In such an application for bail pending appeal, the court is called upon to exercise its discretion which is to be exercised judicially. The applicant raised another ground, that he is likely to serve the sentence or a substantial part of it before the appeal is heard. He has already served four months. Considering the volume of work at this court, it is indeed likely that the appellant may to serve the full term or substantial a part of the sentence before the appeal is heard. For that reason alone, I exercise my discretion and grant

the applicant the prayer sought. He may be released on cash bail of kshs 30,000/= pending the hearing of this appeal.

**DATED, SIGNED AND DELIVERED THIS 23<sup>rd</sup> DAY OF JUNE 2016.**

**R.P.V. WENDOH**

**JUDGE**

**Before:**

**Mr Mulochi for the state**

**Mr H Gitonga for the applicant**

**Applicant present**

**C.A Penina**