



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**CRIMINAL APPEAL NO. 167'B' OF 2015**

**BERNARD SIMIYU WAWIRE ..... APELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The appellant was tried and convicted of the offence of Manslaughter Contrary to *Section 202* of the *Penal Code*. He was sentenced to serve thirty years imprisonment.

2. He was aggrieved by his conviction and sentence. He lodged an appeal to the High Court through a petition of appeal dated 30<sup>th</sup> November, 2015.

On 5<sup>th</sup> March 2016, through his advocates *Ms Miyianda and Company Advocates*, the appellant presented a Notice of Motion requesting the court to admit him to bond pending the hearing and determination of his appeal.

3. The application is premised on the grounds stated on its face which are largely replicated in the supporting affidavit sworn by the appellant on 1<sup>st</sup> March, 2016. In the main, the appellant (applicant) contends that his application ought to be allowed as his appeal has overwhelming chances of success; that he was out on bond of Kshs.100,000 with one surety during the trial and that he did not abscond; that he was willing to have the same surety and security retained.

4. The application was argued before me on 28<sup>th</sup> July, 2016. Learned counsel *Mr. Miyianda* represented the applicant while learned prosecuting counsel *Ms Oduor* appeared for the Republic. In support of the application, *Mr. Miyianda* submitted that the appeal has high chances of success because in his view, given the evidence adduced before the trial court, the appellant was not positively identified as the deceased's assailant; that the evidence regarding the appellant's voice identification was contradictory and lastly that the prosecution failed to call crucial witnesses in support of its case.

5. The application is contested by the state. In her opposition to the motion, learned prosecuting counsel *Ms. Oduor* submitted that the appeal does not have any chance of success as the prosecution adduced before the trial court credible and consistent evidence which proved all the elements of the offence beyond any reasonable doubt; that the applicant has not demonstrated that there are unusual or exceptional circumstances in his case that would entitle him to be granted bond pending appeal.

6. I have considered the application, the grounds of appeal, the rival submissions made by both parties and the evidence presented before the trial court. I have also read the judgment of the learned trial magistrate.

7. It is important to note at the outset that this court under *Section 357* of the *Criminal Procedure Code* has wide discretion in deciding whether or not to admit an appellant to bond pending appeal. That discretion being a judicial one must however be exercised judiciously in accordance with the law taking into account the circumstances of each case.

8. The legal parameters for determination of applications of this nature are now well settled. There are two main principles which the court must bear in mind in exercising its discretion under *Section 357* of the *Criminal Procedure Code*. In order to exercise its discretion in favour of the applicant, the court must be satisfied that the applicant has established that the appeal has high chances of success. The rationale for this requirement is that if indeed an appeal has high chances of success, there would be no justification for depriving the appellant his or her liberty pending the conclusion of the appeal. The other consideration the court must take into account is whether the appellant has demonstrated that there are unusual or exceptional circumstances that would warrant him to be admitted to bond pending conclusion of the appeal. See *Somo V Republic (1972) E.A 476*; *Dominic Karanja V Republic (1986) KLR 612* and *Jivraj Shah V Republic (1986) KLR 605*.

9. The above two legal principles are predicated on the presumption that once an accused person has been convicted by a competent court, he is deemed to have been properly convicted and his conviction remains valid unless and until it is overturned on appeal.

10. In this case, the application is anchored mainly on the ground that the appeal has overwhelming chances of success. In order to ascertain whether this is the position, as stated earlier, I have gone through the entire evidence on record and the judgment delivered by the learned trial magistrate. Although at this stage it would be imprudent for me to comment on the veracity or otherwise of the evidence presented before the trial court as this might prejudice the hearing of the pending appeal, I note that it was not disputed by the appellant that he was the deceased family's close neighbor and that the incident which led to the death of the deceased occurred at night. I have also noted the evidence regarding the appellant's identification as the deceased's assailant and the alibi defence he mounted in the lower court. It is not the function of the court at this stage to make clear findings of fact regarding whether the appellant was positively identified as the deceased's assailant, or whether there were only contradictions that would have credited reasonable doubts in the prosecutions case. This is the duty that will have to be undertaken by the judge who will hear the appeal on its merits. On my part, I can only say that on the evidence on record, the appellant has demonstrated that he has an arguable appeal but I am not satisfied that the appeal has overwhelming chances of success.

11. Regarding the appellant's claim that the court should favourably consider his application as he was out on bond during the trial and he did not abscond, the Court of Appeal considered such an assertion in *Dominic Karanja V Republic (Supra)* and held that ***"A solemn assertion by an applicant that he will not abscond if released, even if it is supported by sureties, is not a sufficient ground for releasing a convicted person on bail pending appeal..."***

This is so because unlike an accused person who enjoys the presumption of innocence, an appellant is already a convict and he no longer enjoys the presumption of innocence. The presumption is automatically extinguished by the fact of conviction.

12. In view of the foregoing, it is clear that the applicant has not met the legal threshold for grant of bail pending appeal. I thus do not find any merit in the Notice of Motion dated 1<sup>st</sup> March, 2013. The same is accordingly dismissed.

**C. W GITHUA**

**JUDGE**

**DATED, SIGNED and DELIVERED** at **ELDORET** this 18<sup>th</sup> day of October, 2016

In the presence of:

Appellant

Mr. Omwega holding brief for Ms Oduor for the Republic

Mr. Miyianda for the appellant

Naomi Chonde – Court clerk