



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NO. 104 OF 2016**

**BETWEEN**

**SOLOMON TABU KHALILI.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(Being an Appeal from original conviction and sentence of Hon. M.L. Nabibya, SRM in Butali SRMC Court Criminal Case No. 858 of 2015 dated 26.10.2016)**

**R U L I N G**

**Introduction**

1. Details of the case against the appellant in the lower court have not been given, but what is clear from the application dated 31/10/2016 is that the appellant was found guilty and convicted by the SRM at Butali in Criminal Case No. 858 of 2015 on a Charge of grievous harm. He was sentenced to 7 years imprisonment

2. By the instant application, the appellant has moved this court for an order, releasing him on bail pending appeal. His reasons in support of the application are that the appeal has overwhelming chances of success, that the offence is bailable; that he is sickly and hence should be granted bail, so that he is able to seek medical treatment and finally that the appellant is ready and willing to abide by any bond terms that this honourable court may impose. The appellant swore a brief affidavit on 31.10.2016 to buttress the grounds appearing on the face of the application.

**Analysis**

3. Though the respondent did not file any replying papers, he was not opposed to the application when the same came up for hearing on 01.12.2016. Counsel however, submitted that the bond of kshs.10,000/= given to the applicant while on trial should be upgraded.

4. In determining whether or not the appellant ought to be released on bail pending appeal, this court is guided by the fact that the appellant can now no longer claim to be innocent because he is already a convict. Secondly, the fact that the appellant has stated in his affidavit that he is ready and willing to comply with the terms of bail if he is granted same is not material to the determination. He is under a duty anyway to comply with such terms if the court grants him the same.

**Determination**

5. This court has carefully considered the application as filed, the submissions by both counsel and the law. It is to be noted at the outset that the lower court file is yet to be availed to this court for perusal of the lower court record. In the circumstances, the court has to consider only the material that is before it. Taking such material into account, I am not satisfied that the appellant has made out a case for the orders sought. I now proceed to give the reasons for the above conclusion.

6. In the first place, the appellant avers that his appeal has high chances of success but in the absence of the lower court record this court has no way of knowing whether or not the said appeal has high chances of success. The appellant who is represented by Counsel did not make any effort to avail even the handwritten record of the lower court. The appellant’s word that his appeal has high chances of success is therefore not verifiable by this court.

7. Secondly, the appellant avers that he is sickly and that he therefore ought to be released on bond so that he can seek medical treatment outside the prison. Two issues arise from this averment. One is that the appellant has not provided any evidence of sickness as alleged. No copies of treatment notes have been availed to the court to assist the court in appreciating the gravity of the appellant’s condition. Two, the appellant has not provided any evidence showing that he has sought treatment from any of the hospitals while he is in prison and that such treatment has either not been forthcoming or has been found inadequate.

8. In the Court of Appeal case of **Ademba-vs- Republic[1983]KLR 442**, the appellant who was found guilty and convicted on his own plea of the offence of personating a public officer applied for bail pending appeal against the custodial sentence. At the time of making the application, no appeal had been filed and no draft memorandum [sic] had been presented. After hearing the appeal the court set out the applicable principles in considering such an application.

- “1) Bail pending appeal may only be granted if there are exceptional or unusual circumstances.
- 2.) The likelihood of success in the appeal is a factor taken into consideration in granting bail pending appeal. Even though the appellant showed serious family and personal difficulties, in view of unlikelihood of success in this appeal, the application could not succeed.
- 3.) -----
- 4.) The applicable law regarding applications to the high court for bail pending appeal were Sections 356 and 357 of the Criminal Procedure Code (Cap 75) .....

9. In the instant case, the appellant has not shown that there are any exceptional or unusual circumstances to warrant consideration of this application in his favour, nor has he proved that his appeal has high chances of success.

10. For the above stated reasons the Notice of Motion dated 31.10.2016 lacks merit and the same is hereby dismissed

It is so ordered

Ruling delivered, dated and signed in open court at Kakamega this **22<sup>nd</sup> day of December 2016**

**RUTH N. SITATI**

**JUDGE**

In the presence of

.....Mr. Manyoni (present).....for appellant/Applicant

.....Mr. Oroni(present).....for Respondent

.....Mr. Polycap.....Court Assistant.