



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MERU**  
**CRIMINAL APPEAL NO. 2 OF 2015**

**HALKANO MATA BAGAJA.....APPELLANT**

**V E R S U S**

**REPUBLIC.....RESPONDENT**

**RULING**

The applicant herein Halkano Mata Bagaja was convicted of the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code. He was sentenced to serve 5 years imprisonment. The appellant filed an appeal to this court on 5<sup>th</sup> February 2015 by way of petition of appeal dated 5<sup>th</sup> February 2015. On the same date he filed a Notice of Motion in which he prays inter alia, that this court do release him on bond pending the hearing and determination of his appeal or in the alternative, the court do suspend the five year sentence pending hearing of the Appeal. The grounds are that he has an arguable appeal with overwhelming chances and prospects of success; that he will be prejudiced if this application is not heard; that he is likely to have served a substantial part of the sentence before the appeal is heard; that his appeal may delay due to other pending appeals which rank in priority in time to the appellant's appeal due to the limited number of judges in the station. He reiterated the same grounds in the affidavit sworn in support of the application.

The Learned State Counsel for the State Mr. Mungai did not seem to be opposing the application, when he stated that there were contradictions on the nature of injuries inflicted.

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.**
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.”**

This is an application for bail pending appeal. The applicant has already been found guilty by the trial court and is serving sentence and it is presumed that the decision of the court is correct until proved otherwise. It is unlike an application for bail pending trial where the applicant has a constitutional right to be presumed innocent until proved guilty. In such application, the principle consideration 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. I have perused the proceedings before the trial court. In my view the issues raised by counsel should be considered on merit during the hearing of the appeal. I find nothing disclosed to demonstrate that the appeal has overwhelming chances of success.

The appellant was convicted on 14/12/2014. So far he has served about 2 ½ months. The record of appeal is ready and the hearing of the appeal is unlikely to take long if the counsel has the record of appeal admitted. I believe a hearing date will be available soon and he is unlikely to serve a substantial part of the sentence. For the above reasons I decline to grant the application for bail pending appeal. Let counsel have the appeal admitted and appeal be set down for hearing. It is so ordered.

**DATED AT MERU THIS 20<sup>TH</sup> DAY OF MARCH, 2015.**

**R. P. V. WENDOH**

**JUDGE.**

**Mr. Omari for Appellant**

**Mr. Kariuki for State**

**Kirimi Court Assistant**

**Appellant present**