

REPUBLIC OF KENYA

IN HIGH COURT OF KENYA AT MERU

HCRA 13 OF 2015

CYRUS MUTUMA APPELLANT

VRS

REPUBLIC RESPONDENT

RULING

By the notice of motion dated 14/4/2015, Cyrus Mutuma prays to be released on bond pending the hearing and determination of this appeal. The applicant was convicted in Isiolo Criminal case No. 730/2012 on 21/1/2015 and was sentenced to death. It is his contention that he has a constitutional right to be released on bond and that there are no compelling reasons to deny him bond and that if granted bond he will faithfully attend court. He also deponed that he was charged for a criminal offence Criminal Case No. 347/2014 in which the charge was withdrawn under Section 87 of Criminal Procedure Code; that his appeal has high chances of success because the ingredients of the offence of robbery with violence were not established; that there was no medical evidence to support the charge, and that the appellant is likely to serve a substantial part of the sentence before the appeal is heard which will be prejudicial to him.

Mr. Mulochi, Counsel for the State filed a replying affidavit opposing the application. He deponed that there are no overwhelming chances of success of the appeal.

The applicant purported to bring this application pursuant to Article 49 of the Constitution; Section 23 and 24 of the Criminal Procedure Code. Article 49 (1) (h) of the Constitution provides that an arrested person has the right to be released on bond or bail on reasonable conditions i.e., pending a charge or trial unless there are compelling reasons not to be released. Clearly, the Article does not apply to persons who are already convicted and are serving sentence like the applicant herein. The grounds which the applicant relies upon are those applicable to a person who is not yet convicted of any offence. In the case of **JIVRAY SHAH V PEBPULIC (1986) KLR 605**, the Court of Appeal gave guidance on what is to be considered in an application for bail pending appeal, which as follows:

- “1. The principle consideration in an application for bail pending appeal is, the existence of exceptional and unusual circumstances upon which the Court of Appeal can fairly conclude that it is in the interest of justice to grant bail.***
- 2. It appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of some substantial point of law to be argued and that sentence or substantial part of it will have been served by the time the appeal is heard, condition of granting bail will exist.***
- 3. The main criteria is that there is no difference between overwhelming chances of success and set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed and the proper approach is the consideration of the particular circumstance and weight and relevance of the parts to be argued”.***

It must be remembered, however, that in such application for bail pending appeal the applicant has been convicted and the presumption of innocence has disappeared following the conviction by a competent court of law.

As to whether there are overwhelming chances of success, I have perused the proceedings of the

witnesses who testified in the trial court and it is my view that although the appeal may be arguable, yet I do not see overwhelming chances of success. The offence of robbery with violence is a very serious one carrying a maximum sentence of death upon conviction.

As to whether there are available dates for hearing of the appeal, I have personal knowledge that if the applicant is able to prepare his record of appeal, there are available dates at the next session, of the two Judge bench and in any case having been sentenced to death on 21/1/2015, about 5 months ago, it is not possible that the applicant will serve a substantial part of the sentence before being heard. I therefore find no merit in the application and it is declined.

DATED, SIGNED AND DELIVERED THIS 19TH DAY OF JUNE, 2015.

R.P.V. WENDOH

JUDGE

PRESENT

Mr. Mulochi for State

Mr. Kimathi Holding Brief for Kiogora for Applicant

Faith, Court Assistant