



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT GARISSA**

**CRIMINAL APPEAL NO. 28 OF 2015**

**ZAMZAM MOHAMED HASSAN..... APPELLANT/APPLICANT**

**V E R S U S**

**REPUBLIC..... RESPONDENT**

***(from original conviction and sentence in criminal case No. 111 of 2014 of the CM Magistrate's court at Garissa.)***

**RULING**

This is an application for bail pending appeal brought by way of a Notice of Motion dated 5th May 2015. The application was brought under Section 357 (1) of the Criminal Procedure Code (Cap 75). It was brought under Certificate of Urgency with the main prayer that this court be pleased to order that the applicant be released on bond or bail pending hearing and determination of the appeal.

The application was filed with a Supporting Affidavit sworn on 4th May 2015 by the applicant Zamzam Mohamed Hassan. It was deponed in the said affidavit inter alia that the charge is fatally defective. Also that the evidence on record is not sufficient to warrant a conviction. It was also deponed that the applicant was a mother of six

children who are all minors, 3 of whom had been paralyzed and needed constant care and attention.

At the hearing of the application, Mr. Nyaga for the applicant submitted that Article 49 (1)(h) of the Constitution of Kenya 2010 provided for bond except when there were compelling reasons against the grant of such bonds. Counsel submitted that they had filed a supplementary petition of appeal. That the appeal had good chances of success. Secondly that the appellant was a mother of six children, one of whom was mentally disabled. That child aged 8 years, suffered from cerebral palsy and the person who took care of the child live at Ifo Refugee Camp which was far away. In addition, the applicant was a mother of a one year old child who was negatively affected by the prison environment. Counsel urged this court not to over emphasize technicalities in determining this application. Counsel stated that the applicant had a fixed abode in the Regugee Camp at Kabios in Dadaab. She was registered as a refugee in June 2012. Counsel also stated that the applicant was on bond during trial and a surety can be found for her. Counsel submitted that the application was not opposed, as no replying affidavit had been filed.

Learned Prosecuting Counsel Mr. Orwa opposed the application. Counsel submitted that there was no requirement that the State should file a Replying Affidavit to such an application. Besides, the State was served with the application on 7th of May 2015. Counsel submitted further that the applicant had not satisfied the requirements for bail pending appeal. No exceptional reasons had been given by the applicant. In additional, the list of the children did not give their abode. The report filed only talked on one child. Counsel further submitted that in the supporting affidavit, nothing was shown as to where the

applicant or the relatives lived. In addition no facts were given to show that the same conditions of bond during the trial were applicable now. Counsel submitted further that prison authorities had adequate facilities for mothers with children in the prison. Counsel suggested that it would be better to fix the appeal for hearing straight away.

Mr. Nyaga for the applicant submitted that there was no set bond procedure for describing an applicant's residence. Counsel emphasized that the documents filed showed that the applicant lived at Kabios Refugee Camp in Dadaab. Counsel emphasized that the prison facilities were over stretched and it was not conducive for a child to remain in prison for long.

This is an application for bail pending appeal. The applicant filed his petition of appeal on 14th April 2015. On 5th May 2015 her counsel Paul Mugwe Nyaga filed a supplementary petition of appeal and the present application.

Though counsel for the applicant has submitted that the application is not opposed, in my view, the state is not required to file responses to every criminal application. I dismiss that contention.

In an application for bond pending appeal, the most important consideration is whether the applicants appeal has over whelming chances of success. *See the case of Somo -vs- Republic 1972 (EA)*. Though counsel for the applicant has relied on Article 49(1) (h) of the Constitution of Kenya 2010, in my view that Article relates to bail before trial. It does not cover bail pending appeal.

Bail pending appeal is however available. It is by the Provisions Section 357(1) of the Criminal Procedure Code. It is thus a statutory rather than a Constitutional right of an accused person.

I have perused the proceedings and the petition of appeal. I have also considered the submissions of counsel on both sides. In my view the appeal herein has over whelming chances of success. The reason has to do with the age of the complainant. The father of the complainant who testified as PW2 stated that the complainant was born in 1996. The offence was committed in 2014. A simple subtraction will show that the complainant would be aged about 18 years as at the time the offence was committed. No attempt was made to provide medical evidence to establish the age of the complainant. In my view, based on the above facts with regard to age, this appeal has over whelming chances of success as the charged is premised on the allegation that the complainant was a minor.

The applicant was on bail during trial. She had a surety. She was released if on own right on bond of 300,000/= plus one surety. In my view the same terms of bond can be applied in the present case. The surety I note was one Duale Jama Abukar.

I thus allow the application and order that the applicant be released on the same terms of bail as she was released at the trial, pending hearing and determination of appeal, pending hearing and determination of Appeal. I will now proceed to fix the appeal herein for hearing.

**Dated at delivered at Garissa this 18th day of June 2015.**

**GEORGE DULU**

**JUDGE**