



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF V KENYA AT NYERI**  
**CRIMINAL APPEAL NUMBER 35 OF 2014**

**ROBERT KARURU NJUGUNA .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

On 14<sup>th</sup> May 2014 **Robert Karuru Njuguna** (hereinafter referred to as the applicant) was convicted of three counts namely; being in possession of an imitated fire arm contrary to Section **89 (3)** of the Penal Code, handling stolen goods contrary to Section **322 (2)** of the Penal Code and conveying suspected stolen goods contrary to Section **322** of the Penal Code. He was sentenced to serve **7** years imprisonment for count one, **2** years imprisonment for count two and **3** years imprisonment for count **3**. The said sentences are to run concurrently. Aggrieved by the said finding, the appellant appealed to this court on 25.5.2015 citing the following grounds:-

- i. *That there was no positive identification.*
- ii. *There were doubts and inconsistencies in the evidence.*
- iii. *That the evidence was circumstantial.*
- iv. *Charges were not properly proved*
- v. *That the learned Magistrate erred in rejecting his defence.*

On 24<sup>th</sup> April 2015, the Appellant moved this court by way of a Notice of Motion seeking orders that he be released on bail pending the hearing of his aforesaid appeal. The application is supported by annexed his affidavit. The applicant argued that he complied with bail terms in the lower court and stated that if released he would attend court when required. The Respondent did not a replying affidavit but **Miss Kitoto** for the state opposed the application and argued that the applicant has not demonstrated that the appeal has high chances of success.

Section **357 (1)** of the Criminal Procedure Code which provides for admission to bail or suspension of sentence pending appeal provides that:-

***357 (1)** After the entering of an appeal by a person entitled to appeal, the High Court, or the subordinate court which convicted or sentenced that person, may order that he be released on bail with or without sureties, or if that person is not released on bail, shall at his request order that the execution of the sentence or order appealed against shall be suspended pending the hearing of his appeal:*

For an appellant to be admitted to bail pending hearing of his appeal, he must satisfy some Principle considerations as was held in the case of **Simon Mwangi Kirika vs Republic** while citing the case of

**Jivraj Shah vs Republic** which are:-

- i. *The principal consideration in an application for bail pending appeal is the existence of exceptional or unusual circumstances upon which the Court of Appeal can fairly conclude that it is in the interests of justice to grant bail.*
- ii. *If 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 the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail exists.*
- iii. *The main criteria is that there is no difference between overwhelming chances of success and a 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 circumstances and weight and relevance of the points to be argued.*

I find useful guidance in the words of **Harris J** in the case of **Chimambhai vs Republic** where the learned Judge rendered himself as follows:-

*“The case of an appellant under sentence of imprisonment seeking bail lacks one of the strongest elements normally available to an accused person seeking bail before trial, namely, the presumption of innocence, but nevertheless the law of today frankly recognizes, to an extent at one time unknown, the possibility of the conviction being erroneous or the punishment excessive, a recognition which is implicit in the legislation creating the right of appeal in criminal cases. As to the measure of that recognition the decision in **Kanjis** case is directly on the point. There, two persons had been convicted of assault causing actual bodily harm and sentenced to terms of imprisonment. Each appealed against both conviction and sentence and applied to the magistrate for bail pending the hearing of the appeal. The magistrate granted bail to one of the appellants but not the other, where upon the latter applied to the court by way of appeal from such refusal. Although in his judgement the judge said it was not the practice to grant bail to an appellant after he had been convicted and sentenced to imprisonment except in very exceptional circumstances, he went on; nevertheless, to illustrate what he considered would be circumstances justifying the granting of bail to such an applicant. The mere fact of anticipated delay in hearing an appeal, he said, was not of itself exceptional circumstance but might become one when coupled with other factors, and added that the good character of the appellant together with such an anticipated delay might constitute an exceptional circumstance”*

The Supreme Court of Uganda in the case of **Arvind Patel vs Uganda** cited with approval the above decision by **Harris J** and set out the consideration which should generally apply in applications for bail pending hearing of an appeal as follows:-

- i. *the character of the applicant.*
- ii. *whether he/she is a first offender.*
- iii. *whether the offence of which the applicant was convicted involved personal violence.*
- iv. *the appeal is not frivolous and has reasonable possibility of success.*
- v. *the possibility of substantial delay in the determination of the appeal.*
- vi. *Whether the applicant has complied with bail conditions granted after the applicant's conviction and during the pendency of the appeal (if any)*

**Justice Oder** in the above cited case had the following to say:-*“In my view it is not necessary that all these conditions should be present in every case.”*(Emphasis added)

The Court of Appeal of Uganda in the case of **Igamu Joanita vs Uganda** cited with approval the above case and numerous other authorities and reiterated the above conditions and added that the said conditions are guidelines and are not exhaustive or mandatory and that they need not all be present. A combination or two or more of the said conditions will suffice. The court further added that the main purpose of

granting bail especially bail pending appeal is that while the applicant is set free pending trial or appeal, the court must be satisfied that the applicant shall in compliance with the bail conditions be available to attend trial or appeal. The court must therefore be satisfied that the applicant will not abscond.

The Supreme Court of India in **Gulabrao Baburao Deokar v. State of Maharashtra and Others** cited its previous decision in **Masroor v. State of Uttar Pradesh and Anor** where it stated as follows as follows:-

*“There is no denying the fact that the liberty of an individual is precious and is to be zealously protected by the courts. Nonetheless, such a protection cannot be absolute in every situation. The valuable right of liberty of an individual and the interest of the society in general has to be balanced. Liberty of a person accused of an offence would depend upon the exigencies of the case. It is possible that in a given situation, the collective interest of the community may outweigh the right of personal liberty of the individual concerned.”*

Further, the supreme court of India in the case of **Krishnan vs The People** stated the conditions to be satisfied in an application for bail pending hearing of an appeal as follows:-

- i. *Bail is granted at the discretion of the court.*
- ii. *The court must be satisfied that there are exceptional circumstances that are disclosed in the application.*
- iii. *The fact that the appellant due to delay in determining the appeal may, have served a substantial part of his sentence by the time his appeal is heard, is one such exceptional circumstance. Each case is considered on its merits, depending on what may be presented as exceptional circumstances.*
- iv. *It is important to bear in mind that in an application for bail pending appeal, the Court is dealing with a convict, and sufficient reasons must therefore exist before such a convict can be released on bail pending appeal.*
- v. *It is not for the court to delve into the merits of each ground. But it suffices that all the grounds are examined, and a conclusion is made that prima facie the prospects of success of the appeal are dim.*
- vi. *The fact that the applicant did not breach the bail conditions in the court below, is not an exceptional circumstance which can warrant to admit an application to bail; pending appeal.*

The Supreme Court of India in **Masroor v. State of Uttar Pradesh and Anor** stated as follows :-

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Granting bail entails the striking of a balance of proportionality in considering the rights of the applicant. It is the duty of the court to ensure that crime where it is proved, is appropriately punished, this is for the protection of society; on the other hand it is equally the duty of the court to uphold the rights of persons charged with criminal offences, particularly the human rights guaranteed under the constitution. This position was expressed by the court of appeal in **Gerald Macharia Githuka vs Republic**.

The cornerstone of the justice system is that no one will be punished without the benefit of due process. Incarceration before trial, or pending the hearing of an appeal when the outcome of the case is yet to be determined, cuts against this principle. The need for bail is to assure that the accused person will appear for trial and not to corrupt the legal process by absconding. Anything more is excessive and punitive.

The general rule in my view is for the courts to try to strike a balance between the need for a tie to the jurisdiction and the right to freedom from unnecessary detention of an accused before conviction, and the need to bear in mind the circumstances surrounding each case. Thus in determining bail amount public

good as well the rights of the accused should be kept in mind.

Article **49 (1) (h)** of the Constitution guarantees the right to bail unless there are compelling reasons to warrant the refusal. Thus, the right to bail is not absolute. Clearly, the right to be released on bail or bond is constitutionally circumscribed by the presence of ‘compelling reasons.’ The right to be released on bail is, with the greatest respect, not ‘an inalienable right’ as was correctly stated by Justice Ibrahim (as he then was) in **Republic vs Danson Mgunya & Another**. By definition, an inalienable right is a sacrosanct right, an absolute, unassailable and inherent right and not transferable. It is a non-negotiable right. Like the right to life, a fundamental inviolable right. Compelling reasons is a qualification to the right to bail. The principle of the right to bail is more poignantly described in **Republic vs Ahmed Mohamed Omar & 6 others** where **Ochieng J** agreed with the assertion that ‘*compelling reasons*’ are a qualification to the right to bail.

The Supreme Court of Nigeria in **Alhaji Mujahid Dukubo-Asari vs Federal Republic of Nigeria** set out several criteria on whether or not to grant bail. Justice Ibrahim T. Mohammed JCS stated:-

*“When it comes to the issue of whether to grant or refuse bail pending trial of an accused by the trial court, the law has set some criteria which the trial court shall consider in the exercise of its judicial discretion to arrive at a decision. These criteria have well-articulated in several decisions of this court. Such criteria include, among others, the following:-*

- i. *The nature of the charges.*
- ii. *The strength of the evidence.*
- iii. *The gravity of the punishment in the event of conviction.*
- iv. *The previous criminal record of the accused, if any.*
- v. *The probability that the accused may not surrender himself for trial.*
- vi. *The likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him.*
- vii. *The likelihood of further charges being brought against the accused.*
- viii. *Detention for the protection of the accused.*

The Supreme Court of Malawi in **M. Lunguzi vs Republic** stated that another ground of refusal is where the court “*is satisfied that the interests of justice so require.*”

After considering the circumstances of each case, the court has discretion to grant or refuse bail provided that the discretion is exercised judicially. In **Republic vs Milton Kabulit & 60 Others Justice Emukule** in a well-reasoned decision said:-

*“My understanding of Section (sic) 49 (1) (g) (h) is firstly, that the right of an arrested person to bond or bail in respect of any offence is solely at the discretion of the court seized of the application. Secondly, the only accused entitled to a right to an automatic bond or bail are those charged with offences (which may be referred to as “petty offences”) the punishment of which {if found guilty and convicted) is either a fine only, or imprisonment for a term of less than six months”*

Though the list may not be exhaustive and each case depends on its own merits, the compelling reasons may include the likelihood of failing to attend court, the character of the accused, the interests of justice and even the nature of the offence and failure to demonstrate that the appeal has high chances of success only to mention some. In this case the applicant has not demonstrated that his appeal has overwhelming chances of success and further given the sentence imposed, the temptation to abscond is high. I am satisfied that there exists compelling reasons that justify the denial of bail in this case. Accordingly, the application for the accused to be released on bail/bond pending hearing of his appeal is refused.

**Dated at Nyeri this 17<sup>th</sup> day of November 2015.**

**JOHN M. MATIVO**

**JUDGE**

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