



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 34 OF 2015**

**CYPRIAN WENDO ..... APPELLANT/APPLICANT**

**V E R S U S**

**REPUBLIC ..... RESPONDENT**

**RULING**

Before me is an application brought by way of Notice of Motion dated 14th November 2015 filed by Mutuku Wambua and Associates Advocate for the appellant/applicant. The provisions of the law under which the application was brought were not cited on the application. The prayers are as follows:-

1. ***That this application be certified as urgent.***
2. ***That the applicant herein be granted bail pending the hearing of the appeal in Garissa High Court Criminal Appeal No. 34 of 2015.***
3. ***That this court do make any other order it deems fit in the circumstances.***

The application has grounds on the face of the Notice of Motion. The grounds are that the applicant was not satisfied with the decision in Mwingi Criminal Case No. 427 of 2013 and had now lodged an appeal No. 34 of 2015. Secondly, that it would take long to hear the appeal and if successful, the appeal would be rendered nugatory in view of the nature of the sentence. Thirdly, that the applicant had a wife and two children who totally depended on him.

The application was filed with a supporting affidavit sworn by Faith Muteo Mutuku Advocate for the applicant. It was deponed that the applicant was charged with rape, convicted and sentenced to serve 7 years imprisonment, and had filed an appeal. It was deponed also that the appeal had high prospects of success and that the applicant if not granted bail, the appeal might be rendered nugatory as the appellant would have served most of the sentence by the time the appeal was heard and determined. It was further deponed that the applicant was the sole bread winner of his family and that he always attended court when required during the trial, and would always do so if released on bail pending appeal.

At the hearing of the application, learned counsel for the applicant Mr. Mwithia submitted that they had disclosed the reasons for seeking bail pending appeal in the affidavit. Counsel relied entirely on the grounds in the face of the application, and emphasized that the Director of Public Prosecution had not filed a response to the application, should thus be deemed not to oppose the same.

Learned Prosecuting Counsel Mr. Okemwa for the Director of Public Prosecutions, submitted that they had perused the application and the supporting affidavit and noted that the applicant had been on bond pending trial. Counsel did not oppose the application for bail pending appeal, but urged the court to determine and impose adequate conditions for the bail in line with the recently published bond/bail guidelines of the Judiciary.

This is an application for bail pending appeal. The parameters for consideration by the court in such an application are different from those in an application for bail pending trial. In the case of bail pending trial, the applicant or accused is presumed innocent until proved guilty. Bail at that stage is a Constitution right under Article 49(1)(h) of the Constitution of Kenya 2010.

Once a person has been convicted, he or she is presumed guilty until acquitted by the court on appeal. Therefore in considering an application for bail pending appeal, the court has to be mindful of the fact that the applicant is already a convict. It is worth mentioning here that under section 357(1) of the Criminal Procedure Code(cap.75) the trial court or appellate court may release a convict on bail pending appeal.

The Learned Prosecuting Counsel did not oppose the application for bail pending appeal, which is a rare occurrence. The court does not usually release a person on bail pending appeal unless the appeal filed has overwhelming chances of success – see the case of JIVRAJ –vs- Republic (1980) KLR 605, and Dominic Karanja –vs- Republic (1986) KLR 612. The applicants counsel says so. However he does not give any demonstration of unusual facts about the case and evidence tendered and how the case was conducted, which would give rise to the high probability of success of the appeal. However the learned Prosecuting Counsel does not oppose the application and this court does not see any reason why bail should be denied in a particular circumstances of this case, the appellant being an Administration Police Officer who has sufficient particulars about his abode, with a family.

I have also perused the evidence in the trial court, and am of the view that the medical evidence was not conclusive.

I am thus persuaded to grant the applicant bail pending appeal, and as a consequence, I order as follows:-

1. The applicant will be released on bail pending appeal on the same terms as he was released during the trial.
2. He will attend mentions and the hearing of this appeal.

**Dated and delivered at Garissa this 9th December 2015.**

**GEORGE DULU**

**JUDGE**