



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CRIMINAL APPEAL NO. 54 OF 2014**

*(An application for bond pending hearing and determination of appeal)*

**JUSTUS MAKOMERE .....APPELLANT/APPLICANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**RULING**

Before me is an application by way of Notice of Motion dated 21<sup>st</sup> May 2014. It was filed on behalf of the appellant by M/S Musiega & Company advocates, under certificate of urgency.

It is an application for bail pending the hearing and determination of appeal.

The application has grounds on the face of the Notice of Motion. The grounds are that the applicant was convicted on his own plea on 16<sup>th</sup> May 2014 and fined to pay Kshs.120,000/= in default to serve 5 years imprisonment; that the fine was beyond the humble financial means of the applicant who had burdensome family responsibilities; that the trial, conviction and sentence were not fair; that the appeal would take time to be heard; that the appeal raised substantial issues of law; and that the applicant suffered from tuberculosis (TB).

The application was filed with a supporting affidavit, which annexed a copy of treatment notes from Kengondi Health Centre. It was also deponed that the applicant had 7 children and that he was wrongly persuaded by the police to plead guilty. That he was not given a chance to mitigate.

On the hearing date, the learned counsel for the applicant Mr. Musiega made oral submissions in court. Learned Prosecution Counsel Mr. Oroni also made oral submissions.

Mr. Musiega, learned counsel for the applicant emphasized that the applicant was allegedly arrested in a police swoop with 90 litres of kangara (liquor). He was said to have pleaded guilty. He was then handed down the severe sentence. That he had already filed an appeal. That he was a man of meagre means and diagnosed to be suffering from tuberculosis. Counsel submitted that it was not clear whether the applicant understood the proceedings, as no translation in Idakho language was done. Counsel also submitted that the applicant was not given a chance to mitigate. He emphasized that the appeal had high chances of success. Counsel relied on the publication Essentials of Criminal Procedure in Kenya authored by Patrick Kiage (now a Judge of Appeal).

Learned Prosecution Counsel Mr. Oroni submitted that, as the prosecutor in the trial court, he would not dwell on whether the appeal had high or overwhelming chances of success. However, counsel stated

that as the applicant was suffering from Tuberculosis, he would not oppose bail pending appeal, as the contagious disease might spread to other inmates in prison.

I have considered the application, the submissions and the extract of the **Essentials of Criminal Procedures** in Kenya by Patrick Kiage, cited by the applicant's counsel.

The considerations for bail pending appeal are different from those for bail pending trial. Bail pending trial is a Constitutional right grounded on the principle that an accused person is presumed innocent until proved guilty. Under Article 49 (1) (h) of the Constitution of Kenya 2010, an arrested person has a right to be released on bond or bail unless there are compelling reasons for not so doing. In bail pending appeal, an applicant is presumed to have been properly convicted thus and serving a proper sentence.

Bail pending appeal is granted in rare and exceptional circumstances – see **ABDI –VS- REPUBLIC [1991] KLR 171**. The burden is on the applicant to demonstrate these rare and exceptional circumstances. The main consideration by the court in an application for bail pending appeal is whether the appeal has overwhelming chances of success – see **Somo –vs- Republic [1972] EA 476**. In that case, there is no justification for retaining the applicant in custody.

The applicant herein has not demonstrated that the appeal has overwhelming chances of success. A mere blanket allegation that he did not understand Kiswahili language in my view is not adequate. He should have explained how it was that he did not understand that language, which is a common language in this country. He did not do so. A mere allegation that the charge is defective, without more is not enough. The fact that he has no means to pay the fine is also not enough. He has not persuaded me that the appeal has overwhelming chances of success. I agree though, that he has an arguable appeal.

With regard to him suffering from tuberculosis (TB), the document annexed to his affidavit only indicated that he complained of a persistent cough and pneumonia. It was inscribed therein that he provides sputum for tests. The results of the sputum tests were not availed to this court. I am therefore not in a position to conclude that the applicant suffers from TB. Though the learned Prosecuting Counsel has conceded to the application on this, I do not agree with him that the applicant will spread TB to other inmates in custody.

In my view, the avenue available to the applicant, is to fix the appeal for hearing at an early date, as proceedings are short and have already been typed.

To conclude, I dismiss the application as it is not merited.

***Dated and delivered at Kakamega this 29th day of May 2014***

**George Dulu**

**JUDGE**