



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CRIMINAL APPEAL NO.62 OF 2014**

**KENNEDY OGETO ..... APPLICANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**RULING**

The applicant KENNEDY OGETO was convicted on a charge of stealing by servant contrary to **section 281 Penal Code** and on 12/03/2014, he was sentenced to serve 3 years imprisonment. He now prays to be released on bail pending hearing of his appeal. By a Notice of Motion dated 14/03/2014, the applicant, who is represented by Mr. Karanja Mbugua states that the appeal has very high chances of success and he will not jump bail. He is willing to abide by any terms and conditions set by the court.

In the supporting affidavit, he deposes that he is a father of three and has a wife who is unemployed – meaning that he is the only source of the family’s daily bread, education and all other needs, so that being in prison is harsh and detrimental to his young family.

The applicant states that he is an employee of Wildlife Lodges Ltd. in Maasai Mara, and stands to lose his job (which is his only source of income) if he is not released on bond.

Miss Muthoni has argued on behalf of the applicant that he is likely to complete the three year sentence before the appeal is heard. Further, the fact that he could easily lose his job, on account of his incarceration ought to compel this court to allow his application. It is also argued that his circumstances as a family man and his valued job situation mitigate against any flight risks.

In opposing the application, Miss Nyakeira submits on behalf of the State that the appellant has not demonstrated any overwhelming chances of success in his appeal, and that loss of his job cannot be a good ground for bail, as he is already convicted. She contends that the best option is to have the appeal listed for hearing on priority basis.

The principles to be applied in considering bail pending appeal were discussed in the case of **SOMO V Republic [1972] EA pg 467-481** and were set out as:-

1. Whether there are exceptional or unusual circumstances.
2. The most important ground is that an appeal has an overwhelming chance of being successful.

Of course other factors to be taken into account are whether the sentence pre-disposes the applicant to flee

the jurisdiction of the court, and whether the appellant is likely to serve a substantial portion of his sentence before the appeal is heard.

I have perused the memorandum of appeal, I think it raises arguable issues, but this must be considered against the presumption that at this point, it is deemed that the applicant was properly convicted – unless the sentence is so outrageously illegal. What I can infer from the memorandum of appeal is that the issues raised are not frivolous. However in my view the non-frivolous aspect of the appeal alone cannot be the sole consideration, unfortunately the applicant has not demonstrated that the appeal has an overwhelming chance of success, merely saying that it has an overwhelming chance of success does not make it so.

There is also the question as to whether the applicant is likely to attend court if released on bail. The appellant is serving three years in prison, if the appeal were to fail, and he got an inkling that it would, would he still feel obliged to come to court?

I believe the possibility of absconding is relevant in the light of the length of the sentence he is serving, and he would be tempted to abscond. I doubt that the applicant is likely to serve a substantial period of the sentence, as this appeal can be heard on priority basis.

Will the applicant suffer hardship because he stands to lose his job? I think that is a natural consequence for anyone serving a custodial sentence, and cannot be classified as special or unusual circumstances. In any event nothing has been presented from his employer to show that he is guaranteed his job even after conviction.

My finding is that the application has no merit and is dismissed. I direct that the appeal be listed for hearing on priority basis.

**Delivered and dated this 19th day of May, 2014 at Nakuru.**

**H.A. OMONDI**

**JUDGE**