



REPUBLIC OF KENYA

High Court at Meru

Criminal Appeal 14 of 2013

MOSES KIRIINYA MUGUONGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The application is a notice of motion dated 19th March 2013. It has been brought under section 357 of the Criminal Procedure Code, Cap 75 Article 49(1) (h) of the Constitution of Kenya and all enabling provisions of law.

The applicant seeks orders in terms of prayers 1 – 3 as follows:

- 1. That the application be certified urgent, and it be heard on priority basis.**
- 2. That the appellant/applicant, be admitted to bail pending hearing and determination of the appeal.**
- 3. That this honourable court do make any other order it deems fit in this circumstances.**

The application is premised on six grounds as follows:

- i. That the applicant has been sentenced to serve three (03) years imprisonment without an option of a fine.**
- ii. That in the trial court, the applicant was released on a bond of Ksh.10,000/- or cash bail of Ksh.5,000/= which he adhered to until he was sentenced.**
- iii. That the applicant may serve a substantial part of, or the whole sentence, before the appeal is concluded.**
- iv. That the appeal has high chances of success**
- v. That the applicant's health has been deteriorating due to cold conditions at Kangeta prison**

since he comes from a hot area, and is the sole provider for his four tender children.

vi. That the applicant never absconded court in the primary case and shall abide by the bond terms granted by the court.

The application was argued by Mr. Mbaabu for the Applicant. Mr. Mbaabu in his submissions told the court that he was relying on his affidavit and the grounds on the face of the motion. Counsel urged that the appeal had overwhelming chances of success on the grounds that the house alleged to have been burnt by the applicant was still there and the applicant lives in it. He also submitted that the Applicant had bail pending his trial in the lower court.

Mr. Mungai learned State Counsel did not oppose the application. He submitted that from the face of the application a substantial issue has been raised regarding the house. He also submitted that the Applicant is likely to serve his entire sentence before his appeal is heard. I have considered this Application together with the affidavit in its support sworn by the Applicant's Advocate. I have also considered the submissions raised by both counsels.

Unlike an application for bail pending trial where the applicant has a constitutional right to be considered innocent until proved guilty (Article 49 of the Constitution) an applicant for bail pending appeal stands on the premise that is he has already been found guilty on the offence. In an application for bail pending appeal the principle consideration is whether the appeal has a likelihood of success (**Ademba vs Republic 1983 KLR PG 442** and **Somo vrs Republic 1972 EA 476**). The other considerations are whether there exist exceptional circumstances that would justify the applicant being granted bail pending his appeal. The other grounds upon which bail may be granted is where there is an anticipated delay in the hearing of appeal which ground should be considered together with other factors which constitute good grounds for granting bail pending appeal (see **Chimambhai 1971 EA 343**)

When considering an application for bail pending appeal the court has discretion in the matter. However, that discretion must be exercised judiciously. The applicant in this case was convicted of one count of arson contrary to section 332 (a) of the Penal Code. He was sentenced to 3 years imprisonment on the 20th February, this year. I have perused the record of the proceedings and without prejudicing the pending appeal the appeal may be arguable however, I do not see overwhelming likelihood of success. The offence of arson is a serious offence and carries a maximum sentence of five years imprisonment. The circumstances of that offence, from a cursory perusal of the proceedings the circumstances of the offence were serious. I have personal knowledge of the fact that dates for the hearing of appeals are open and that this appeal is likely to be heard before the Applicant has served a substantial part of his sentence.

In the result I find no merit in this Application and the same is dismissed.

DATED SIGNED AND DELIVERED THIS 18TH APRIL 2013.

**J. LESIIT
JUDGE.**