



REPUBLIC OF KENYA

High Court at Machakos

Criminal Appeal 198 of 2011

No. 42/2013

JUSTUS MUMO MUSAU.....APPLICANT/APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. In an application dated 5th February, 2012, the Applicant/Appellant herein seeks to be released on bail pending appeal. In the alternative it is his prayer that his appeal be prioritized.

2. The Application is supported by the affidavit of the Applicant whereby he depones that he was convicted and sentenced to 20 years imprisonment for the offence of defilement on the 28th October, 2011.

3. He appealed against the conviction and sentence and he believes that that his appeal has overwhelming chances of success. He also averred that he was involved in an accident and he was yet to heal.

4. **Mr. Mwangi** the learned State Counsel opposed the application arguing that the Applicant had not proved that his appeal had high chances of succeeding. He submitted further that the record of the lower court showed that there was proof beyond doubt that he committed the offence. The State therefore opposed his release on bail.

5. Principles that guide courts in granting bail pending appeal were enunciated in the case of *Dominic Karanja versus Republic [1986] KLR 612* where it was stated as follows ;-

“...the most important issue was that the appeal had such overwhelming chances of success, there was no justification for depriving the applicant liberty and the minor relevant consideration would be whether there were exceptional or unusual circumstances. The previous good character of the applicant and hardships, if any facing the family were not exceptional or unusual factors. Ill health per se would also not constitute exceptional circumstance where there existed medical facilities. A solemn assertion by an applicant that will not abscond if released, even if is supported by sureties, is not sufficient ground for releasing a convicted person on bail pending appeal...”

6. The Applicant stated that following the provisions of Article 49(1) (h) of the Constitution, it was

his constitutional right to be out on bail. This constitutional provision is applicable where an accused person is presumed innocent until proven guilty. In the instant case the Applicant is a convict serving sentence hence the right is waived.

7. I have perused the lower court's records and the Petition of Appeal filed herein. I am not persuaded that the applicant has an arguable case.

8. The Applicant has also deposed that he is unwell. There is however, nothing to support the allegation. Besides, this even if proved cannot be considered an exceptional circumstance to warrant the applicant being released on bail since there is medical facility in prison.

9. In the result, I find the applicant having failed to demonstrate why he should be out on bail. Accordingly, the application is dismissed.

10. The hearing of the appeal shall be prioritized.

DATED, SIGNED and DELIVERED at MACHAKOS this 30TH day of MAY, 2013.

L.N. MUTENDE
JUDGE