



REPUBLIC OF KENYA

High Court at Meru

Miscellaneous Criminal Application 77 of 2012

PETER GIKUNDA MWITI.....APPLICANT

V E R S U S

REPUBLIC.....RESPONDENT

LESIIT J.

R U L I N G

The Appellant urged the court to release him on bail pending his appeal. He relied on his Chamber Summons dated 4th December, 2012 in which he seeks:

- 1. That I the Appellant/Applicant be granted bail bond pending the hearing of my appeal.**
- 2. That if this honorable court is unable to grant bail I request for my appeal to be heard instead.**
- 3. That this honourable court be pleased to grant any other orders which deem fit I the circumstances of this application.**

The grounds of the Application are:-

- 1. That the Appeal has overwhelming chances of success.**
- 2. That I am a bread winner of my two young siblings.**
- 3. That I will obey all terms and conditions on bond.**

He also relied on his affidavit in support in which he states that Nkubu Court convicted him and sentenced him to 15 years imprisonment.

The Application was opposed. Mr. Makori learned State Counsel opposed the Appellant's Application on grounds the Appellant had not demonstrated overwhelming chances of success of his appeal. Secondly Mr. Makori submitted that the Appellant had not established exceptional circumstances upon which bail pending appeal could be granted.

Mr. Makori relied on two authorities. **Wafula V. Republic [2012]** eKLR where Gikonyo, J, a court of parallel jurisdiction held.

“In an application under section 357 of the CPC it is the appellant who should prove why he should be released on bail pending appeal. This approach of the law is underpinned by the fact that the

appellant is presumed to have been properly convicted and is not in the same standing as a person facing initial trial. On conviction, the presumption of innocence is unraveled, and the burden of proof, though not beyond reasonable doubt, is on the Appellant to prove his appeal and any other intermediate relief such as bail pending appeal.”

The second case is **Kyalo Musyimi versus Republic [2006] eKLR** No part of the judgment was highlighted.

I have considered the Applicant’s application. The Appellant was convicted of rape contrary to section 3(1) (a) and (b) as read with S3(3) of the Sexual Offences Act No. 3 of 2006. He was convicted of count 3 of stealing contrary to section 275 of the Penal Code. In the main count 1, he was sentenced to 15 years imprisonment in the third count he was sentenced to a fine of Ksh. 10,000/- and in default six months imprisonment. The Sentence was imposed on 16th November, 2012.

The Appellant first ground is that his appeal has an overwhelming chance of success. He did not substantiate or elaborate any ground. Second ground was he was a sole bread winner of his family and thirdly that he would obey bond terms set by the court.

In **DOMINIC KARANJA V. REPUBLIC [1986] KLR 612** the Court of Appeal considered conditions an applicant for bail pending appeal should satisfy before the Appeal can be granted. The court held:

(a) The most important issue was that if the appeal had such overwhelming chances of success, there is no justification for depriving the Applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances.

(b) The previous good character of the applicant and the hardships, if any, facing his family were not exceptional or unusual factors. Ill health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners.

(c) A solemn assertion by an Applicant that he will not abscond if released, even if it is supported by sureties, is not sufficient ground for releasing a convicted person on bail pending appeal.

(d) Upon considering the relevant material in this case, there was no overwhelming chance of the appeal being successful.

I have considered the record of proceedings in this case. I have also considered the grounds upon which the application is premised. The complainant was an elderly woman much older as to regard the Appellant as her grandson, according to her evidence. The incident took place in broad daylight. After raping her, the Appellant is accused of dragging the complainant to her house where he stole her property before running away. It was my view that given evidence adduced before the trial court and after considering the grounds raised by the Appellant. I am unable to say clearly and certainly that the Applicant appeal has overwhelming chances of success. As for the fact he is a sole bread winner of his family, that does not constitute an exceptional circumstance that would warrant the court to grant him bail. Neither does his solemn assertion that he will not abscond if released.

Having considered the application carefully, I find no merit in it and accordingly I dismiss it in its totality.

DATED, SIGNED AND DELIVERED THIS 16TH DAY OF MAY, 2013

LESIIT, J

JUDGE.