



No. 34

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEALS NOS. 268 AND 269 OF 2012

CLIFF BIKERI MOKUA 1ST APPLICANT

EDWIN CHWEYA MOKUA 2ND APPLICANT

VERSUS

REPUBLIC RESPONDENT

RULING

1. The appellants who were convicted by the SPM's Court, Nyamira, for the offence of robbery with violence contrary to section 296 (2) of the Penal Code and sentenced to life imprisonment on the 4/12/12, now seek bail pending appeal for the said conviction and sentence.
2. In urging the Notices of Motion dated 20/12/12 for bail pending appeal, counsel for the appellants, Ms. Sagwa submitted a follows:-

“Notice of Motion of 20/12/12 for bail pending appeal. 1st applicant suffers from Asthma and the 2nd appellant suffers from Diabetes. They are serving a life imprisonment. Their appeal has high chances of success. I refer to Article 51 of the Constitution on the rights of detained persons. They are also entitled to bail pending determination of the appeal. The appellants had been on bail during trial. They undertake to attend court before this court until determination of the appeal.”

3. Counsel for the State, Mr. Shabola, responded in opposition to the applications stating:-

“I state that the State opposes the application. The applicants are now convicts serving life imprisonment. From the severity of sentence, there are high chances of absconding. The appellants were on bail during trial but the circumstances were changed by their conviction for the offence. If the court decides to release the appellant, the court should put such terms as would ensure the two applicants of attendance to court.”

4. The appellants, speaking for themselves, informed the court as follows:-

“Appellant I: I am 27 years. I am a student of Graphic design. I am a Gospel singer. I am not employed. I have health problem. I am an asthmatic case. I undertake to attend court whenever required to do so. I pray that we be released on bail pending

appeal.

Appellant II: I am diabetic. I am at the same Institute with the 1st appellant pursuing a course web-design. We are twin brothers. I pray for bail pending appeal.”

5. In a recent decision, **Boke Chacha v. R** Kisii HC Criminal Case No. 244 of 2012, I considered the authorities on bail pending appeal and held as follows:-

“According to authorities on bail pending appeal, bearing in mind that the applicant has now been convicted by a competent court and is on punishment for the conviction which stands until it is set aside on appeal, the criteria for consideration is:

- a. **Whether there exists exception or unusual circumstances which justify grant of bail in interests of justice. See *Jivraj Shah v. R (1986) KLR 605.***
- b. **Such exceptional circumstances exist where the appeal has overwhelming chances of success or where a set of circumstances exist which disclose substantial merit in the appeal and that the sentence or a substantial part of it will have been served by the time the appeal is heard. See *Jivraj Shah supra; Mutua v. R (1988) KLR 497; and Somo v. R (1972) E.A 476.***
- c. **The previous good character of the applicant and the hardships facing his family, and his ill health, where there existed prison medical facilities for prisoners, are not exceptional or unusual circumstances. See *Dominic Karanja v. R (1986) KLR 612.***
- d. **A solemn assertion, even if supported by sureties, that the applicant will not abscond if released is not sufficient ground for releasing a convicted person on bail pending appeal. See *Dominic Karanja, supra.*”**

6. Having considered the circumstances of the present case including the appellants health conditions, respectively, Asthma and Diabetes for the 1st and 2nd appellants, I am not persuaded that the prison authorities are not capable of the diseases’ management and/or treatment in the Prison Health Facilities. Indeed, medical chits from the G. K Prison, Kisii attached to the applications indicate that the appellants have been given treatment and medication at the Prison Facility as known Asthmatic and Diabetic patients, respectively.

7. The apparent previous good character in that the appellants were on bail pending trial and their scholarly pursuits as students of graphic and web design, respectively, are not exceptional or unusual circumstances to justify bail pending appeal.

8. Most importantly, other than the statement by counsel that the appeal has high chances of success, there was no demonstration of overwhelming chances of success or substantial merit of the appeal or any suggestion that a substantial part of the sentence will have been served before the appeal is determined, in accordance with the authorities.

9. I consider that the justice of the case will be met by an order for the full hearing of the appeal on priority basis on a date to be fixed in consultation with counsel for the parties. The appellants’ applications for bail pending appeal dated 20/12/12 are declined.

Dated, signed and delivered this 27th day of JUNE 2013.

.....

EDWARD M. MURIITHI

JUDGE

In the presence of: -

..... for the Applicant

..... for the Respondent

Mr. Edwin Mongare Court Clerk