REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO. 37 OF 2012

WILLY KOSGEI …... APPELLANT

VERSUS

REPUBLIC …..RESPONDENT

RULING

Willy Kosgei, the appellant/applicant herein, is before this court seeking to be admitted to bail pending appeal vide the summons dated 18th December, 2012 and filed in court on 30th January, 2013. The summons is supported by the Applicant's affidavit sworn on the 18th December, 2012. When the summons came up for hearing, Mr. Mutai, learned counsel appearing on behalf of the Director of Public Prosecutions vehemently opposed the application.

Let me set out the brief history of this matter. The appellant was tried on a charge of **Arson** contrary to **Section 332(a)** of the **Penal Code** before the Principal Magistrate's Court, Sotik. The particulars of the offence were that on 25th June, 2011 at Minute Village in Bureti District within the Rift Valley Province, the appellant wilfully and unlawfully set on fire a dwelling house valued at Kshs. 500,000/= belonging to **Samuel Kipkemoi Kirui.** The appellant denied the offence hence he had to undergo a full trial. A total of five (5) witnesses testified in support of the Prosecution's case while the appellant testified and also summoned two independent witnesses in support of his defence. In the end, Hon. M.O. Okuche, the learned Senior Resident Magistrate, convicted the appellant and sentenced him to serve six (6)years imprisonment. The applicant being dissatisfied with the aforesaid decision filed this appeal.

In his Petition of Appeal, the appellant has listed the following grounds:

1. **That, the learned trial magistrate erred in law and fact by basing his conviction on unsafe unsubstantiated and untrustworthy evidence.**
2. **That, the learned trial magistrate erred both in law and fact by not making a finding that PW1 and PW2 were incredible witnesses and to base a conviction on their evidence was unsafe.**
3. **That, the learned trial magistrate misdirected himself both in law and fact by basing conviction on shoddy and fake investigation.**
4. **That, the learned trial magistrate erred in both law and fact by rejecting my defence without concrete reason and thus shifting the burden of prove to the defence side.**
5. **That, the learned trial magistrate misdirected himself both in law and fact without considering my mitigation together with circumstances,nature and the evidence on record before the sentence was arrived at as there was a possibility of lesser sentence if considered.**
6. **That, as I cannot recall everything that conspired, I do humbly request to be supplied with court proceedings to enable me raise more grounds during the hearing and disposal of this appeal.**

7. **That, I wish to be present during the hearing and disposal of this appeal.**

Pending the hearing and determination of this Appeal, the appellation has beseeched this court to release him on bail. The appellant mainly relied on the ground that he has a serious medical condition which in his view is exceptional to entitle him to be released on bond. He further argued that his appeal raises serious questions of fact and law hence he has overwhelming chances of success on appeal. Mr. Mutai, on his part urged this court to dismiss the application claiming the same has no overwhelming chances of success. He also stated that the appellant has not shown the exceptional circumstances which can entitle him to be released on bond.

The principles to be considered when determining applications for bail/bond pending Appeal are well settled.

First, an applicant must show that he has an appeal with overwhelming chances of success.

Secondly, an applicant must show the existence exceptional circumstances. The above principles were restated by the court of Appeal in the case of **Ademba -vs- R [1983]K.LR. 442** in which it held inter alia that;

" 1. Bail pending Appeal may only be granted if there are exceptional or unusual circumstances.

2. The likelihood of success in the Appeal is a factor taken into account in granting bail pending appeal.

Even though the appellant showed serious family and personal difficulties, in view of the unlikelihood of success of this appeal, the application could not succeed.

3. …..................

4.…...................."

It would appear that the most serious ground which the court must consider is whether the appeal has overwhelming chances of success. If the court comes to the conclusion that the appeal has high chances of success then it should admit an appellant to bail pending appeal. On the other hand if the court is of the opinion that the appeal is unlikely to succeed, then the applicant should be denied bail even if he establishes exceptional circumstances. I think it is convenient at this juncture to examine whether the appeal before this court is likely to succeed. The appellant is of the view that his appeal has high chances of success while the Director of Public Prosecutions thinks otherwise. I have already enumerated the grounds of appeal presented by the appellant. Though the appellant has listed seven(7) grounds of appeal in his Petition the same may be summarized to four main grounds vizly:

i. ***That there was no credible evidence to sustain a conviction.***
ii. ***That the appellant's defence was rejected without due consideration.***
iii. ***That the trial magistrate shifted the burden of proof to the appellant.***
iv. ***That the trial court erred when it failed to take into account the appellant's mitigation thus rendering a harsh and excessive sentence.***

I have critically examined the recorded evidence vis a vis the above grounds of appeal. Let me state that care must be taken when commenting on the merits of the appeal at this stage to avoid prejudicing the outcome of the appeal. In my considered opinion, I do not think the appeal has high chances of success. Having failed to satisfy the first principle, I am minded to consider the second principle as to whether there exist exceptional or unusual circumstances. The applicant simply stated that he has a medical condition which would only be attended to when he is out on bond. I have looked at the medical report attached to the appellant's affidavit. There is nothing unique about his medical condition. It would appear that the appellant had gone for medical examination and treatment for injuries he suffered due to panga cuts inflicted on him by his father, the complainant in this appeal. There is no evidence to show that

those injuries cannot be treated by the Prison Medical facility and Personnel. In my view, I find nothing exceptional nor unusual.

In the end, I see no merit in the application for bail. The same is ordered dismissed.

Dated, signed and delivered in open court at Kericho this 25th day of July, 2013

J.K. SERGON

JUDGE

In the presence of

Miss Muthee for the State

Appellant present in person

Mr. Koech – Court Clerk