



No. 72/2013

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 138 OF 2013

DOMINIC MUTIE WILLY.....APPELLANT

v

REPUBLIC.....RESPONDENT

RULING

1. In an application dated 3rd July, 2013, **Dominic Mutie Willy**, hereinafter “*the Applicant*” seeks orders;-

“i. Stay of execution of sentence imposed by the trial magistrate in Mavoko Law Courts in Criminal Case No. 223/2012.

ii) Bail pending hearing and determination of Criminal appeal No. 138/2013”

2. The application is premised on grounds that the appeal has high chances of success; the sentence imposed is excessive and the applicant will be prejudiced if part or the whole of the sentence imposed is executed prior to the hearing and determination of the appeal.
3. In an affidavit deposed by the Applicant he states that he was charged with the offence of preparation to commit a felony. He was convicted by the trial magistrate **Ms L.A Mumussaba** and sentenced to three (3) years imprisonment. Having filed an appeal against the conviction and sentence he stands to suffer as he may serve a substantial part of the sentence prior to determination of the appeal. Having attended the case in the lower court faithfully he promises to abide with any terms to be imposed.
4. **Mr Nzavi** for the applicant in his submission stated that the appeal has high chances of success as the conviction was based on insufficient evidence and contradictory evidence.
5. **Mrs Gakobo** for the State opposed the application arguing that the applicant had not demonstrated that the appeal would be successful. The evidence adduced was sufficient to sustain the conviction. The contradictions alluded to in her opinion were immaterial. The prosecution having proved the case, there were no circumstances warranting the court to exercise its discretion.
6. I have considered rival submissions by both counsels for the Applicant and the learned State Counsel.
7. I am guided by the case of ***Dominic Karanja versus Republic [1986] KLR 612*** where the court of Appeal held thus;

“The most important issue was that if the appeal had such overwhelming chances of success, there was no justification for depriving the applicant of his liberty and the minor relevant considerations would

be whether there were exceptional or unusual circumstances”

8. A perusal of proceedings and judgment thereof shows that the Applicant was sentenced to three (3) years imprisonment in the month of June 2013. The record of appeal has been prepared and the appeal is pending admission to hearing. Bail would be used to secure the applicant's release if the evidence on record is so weak such that it should not have secured a conviction.
9. Having looked at the evidence adduced, the strength cannot be said to be wanting. It can therefore not be asserted with certainty that the appeal has a chance of succeeding.
10. From the foregoing, the application by the applicant for release on bail is rejected. Following admission to hearing the case should be fixed for hearing on a priority basis.
11. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 4TH day of SEPTEMBER, 2013.

L.N. MUTENDE

JUDGE