

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL CASE NO. 19 OF 2011

JOHN OPIYO OGOLLAAPPELLANT/APPLICANT

VERSUS

REPUBLICRESPONDENT

RULING

1. In the application dated 18th July 2013, the Applicant seeks to be released on bail pending appeal.
2. The application is supported by an affidavit deponed by **John Opiyo Ogola** the Applicant, who states that he was convicted of the offence of handling stolen goods contrary to section 322(2) of the Penal Code and sentenced to 12 years imprisonment. That he is ailing and is scheduled to undergo a third operation at Kenyatta National Hospital and his appeal against both the conviction and sentence has a high chance of succeeding.
3. **Mr. Mwangi**, the learned State Counsel opposed the application. He argued that the applicant had not produced any medical documents to establish the alleged medical condition. Basing his arguments on the case of **Dominic Karanja versus Republic [1986] KLR 612**, he argued that the applicant failed to demonstrate that his case had a high chance of succeeding. He had not served a substantial part of his sentence as he has been in prison for only three years and there are no unusual circumstances that would call for his release on bail.
4. In response thereto the applicant stated that in fact he was not appealing against the conviction. His appeal was for the purpose of mitigation in respect of the sentence passed by the lower court.
5. In the cited case of *Dominic Karanja*, the Court of Appeal laid down principles that guide courts in determining whether or not bail should be granted pending appeal. It stated thus:-

“1. 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 was exceptional or an usual circumstances,

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

6. Bail should be used to secure liberty at this stage when the appeal has an overwhelming chance of success. The applicant having stated that he is not contesting the conviction is evidence that the lower court did not misdirect itself by convicting him. This is tantamount to saying that the appeal has no chance of succeeding.
7. In his oral arguments the applicant based his contention on the fact that he had a medical condition that could only be dealt with while out on bail. He told this court that he has previously undergone treatment while in custody. This is evidence that medical facilities do exist that he can access. In the circumstances ill health alluded to by the applicant cannot be said to be an exceptional or unusual factor that should move this court to grant him bail.
8. In the result, the application is unmeritorious. Accordingly, it is dismissed. The appeal may however be heard on priority basis.

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

L.N. MUTENDE

JUDGE