



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT MACHAKOS**

**Criminal Appeal 182 of 2011**

**HENRY JUMA MESACHE ..... APPELLANT/APPLICANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the conviction and sentence of the Senior Principal Magistrate*

*S.M. Mungai delivered on 4<sup>th</sup> August 2011 in Machakos Criminal Case No. 2069 of 2010)*

**RULING**

Before me is a Chamber Summons dated 24<sup>th</sup> November 2011 filed under Section 357 of the Criminal Procedure Code (Cap 75). It is an application for bail pending appeal. The application has grounds on the face of the Chamber Summons. It was filed with an affidavit sworn on 24<sup>th</sup> November 2011 by the applicant.

It was deponed in the affidavit, *inter alia*, that the applicant was sentenced on 5<sup>th</sup> August 2011 to serve three (3) years imprisonment. That he had lodged an appeal which was arguable and had good chances of success. That during trial, he was out on cash bail of 30,000/= and that he would avail himself if granted bail. That if the application was not granted, he would serve a substantial part or even finish the sentence, which would render the appeal nugatory.

The application was filed under certificate of urgency.

At the hearing of the application, Mr Kimeu, for the applicant submitted that the applicant would suffer irreparable loss if bail was not granted. Counsel submitted that the appeal had overwhelming chances of success in that though the trial court found that it was the 1<sup>st</sup> accused who committed the offence, nevertheless it went on to convict the applicant. He relied on the petition of appeal filed.

Mr Mukofu, for the State, opposed the application. Counsel emphasized that, with three judges in the station, the appeal could be determined quickly. Counsel stated that there was no basis for the contention that the appeal had overwhelming chances of success.

I have considered the application and submissions on both sides. This is an application for bail pending appeal. In the case of **Dominic Karanja –vs- Republic (1986) KLR 612**, the Court of Appeal held:-

- 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 consideration would be whether there were exceptional or unusual circumstances.**
- 2. The previous good character of the applicant and the hardships, if any, facing the 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.**
- 3. A solemn assertion by an applicant that he will not abscond if released, even if supported by sureties, is not sufficient ground for releasing a convicted person on bail pending appeal.**
- 4. ....**

The above is, but one of the cases in which it has consistently been reiterated that the main consideration in an application for bail pending appeal is whether the appeal has overwhelming chances of success.

I have perused the record of proceedings and judgment. I have perused the petition of appeal. The only ground of appeal which could raise a high probability of success in the appeal, is ground 7 which reads:-

**“7. THAT the trial magistrate erred in fact in proceeding to convict and sentence the appellant after finding that it was the 1<sup>st</sup> accused who committed the offence.”**

Having perused the judgment, I do not see any specific such error on the face of the record of the judgment. The learned trial magistrate treated each of the accused as having played a part in the commission of the offence. I do agree that this is an arguable appeal. However, the applicant has not demonstrated that his appeal has overwhelming chances of success, thus calling for exercise of this court’s discretion to release him on bail pending appeal. Consequently, I find no merits in the application.

I however, appreciate that the sentence is short and order that an early hearing date for the appeal be given, after its admission, if that has not been done already.

Otherwise, the application for bail pending appeal is hereby dismissed.

Dated and delivered at Machakos this **14<sup>th</sup>** day of **June** 2012.

**George Dulu**  
**Judge**

**In presence of:-**

Mr Mutinda Kimeu for the Applicant

N/A for State  
Nyalo – Court clerk.