REPUBLIC OF KENYA

High Court at Machakos

Criminal Appeal 192 of 2009

FROM ORIGINAL CR. CASE FILE NO. 826/05 AT CM'S COURT MACHAKOS

IN THE MATTER OF SECTION 165 (3)

IN THE MATTE ROF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER SECTION 49 (1) (h) OF THE CONSTITUTION OF KENYA

IN THE MATTER OF HIGH COURT CRIMINAL APPEAL NO. 192/07 AND CM'S COURT CRIMINAL CASE NO. 829/05

GEOFFREY MUREITHI MUNENE ..…….…… APPELLANT

VERSUS

REPUBLIC ……...……. RESPONDENT

R U L I N G

Before me is an application dated 7th August 2012 filed by **Geoffrey Mureithi Munene**, one of the appellants herein. It is an application for bail pending appeal.

The application was filed with a supporting affidavit sworn by the appellant. It was deponed that the court had powers to grant bail or bond as provided for under **Article 49 (1) (h)** of the **Constitution** of **Kenya**. That the appellant will be easily available at any given time and date. That prior to arrest, he was a hardworking Kenyan businessman and had now been in custody for about 7 years. That the prosecution case was flawed with doubts, inconsistencies and contradictions, and that the decision of the magistrate was against the weight of the evidence.

At the hearing of the application, the applicant urged the court to grant him bail pending appeal.

The learned State Counsel **Ms. Kwamboka** opposed the application. Counsel argued that in the supporting affidavit, the applicant had not demonstrated that the appeal had overwhelming chances of success. Counsel submitted that the Constitution only provided for a right to bail pending trial, since the presumption of innocence ceased once someone was convicted.

Indeed, **Article 49 (1) (h)** of the **Constitution** provides for the right of an arrested person to be released on bail. It states:-

49(1) an arrested person has the right

(h) to be released on bond or bail, on reasonable conditions, pending charge or trial, unless there are compelling reasons not to be released.

The above provisions of the **Constitution** clearly provide for the right to bail pending charge or trial. They do not provide for bail after conviction. However, the same is not prohibited.

Courts in **Kenya** have held that though the presumption of innocence ceases on conviction, bail can still be granted pending appeal, but subject to very restricted conditions. In **Somo –vs- Republic (1972) EA 476**, the High Court in Kenya, after considering a number of decisions, stated that the most important consideration in such an application is whether the appeal of the applicant has overwhelming chances of success.

In my view, the burden is on an applicant for bail pending appeal to demonstrate whether his/her appeal has overwhelming chances of success. As the learned State Counsel has stated, the applicant herein has not demonstrated either in his affidavit in support of the application or in his submissions that his appeal has overwhelming chances of success. Merely stating that there are contradictions in evidence, without demonstrating the overwhelming chances of success of the appeal, is not enough. The fact that an applicant has been in custody for long and his business has suffered, is also no ground to release a convicted person on bail pending appeal.

From the court record, I find that on 14/6//2012, the appeals herein, which are four in number, were listed for hearing on 22/11/2012. However on 7/8/2012, this application was filed by the applicant, thus delaying the hearing of the appeal further. In my view, the only sensible solution is to have the appeals heard on priority basis, as the applicant has not demonstrated that the appeal has overwhelming chances of success, or exceptional circumstances.

Coming to the application for bail pending appeal herein, I find no merits in the same. It is dismissed. I order that the four appeals which have already been consolidated be given a hearing date on priority basis. The Deputy Registrar to ensure that the appeals are given a hearing date within the first High Court term of 2013.

Dated and delivered at Machakos this **18th** day of **December** 2012.

George Dulu
Judge

In presence of:-
Applicant present in person
N/A for State
Mutinda – Court clerk