



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
CRIMINAL APPEAL NO. 48 OF 2011

M.N.N.....APPELLANT/APPLICANT

VERSUS

REPUBLIC RESPONDENT

RULING

Before me is a Chamber Summons dated 8th April 2011. It is an application requesting that the Applicant be released on bail pending hearing of his appeal.

The application was filed with a supporting affidavit sworn on the 8th of April 2011 by Mr. Macharia Muraguri, advocate for the Applicant. It is deponed in the said affidavit *inter-alia*, that the Applicant had been granted leave to appeal from a decision of the Subordinate Court. That the appeal had already been filed and had high chances of success. That the Applicant was aged 17 years and ought not have been awarded a custodian sentence. That the Applicant was a student in form four and would lose his future unless he was enabled to complete his school. That the Applicant be granted bail as was done in the lower court.

At the hearing of the application, Mr. Muraguri for the Applicant submitted that the appeal had seven grounds. He submitted also that the Applicant was aged 17 years and his future was at stake. He needed time to read for his exams. Counsel emphasized that the Applicant had been on bond, and honoured such bond terms, during the trial in the Subordinate Court. Counsel argued that the Applicant had not attained majority age and should not therefore have been imprisoned for three years. Counsel further stated that the Applicant was merely visiting his girlfriend at a school, and was mistakenly taken to be a thief.

The application is opposed. The State Counsel Ms. Matiru submitted that the Applicant had been positively identified by PW 1. He had taken items from the suitcases in the dormitory. Counsel submitted that there was no medical evidence to show that he was aged 17 years. Counsel concluded by stating that the Applicant had not demonstrated overwhelming chances for success in the appeal, to justify grant of bail pending appeal.

I have considered the application and the submissions of counsel on both sides. This is an application for bail pending appeal in a criminal case. The Applicant is already a convict in prison. He was indeed on bail during the trial in the Subordinate Court. However, the standard required for release on bail after conviction is higher than that during the initial trial.

It has long been settled that an applicant for bail pending appeal has to demonstrate overwhelming

chances of success in the Appeal. *See Dominic Karanja versus Republic [1986] KLR 612.*

The Applicant states that he was granted bail during the trial in the Subordinate Court. That he complied with those terms of bail. As was stated in the above case, the fact that an accused person was on bail during the trial and complied with the conditions of the bail, is not a sufficient ground for the grant of bail pending appeal.

The Applicant also states that he was 17 years at the trial. Therefore he should not have been committed to prison, since he had not reached the age of majority. It is true that the Applicant stated in his unsworn defence that he was 17 years of age. He also stated at the hearing that he was a form three student. No documentary or expert evidence was however produced either with regard to his being a student or the alleged age. Even in this application for bail pending appeal, no documentary evidence has been produced. Therefore, there is nothing exhibited that can persuade the court that the applicant either is a student in secondary school or aged about 17 years. The court cannot use guesswork or statements from the bar to draw conclusions on alleged facts.

I now turn to the important parameter of overwhelming chances of success of the appeal. This is the most important consideration in an application for bail pending appeal.

It was for applicant to demonstrate overwhelming chances of success in the appeal. He has failed to do. He has not given any facts or legal arguments that would demonstrate that the appeal has high chances of success. Though the appeal is an arguable appeal, there is no basis whatsoever given to persuade this court to exercise its discretion to release the applicant on bail pending appeal. The application has therefore to be dismissed.

Consequently, this application has no merit and I dismiss the same.

Dated and delivered at Embu this 30th day of May 2011.

**George Dulu
Judge**

In the presence of N/A for Applicant, Applicant present in person.

Ms Matiru for State, Njue C/c