



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**CRIMINAL APPEAL NO. 27 OF 2011**

**DAVID MUKIRIA**

**KARANI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**R U L I N G**

Before me is a Notice of Motion dated 8/03/2011 filed on behalf of the Appellant under Section 357(1) of the Criminal Procedure Act (Cap 75 Laws of Kenya). It is an application for the Appellant to be released on bail pending hearing and determination of appeal.

The application is supported by an affidavit sworn by the appellant on 8/03/2011. It was deponed in the said affidavit *inter alia* that the applicant was imprisoned for 20 years for defilement on 24/03/2011. It was deponed that he had already lodged an appeal against both conviction and sentence, and that the said appeal had overwhelming chances of success. It was also deponed that the appellant was released on bond during the trial in the subordinate court at Baricho.

In support of the application counsel for the appellant Mr. Kimani, submitted at the hearing of the application that the appellant had complied with bail terms during trial before the subordinate court. Counsel argued that the appellant, if admitted to bail pending appeals would abide by any conditions that would be imposed by the court. Counsel submitted also that the appeal filed had overwhelming chances of success. Therefore it would only be fair and just if the appellant was granted bail pending appeal.

The application is opposed. The State Counsel, Miss Matiru, submitted that the appeal does not have overwhelming chances of success. She also submitted that no special circumstances have been

demonstrated to justify the grant of bail pending appeal. The applicant had merely complained of an eye infection in mitigation which could be treated satisfactorily while in prison.

I have considered the application. I have perused the affidavit, the proceedings before the trial court, as well as the judgment. I have also considered the submissions and the law. This is an application for bail pending appeal. The considerations to be taken by the court in determining such an application were clearly stated by the Court of Appeal in the case of ***Dominic Karanja Vs Republic [1986] KLR 612***, wherein *Nyarangi, Platt and Gachuhi JJA* stated inter alia that

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 were exceptional or unusual circumstances.***
2. ....
3. ***A solemn assertion by an applicant that he will not abscond if released even if it is supported by sureties, is not sufficient ground for releasing a convicted person on bail pending appeal.***
4. ....

As was stated by the Court of Appeal in the above case, the most important consideration is whether the appeal has overwhelming chances of success. The other minor consideration is whether there are any unusual circumstances. In my view the burden is on the appellant to demonstrate the overwhelming chances of success and the unusual circumstances that will persuade the court to grant bail pending appeal.

Having perused the record before the trial court, the judgment of the trial court, and considered the submissions of counsel for the appellant, it is clear to me that this is an arguable appeal. The applicant has however not demonstrated that the appeal has overwhelming chances of success. There is nothing outrageously wrong in the record of proceedings that would lead me to the conclusion that the appeal has overwhelming chances of success.

He has also not demonstrated exceptional or unusual circumstances. He was sentenced to serve 20 years imprisonment. The appeal will be heard, in the normal circumstances, within 2 years. Therefore it cannot be said that a substantial part of the sentence will be served before the appeal has been heard. The fact that the appellant was on bail during the trial and that he will comply with bail terms or conditions if granted, is not an exceptional circumstance or a sufficient ground justifying the grant of bail pending appeal.

For the above reasons this application is rejected and is hereby dismissed.

Dated and delivered at Embu this 19<sup>TH</sup> day of May 2011.

**George Dulu**

**JUDGE**

**In the presence of:-**