



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 134 OF 2011

(Being an Appeal from the Judgment of the Senior Resident Magistrate T.M.

MWANGI in Criminal Case No. 859 of 2008 at Gichugu – SRM Court)

JOSPHAT WAMBUGU GAKUNGI.....APPELLANT
VERSUS
REPUBLIC.....
RESPONDENT

R U L I N G

This is the Appellant's application for bond pending appeal under Section 357 of the Criminal Procedure Code for orders that the Appellant be granted bail pending appeal for the following reasons:

1. The appeal has overwhelming chances of success.
2. Appellant was out on bond in the lower court
3. His health is deteriorating as he suffers from diabetes and hypertension
4. Appellant is aged 75 years.

Mr. Gori for Appellant/Applicant submitted along the lines of the grounds supporting the application. He says the trial court imposed an uncalled for clause after the sentence concerning the Appellants right to remission. He also annexed documents to confirm the Appellant's treatment record.

The state opposed the application saying there was nothing to show that the Appellant's illness was extraordinary.

Section 357 of the Criminal Procedure Code provides for bond pending appeal. This is however a discretion the court must exercise judicially, in accordance with laid down principles. A reading of the cases of *Mundia Vs Republic [1986] KLR 623* and *Dominic Karanja Vs Republic [1986] KLR 612* bring out the following issues to look out for while considering an application of this nature.

1. The appeal must have chances of success.
2. There are exceptional and unusual circumstances which have come up
3. A risk that the sentence will have been served by the time the appeal is heard.

Of course this ties up with the element of a successful appeal. There is presumption that once a person is convicted he was properly convicted.

The record is clear that the 1st complainant's hand was chopped off and the 2nd complainant was

assaulted. Eye witnesses have testified and they point an accusing finger at the appellant.

The Appellant on the other hand says it is him who was assaulted by PW2 who also assaulted PW1 (1st Complainant). It is therefore clear that PW1, PW2, the Appellant and all witnesses who have testified were at the scene. This is evidence which must be re-evaluated by this court at the hearing of the appeal.

The age of the Appellant and his health are not things he acquired by virtue of his imprisonment. The prison is capable of handling the diabetes. I therefore find no exceptional or unusual circumstances concerning his age and health for now.

The Appellant was sentenced to serve 15 years imprisonment on 29/7/2011. There is no risk of him serving the jail term before the appeal is heard.

In the circumstances I decline to grant the application sought.

I however note that the records are ready and this appeal should be set down for hearing immediately.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 26TH DAY OF
OCTOBER 2011.**

**H. I. ONG'UDI
JUDGE**