



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Appeal 311 of 2009**

**(From Original Conviction and Sentence in Criminal Case No. 2995 of 2005 of the Chief Magistrate's Court at Nairobi)**

**JOHN NGUGI GATHUMBE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**R U L I N G**

The applicant, John Ngugi Gathumbi, was charged in the Chief Magistrate's Court at Nairobi with 4 counts of forgery contrary to Section 353 of the Penal Code. He was found guilty as charged and sentenced to pay a fine of KShs. 200,000/= on each count, and in default to serve 1 year imprisonment on each count with effect from 8<sup>th</sup> July, 2009. Apparently he did not pay the fine and, as a consequence, he is now serving 6 years imprisonment from the said date. He filed High Court Criminal Appeal No. 311 of 2009 challenging his conviction and sentence, and then filed this application.

By the application, the appellant prays for orders that this court be pleased to grant or admit him to bail and upon being so admitted be released from prison pending the hearing and determination of the appeal. He also urges the court to further order that the same terms granted to the applicant in the lower court do continue to apply and that in the event of a variation, the same be varied downwards.

The application is supported by the annexed affidavit of the applicant himself, in which he deposes that he has already filed an appeal against his conviction and sentence and that he believes that his appeal has overwhelming chances of success. He also avers that if admitted to bail he will not abscond or fail to surrender to custody if so required to do, and that he will not obstruct the course of justice. Finally, he states that he is a paraplegic as a result of a road accident sustained in 1981, and he requires constant physiotherapy and therefore fears that his condition will deteriorate during the period of incarceration.

At the hearing of this application, Mr. Mtange appeared for the applicant while Ms Idagwa appeared for the Republic. Mr. Mtange submitted that the appellant was a paraplegic and his appeal was arguable. He argued that there was no evidence before the trial court that the appellant made any document and the opinion of a document examiner was not sought, and therefore the elements of forgery were not satisfied. The documents produced were photocopies and some material witnesses were not called to testify. He therefore submitted that the appellant had an arguable appeal and urged the court to grant the applicant bail so that he can attend to his medical problem.

Opposing the application, Ms Idagwa for the Republic submitted that there was ample evidence to support the conviction and that the appeal had no overwhelming chances of success. Secondly, the applicant had not demonstrated to the court that there will be delay in the hearing of his appeal and there were no special circumstances warranting the grant of bail pending appeal. Furthermore, the appellant had admitted that since conviction, he had been receiving medical treatment. She thereupon asked the court to dismiss the application.

In a short reply, Mr. Mtange submitted that the applicant had been receiving medical treatment but he required advanced treatment. He therefore asked for orders as prayed.

After considering the proceedings, and judgment in the trial court as well as the application and submissions of counsel, I wish to hasten to observe that **“to admit an appellant to bail pending appeal is a discretion of this court which must be judicially exercised keeping in sight all the facts relating to the application, all the matters material to the trial at the lower court, grounds submitted in the petition, the chances of success, and the nature of the trial”** (ABDI v. REPUBLIC [1991] KLR 171 at page 173). In the exercise of that discretion, the most fundamental consideration in determining whether to grant bail pending appeal is whether the appeal has overwhelming chances of success. If so, there is no justification for depriving the applicant of his liberty. The subservient considerations would be whether there are exceptional or unusual circumstances (DOMINIC KARANJA v. REPUBLIC [1986] KLR 612). In that case, the Court of Appeal observed that a solemn assertion by the applicant that he will not abscond if he is released, as the applicant herein has asserted, is no sufficient ground, even with the support of sureties, for releasing a convicted person on bail pending appeal. Even the applicant’s medical condition does not constitute an exceptional or unusual circumstance since there exists medical facilities for prisoners in the country, and a prisoner may be referred elsewhere for specialized medical treatment.

Since there are no exceptional or unusual circumstances in this case, the only issue to be determined is whether there are overwhelming chances of success in the appeal. Learned counsel for the applicant submitted that the appeal raised some arguable issues, and I entirely agree with him. However, the test is not whether the appeal is arguable, but whether it has overwhelming chances of success, and the emphasis here is **“overwhelming”**. In the context in which that word is used, it denotes a situation in which it is almost obvious that the appeal will succeed. But an arguable appeal does not have as high a probability of success as one with overwhelming chances of success.

Against that background, I have perused the proceedings and the judgment of the trial court and weighed them against the grounds set out in the petition of appeal. I have also perused the affidavit in support of the application, and considered the submissions by counsel for both parties. Having done that, I am not able to share Mr. Mtange’s optimism that the appeal has overwhelming chances of success. That does not mean that it will not succeed, but only that its chances of success are not overwhelming.

For the above reasons, the application fails and I accordingly decline to grant bail pending appeal.

It is so ordered.

Dated and delivered at Nairobi this 19th day of November 2009.

**L. NJAGI**

**JUDGE**