

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPLICATION NO. 100 & 101 BOTH OF 2004

(From original conviction and sentence in Criminal Case 2692 of 2003 of the

Senior Resident Magistrate's Court at MOLO – P.K. KIRUI ESQ.)

ELPHAS ONDIEKI KHATELA.....1ST APPLICANT

BENARD OKWEMBA WANJALA.....2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

This is an application for bail pending appeal. It is made on the grounds that the appeals which have already been filed have high chances of success and that the applicants were jailed for 12 months and the appeals may not be heard before the sentences are fully served.

The applicants were sentenced on 19th July, 2004. Counsel for the applicants submitted that during the trial in the lower court, the appellants had been granted bail and they faithfully attended court.

He therefore submitted that there was no likelihood of their absconding. He sought to rely on the case of ***CHIMABHAI VS REPUBLIC [1971] E.A. 343*** where it was held that anticipated delay in the hearing of an appeal together with other factors could constitute good grounds for granting bail pending appeal.

The applicants' counsel did not make any effort to prove that the appeal had high chances of success. I have perused the proceedings and the judgment of the trial court and I am not persuaded that the appeal has overwhelming chances of success as stated in ***SOMO VS REPUBLIC [1972] E.A. 376***. No exceptional or unusual circumstances in the matter have been shown. In ***DOMINIC KARANJA VS REPUBLIC [1986] K.L.R. 612*** the Court of Appeal held that the previous good character of the applicant and the hardships, if any, facing his family were not exceptional or unusual factors and a solemn assertion by the 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.

An applicant for bail pending appeal cannot rely on the argument that the lower court had granted him bail and he did not abscond and equally urge the appellate court to consider that as a point in his favour. This is so because the applicant for bail pending appeal, unlike an accused person seeking bail before trial, cannot rely on the presumption of innocence as he has already been convicted after a trial and he therefore must convince the appellate court that he has a meritorious appeal.

I dismiss the applications but hope that the applicants' counsel will take the necessary steps to have the appeal listed down for hearing as soon as possible.

DATED, SIGNED & DELIVERED at Nakuru this 22nd day of October, 2004.

DANIEL MUSINGA

AG. JUDGE