



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**CRIMINAL APPEAL NO. E007 OF 2020**

**REPUBLIC.....PROSECUTOR**

**VS**

**JANE NYAGUTHII AGNES.....ACCUSED**

**RULING**

1. This is a ruling for bail pending appeal. The application for bail pending appeal by a chamber summons dated 4<sup>th</sup> January, 2021. It is made by Jane Nyaguthii Agnes. Jane was convicted on 25<sup>th</sup> November, 2020 before the Thika Chief Magistrate's court in Criminal Case No. 234 of 2015 for the offence of kidnapping with intent to confine contrary to section 259 of the Penal Code. She was convicted alongside two of her co-accused. The subject of the kidnap was a minor child. Jane being aggrieved of that conviction has filed this appeal against conviction and sentence of 3 years imprisonment.

2. In support of the application Jane deponed that her conviction by the trial court is a nullity. That she suffers from asthma which condition deteriorated leading to her hospitalisation. She is concerned that she is susceptible to contracting COVID-19 virus because of her health condition. She therefore requests to be granted bail pending appeal.

3. The application is opposed by Director of Public Prosecutions in the following grounds of opposition:-

(a) THAT the instant application is misconceived and non-starter.

(b) THAT the appellant/applicant is at this point the subject of a valid conviction imposed by a competent Court.

(c) THAT in view of ground 2 above the appellant/applicant is devoid of the presumption of innocence.

(d) THAT bail/bond pending appeal does not exist as of right as it is issued and/or granted in exceptional circumstances which the appellant/applicant has not demonstrated.

(e) THAT the appellant's/applicant's pleadings, as drawn, do not demonstrate that she has an appeal with overwhelming chances of success.

(f) **Section 357 (1) of the Criminal Procedure Code** provides admission to bail pending appeal, it provides that:

***“After the entering of an appeal by a person entitled to appeal, the High Court, or the subordinate court which convicted or sentenced that person, may order that he be released on bail with or without sureties, or, if that person is not released on bail, shall at his request order that the execution of the sentence or order appealed against shall be suspended pending the hearing of his appeal.”***

4. In the case of **DOMINIC KARANIC KARANJA VS. REPUBLIC (1986) KLR 612** the Court of Appeal stated that:-

***“(a) The most important issue was that if the appeal had such overwhelming chances of success, there is no justification for depriving the applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances;***

***(b) The previous good character of the applicant and the hardships if any facing his family were not exceptional or unusual factors. Ill health per se would also not constitute an exceptional circumstance where there existed medical facilities for***

*prisoners;*

***(c) 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.”***

5. Jane has, by her affidavit, asserted that her appeal has overwhelming chance of success. She has also stated that she suffers from asthma. As it is noted in the above case the Court of Appeal held that ill health *per se* is not an exceptional circumstance to lead to granting of bail pending appeal. Has Jane, however discharged the burden to persuade this Court that her appeal contains grounds that are not frivolous? Jane has raised five grounds of appeal. Jane was convicted of a very serious offence of kidnap of a minor child. Her grounds do not surpass the “not frivolous” threshold. In this regard I find that the application fails. Jane lacks the presumption of innocence after her conviction. After conviction the onus rests on Jane to justify release on bail pending appeal. See the case of ***KIGORO MACHORO VS. REPUBLIC 2019) eKLR*** thus:-

***“In the case of Chimambhai v Republic 1971 EA 343, J. Harris made another observation in such an application when he said***

***“The case of an appellant under sentence of imprisonment seeking bond lacks one of the strongest elements normally available to an accused person seeking bail before trial, namely, the presumption of innocence, but nevertheless the law of today frankly recognizes, to an extent at one time unknown, the possibility of the conviction being erroneous or the punishment excessive, a recognition which is implicit in the legislation creating the right of appeal in criminal cases...”***

#### **DISPOSITION**

6. In the end the application dated 4<sup>th</sup> January, 2021 is dismissed.

**RULING DATED AND DELIVERED AT KIAMBU THIS 15TH DAY OF APRIL, 2021.**

**MARY KASANGO**

**JUDGE**

Coram:

C/A: Kevin

For the Appellant: Mr.Bosire

For the Respondent: Ms. Kathambi

#### **COURT**

Ruling delivered virtually.

**MARY KASANGO**

**JUDGE**