

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 118 OF 2019

(From Original Conviction and Sentence in Butere PMCCRC No. 356 of 2018, by Hon. MI Shimenga, Resident Magistrate, of 14th October 2019 and 22nd October 2019, respectively)

FRANCO MUCHIKA MICHERA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The appellant was convicted by Hon MI Shimenga, Resident Magistrate, on 30th May 2019, of assault, contrary to section 251 of the Penal Code, Cap 63. Laws of Kenya, and was accordingly sentenced to three (3) years imprisonment. He subsequently filed the appeal herein against the conviction and sentence.

2. I am called upon to determine an interlocutory Motion, dated 22nd October 2020, where the appellant seeks to be admitted to bond or bail pending appeal. He avers that his appeal has overwhelming chances of success, that he would abide by bail terms if the application is granted, that he had reconciled with the complainant and that he feared that if he was not admitted to bond/bail he might serve out the term of imprisonment rendering his appeal academic.

3. It was directed, on 19th January 2021, that the appeal be canvassed by way of written submissions. None of the parties have filed written submissions.

4. The matter was placed before me on 10th February 2021, when Mr. Khayumbi urged me to allow the application, as it was not opposed. Ms. Omondi stated that the reasons given in the application did not warrant the order sought.

5. Bail pending appeal is provided for under section 357 of the Criminal Procedure Code, Cap 75, Laws of Kenya. It is undoubtedly a right that accrues to the appellant herein, and I need not reproduce the provision verbatim in this ruling.

6. It was stated by the Court of Appeal in *Mutua vs. R* (1988) KLR 497, that:

“It must be remembered that an applicant for bail has been convicted by a properly constituted court and is undergoing punishment because of that conviction which stands until it is set aside on appeal. It is not wise to set the applicant at liberty either from the point of view of his welfare or of the state unless there is real reason why the court should do so.”

7. A court faced with an application for bail pending appeal has to exercise discretion judicially, upon taking into account various factors, which include whether the appeal has overwhelming chances of success (see *Ademba vs. Republic* (1983) KLR 442, *Somo vs. R* (1972) EA 476 and *Mutua vs. R* (supra), whether there exist exceptional or unusual circumstances to warrant the court’s exercise of its discretion (see *Ragbir Singh Lamba vs. R* (1958) EA 337, and whether there is a high probability of the sentence being served out before the appeal is heard (see *Chimabhai vs. R* (1971) EA 343).

8. Of the principles set out above the only one that the appellant appears to anchor his application on is that the term of imprisonment imposed was fairly short, and he feared that he might serve it out before the appeal is heard and determined.

9. An appellant is entitled to his day in court. I note that the term imposed is fairly short, and could be served out before the appeal is heard and determined. I will exercise discretion in favour of the appellant, and allow the application. He is admitted to his own bond of Kshs. 75, 000.00 with a surety of similar amount, or cash bail of Kshs. 20, 000.00.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 7TH DAY OF MAY, 2021

W MUSYOKA

JUDGE