



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**CRIMINAL APPEAL NO. E002 OF 2020**

**KENNETH MUTUGI KIOBE .....APPELLANT**

**VERSUS**

**REPUBLIC.....PROSECUTOR**

**RULING**

1. **KENNETH MUTUGI KIOBE** (appellant) by Notice of Motion application dated 10<sup>th</sup> December, 2020 seeks to be admitted to bail/bond pending the hearing and termination of this appeal.

2. Appellant was convicted before the Chief Magistrate Court at Thika of the offence of defilement and was sentenced to serve 30 years imprisonment. He has filed this appeal against that conviction and sentence. In support of his application for bail/bond pending appeal, he deponed through his two affidavits that he is a breadwinner of his family, who he cannot provide for while he is in custody; that he has a history of TB infection which re-lapsed following his incarceration; that he is not a flight risk and he has keenly attended the court sessions of his trial; and that he is willing to abide by whatever terms of his release this Court will order.

3. The appellant's learned counsel *Mr. Dunstan Omari*, in his submissions in support of the application argued that the appellant's appeal has overwhelming high chance of success because amongst other reasons, the appellant was not informed of his right to be represented by counsel during his trial.

4. The application was opposed by *Stephen Kasyoka* prosecution counsel at the Director of Public Prosecution (DPP). That learned counsel relied on the following grounds:-

1. That the instant application is misconceived and non-starter.

2. That the appellant/applicant is at this point the subject of a valid conviction imposed by a competent court.

3. That in view of ground 2 above, the appellant/applicant is devoid of the presumption of innocence.

4. 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.

5. That the appellant's/applicant's pleadings, as drawn, do not demonstrate that he has an appeal with overwhelming chances of success.

**ANALYSIS**

5. **Section 357(1)** of the Criminal Procedure Code is the Section under which the present application is considered. It provides:-

***“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.*”**

6. As stated above, the appellant was convicted and sentenced by the trial court. The appellant is therefore not entitled to the presumption of innocence, even though ultimately he may be acquitted by this Court. Following his conviction, the onus rested upon the appellant to

justify his release on bail pending appeal. It follows that the criterion for granting bail before trial and after conviction is not the same. The Court of Appeal in discussing what should guide a court in consideration of an application in a case such as this one cited by the High Court in **JOHN KOYI WALUKE & ANOTHER VS. REPUBLIC (2020) eKLR** stated:-

**“73. Similar position was held in the case of PETER HINGA NGATHO V. REPUBLIC (2015) eKLR, REBECCA NABUTOLA V. REPUBLIC (2012) eKLR AND DOMINIC KARANJA VERSUS REPUBLIC (Supra) where the Court of Appeal set out guiding principles for grant of bail pending appeal as:-**

**i) The most important is if the appeal has such overwhelming chance of success, there is no justification for depriving the applicant of liberty and the minor relevant consideration will be whether there were exception or unusual circumstances.**

**ii) The previous good character of the applicant, if any, facing the family were not exceptional or unusual factors. Ill health would also not constitute exceptional circumstance where the existed medical facilities for prisoners.**

**iii) 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.**

**iv) Upon considering the relevant materials in this case there was no overwhelming chance of appeal being successful.”**

**(underlining mine)**

7. The appellant submitted that his present appeal has high chances of success. At this stage, I should take care not to express any conclusive opinion on the pending appeal so as not to usurp the role of the court that will finally hear this appeal.

8. I have examined the trial court’s judgment and only partial proceedings supplied by the appellant. On a prima facie basis, I have formed the view that appellant’s appeal does not have a high chance of success. It follows that appellant’s application for bail pending appeal falters on the most important principle of granting bail pending appeal.

9. Appellant gave other ancillary grounds in support of his application. He submitted that he is the sole bread winner of his family. In making that submission, appellant failed to state which are those members of his family that depend on him. He failed to state whether he is married and if so to whom and whether that marriage is blessed with children and their ages. That ground fails for lack of support of material particulars.

10. The fact that appellant at one stage suffered from TB or whether he re-lapsed (even though there was no evidence of such re-lapse) is not a basis of granting bail pending appeal. The prison authority is able to have access to the necessary treatment.

11. On the whole, I find no merit in the application for bail pending appeal.

## **DISPOSITON**

12. For the reasons set out above, the notice of motion dated 10<sup>th</sup> December, 2020 is dismissed.

***RULING DATED, SIGNED and DELIVERED at KIAMBU this 10<sup>th</sup> day of JUNE, 2021.***

**MARY KASANGO**

**JUDGE**

Coram:

Court Assistant: Ndege

Applicant/Appellant:

For Appellant Ms. Kathurima Holding brief for Danstan Omari

Respondent: Mr. Kasyoka

**COURT**

Ruling delivered virtually.

**MARY KASANGO**

**JUDGE**