



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CRIMINAL APPEAL NO. E027 OF 2021**

**PTE DENNIS MURIMI NJOKI (155402).....APPELLANT/APPLICANT**

**VERSUS**

**THE DIRECTOR OF MILITARY PROSECUTIONS/**

**DEFENCE COURT MARTIAL ADMINISTRATOR.....RESPONDENT**

**RULING**

1. The appellant herein was charged before a Court Martial in Court Martial Case No.1 of 2020 with 4 counts namely; murder contrary to *Section 203* as read together with *Section 204* of the *Penal Code* and three counts of Stealing contrary to *Section 88(1) (a)* as read together with *Section 88(2)* of the *Kenya Defence Forces Act*.
2. On the 13<sup>th</sup> of April 2021, the court convicted the appellant on manslaughter and sentenced him to 30 years imprisonment and further found him guilty of one count of stealing and sentenced him to 2 years imprisonment with the sentences running concurrently.
3. Aggrieved by the said decision, the appellant has lodged an appeal against the conviction and sentences.
4. Pending the hearing and determination of the appeal, the appellant seeks to be admitted to bail. In this regard, the appellant through a Notice of Motion dated the 3<sup>rd</sup> of May 2021 relies on *Section 357* of the *Criminal Procedure Code* and *Sections 47, 48 and 50* of the *Constitution* and argues that he is entitled to bail pending appeal. According to the appellant, the appeal has overwhelming chances of success since the appeal is arguable and or prima facie raises plausible grounds of appeal which are not frivolous. Further, the appellant argues that the sentence as meted was harsh and unjustified going by the High Court Precedents and taking into account the fact that the appellant was convicted on account of manslaughter and not murder as charged.
5. The application is opposed by the respondent on grounds that the application does not meet the legal requisite threshold of the orders sought. In particular, the respondent argue that the appellant has not shown that the appeal has overwhelming chances of success or that there are exceptional circumstances to warrant the court to allow the application. Furthermore, the respondent argues that the appellant was convicted against overwhelming evidence that was tendered by the prosecution and thus the appeal has very lean chances of success.
6. The application was canvassed by way of written submissions.

**Appellant/Applicant's Submissions**

7. The appellant/applicant via submissions dated the 19<sup>th</sup> of May 2021 submitted that the application has merit because the three grounds of appeal demonstrates a prima-facie case with high chances of appeal. In this regard, the appellant submitted that the 30-year imprisonment was too harsh and thus unjustified in light of precedents emanating from the High Court where accused persons not found guilty of murder were set free without the charge being reduced and or being substituted to manslaughter like what the court martial did. The appellant thus relied on the cases of **R vs Collins Ombako, Criminal Case No.17 of 2016, R vs Silas Onzere, Criminal Case No 5 of 2016, R vs Abel Matunda, Criminal Case No 98 of 1999, R vs Edson Hamisi Changilwa & 3 others, Criminal Case No. 19 of 2013 and R vs Ismael Hussein Ibrahim, Criminal Case No.4 of 2016** submitting that the appeal has high chances of success.
8. Secondly, the appellant submitted that the court martial disregarded the advice of the Judge Advocate while convicting the appellant on count 4 of stealing which the appellant argued goes against the provisions of *Section 175* of the *Kenya Defence Forces Act* that stipulates any rulings or directions given by the Judge Advocate are binding on the court. In this regard, the appellant argued that the operative word under *Section 175* of the KDF Act is "SHALL", which denotes the mandatory nature of the said provision and relied on the case of **Samson Tela Akute vs R, Criminal Appeal No. 844 of 2004.**
9. Lastly, the appellant submitted that the court in sentencing the appellant to 30-year imprisonment failed to take into account the appellant's

mitigation including his record at work, age, time spent in custody and the advice of the Judge Advocate and thus, the appellant has made out a plausible case that merits him being released on reasonable cash bail or surety.

### **Respondent Submissions**

10. The respondent on the other hand submitted vide its submissions dated the 25<sup>th</sup> of June 2021 that the application is unmerited for the reason that the applicant has not demonstrated that his appeal has overwhelming chances of success or that there are exceptional circumstances to warrant the court allow the same.

11. Secondly, the respondent submitted that the applicant was convicted against overwhelming evidence tendered by the prosecution and thus his appeal has very lean chance of success.

12. Further, the respondent submitted that a glimpse of ground one of appeal indicates that the appellant is not challenging the conviction but is challenging the excessiveness of the sentence. Consequently, the respondent submitted that the charge of manslaughter carries a maximum of life imprisonment and a sentence of 30 years is thus within the law and cannot be appropriate ground for the court to release the appellant on bail pending appeal.

13. The respondent thus urged this court to dismiss the application.

### **Analysis & Determination**

14. Having considered the application, the affidavits and submissions made by parties, it is quite clear that the only issue for determination is whether there are grounds on which the appellant should be granted bail pending the hearing and determination of his appeal.

15. The Right to Bail is anchored under **Article 49(1)(h) of the Constitution** which provides that: -

**“An accused person has the right ...**

**(h) to be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released.”**

16. However, the above provision is only limited to a case where an accused person is facing trial at the first instance. Consequently, where there is an appeal, an accused person cannot rely on the said provision. Patrick Kiage in his book ***Essentials of Criminal Procedure in Kenya, Law Africa Publishing 2010 at 129***, notes that unlike pre-trial bail which is grounded on the constitutional presumption of innocence in favour of the accused person, bail pending appeal does not exist as of right and is only issued in exceptional circumstances.

17. In this regard, the court in ***Charles Owanga Aluoch vs. Director of Public Prosecutions [2015] eKLR*** held that:

***“The right to bail is provided under Article 49(1) of the Constitution but is at the discretion of the court, and is not absolute. Bail is a constitutional right where one is awaiting trial. After conviction that right is at the court’s discretion and upon considering the circumstances of the application.”***

18. The above holding is premised on the fact that in bail pending appeal, the presumption of innocence is no longer operative since the presumption at this stage is that the conviction was proper unlike in bail pending trial where there exists in law the presumption of innocence. See ***Patrick Kiage [supra] at 130***. Thus, in bail pending trial, the prosecution carries the burden of raising compelling reasons showing why an accused person should not be granted bail; while in bail pending appeal, the burden shifts to the appellant to show why he or she should be granted bail/bond pending the appeal. The Bail and Bond Policy at paragraph 4.30 further confirms this position by placing the burden on the applicant/appellant to establish that the appeal has high chances of success or that he or she is likely to serve a substantial part of the sentence before the appeal is heard and thus entitled to bail pending appeal.

19. It is for the above reason that a different test applies where the matter before the Court is an application for release on bail pending the hearing of the appeal. See ***Joshua Kiarie Nguguna v Republic [2021] eKLR***. Similarly, the principles governing the grant of bail pending appeal differ from those that govern bail before conviction. See, ***PLO Lumumba, A Handbook on Criminal Procedure in Kenya, Law Africa, 2005 at 32***.

20. It was thus held in ***Masrani vs. R [1060] EA 321*** that:

***“Different principles must apply after conviction. The accused person has then become a convicted person and the sentence starts to run from the date of his conviction.”***

21. In this regard, it is instructive to refer to **Section 357(1) of the Criminal Procedure Code** which provides as follows:

***“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.”***

22. Thus, in Charles Owanga Aluoch vs. Director of Public Prosecutions [Supra], the court held that:

***“The courts have over the years formulated several principles and guidelines upon which bail pending appeal is anchored. In the case of Jiv Raji Shah vs. R [1966] KLR 605, the principle considerations for granting bail pending appeal were stated as follows:***

***1. Existence of exceptional or unusual circumstances upon which the court can fairly conclude that it is in the interest of justice to grant bail.***

***2. It appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of a substantial point of law to be argued and that the sentence or substantial part of it will have been served by the time the appeal is heard, then, a condition of granting bail will exist.”***

23. This position was restated in Mutua vs. R [1988] KLR 497, wherein the Court of Appeal stated:

***“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.”***

24. However, as held in Shah v R 1976 CA [UR], even where the above circumstances exist, bail is not always automatic and the court rather than granting bail can expedite the hearing of the appeal. Simply, it is the discretion of court whether or not to grant bail pending appeal.

25. In the exercise of this discretion, the court is guided by the following factors as laid down in Somo v R [1972] EA 476, Jivraj Shah vs R [1986] eKLR and Chimabhai vs. R [1971] EA:

***a. Whether the appeal has overwhelming chances of success.***

***b. There are exceptional or unusual circumstances to warrant the Court’s exercise of its discretion and***

***c. There is a high probability of the sentence being served before the appeal is heard.***

26. However, as rightly observed by the Court of Appeal in Dominic Karanja v Republic (1986) KLR 612, the main ground/the most fundamental ground for consideration is whether the appeal has an overwhelming chance of success.

27. Without getting into the merit of the appeal, the main ground of the appeal is that the applicant was charged with the offence of murder but convicted for an offence of manslaughter of which he was not charged with.

28. Section 179 (1) and (2) of the *Criminal Procedure Code* entitles the court to convict an accused person for a related lesser offence of which is established beyond reasonable doubt, from a more serious offence of which the accused was charged with, and of which the prosecution fails to establish beyond reasonable doubt.

29. From the foregoing it can’t therefore be said that the appeal has an overwhelming chances of success on the said ground.

30. Our Criminal Appeals diary is also not far and I am able to allocate a soon date for hearing of the said appeal, and concluding it before a substantial part of the sentence is served.

31. I accordingly find that there are no availed exceptional or unusual circumstances that would entitle the appellant to bail pending appeal.

32. The application lacks merit and is hereby dismissed.

**S. M GITHINJI**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 22ND DAY OF JULY, 2021.**

In the presence of:-

Mr. Kariuki for the applicant.

Ms Limo for state

Gladys - Court assistant