



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**MISC. CRIMINAL APPLICATION NO. E019 OF 2021**

**HUMPHREY THOYA IHA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**Coram: Hon. Justice R. Nyakundi**

**Mr. Oyas Advocate for the Applicant**

**Mr. Mwangi for State**

**RULING**

The notice of motion filed in Court on 3.6.2021 seeks an order of the Court for the convicted applicant **Humphrey Thoya Iha** to be released on bail pending appeal. In support of the application is an affidavit sworn by the applicant counsel one **Oyas**.

At the hearing of the application both counsels were permitted by the Court to make oral submissions.

**Determination**

It is not in dispute that under Section 356 and 357 of the Criminal Procedure Code the Court has the discretion to consider releasing a convicted person on bail pending appeal. The discretion is buttressed which the Supreme Court of **Malawi in Suleiman v R {2004} MLR 398** as exceptional and unusual circumstances. The Court held interalia that:

*“The expression exceptional and unusual circumstances, in the context of applications of bail pending appeal, means circumstances where, one the one attend, it appears prima facie that the appeal is likely to be successful or on the other hand where there is a risk that the sentence will have been served by the time the appeal is heard.”*

Obviously, bail pending appeal though discretionary is more limited compared with bail under Article 49 (1) (h) of the Constitution for arrested persons likely to be indicted with a criminal charge. The circumstances in the comparative of respondent is also applicable locally as stated in the case of **Charles Owanga Ahora v DPP {2015} eKLR, Jiv Raji v R {1966} KLR 605**. The principle considerations for granting bail pending appeal stands and remain coalesced within the following context:

*(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.*

As stated in the above cases, for the Court to exercise its discretion in favor of the applicant for bail pending appeal certain conditions must be satisfied by way of dispositions in the affidavit in support of the motion or as the case may be.

In the instant case, the applicant has been unable to show compelling and exceptional circumstances sufficient enough for the grant of bail pending appeal.

Accordingly, the motion is denied.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 14<sup>TH</sup> DAY OF JULY, 2021**

.....

**R. NYAKUNDI**

**JUDGE**

**In the presence of**

1. Mr. Mwangi for DPP
2. The applicant