



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL APPEAL NO. 47 OF 2020

PATRICK MAINA WAMAITHAAPPELLANT/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. **PATRICK MAINA WAMAITHA** was on 3rd October, 2019 convicted of the offence of being in possession of bhang contrary to **section 3(1)2(a)** of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994. He was sentenced to serve 6 years imprisonment. He has filed this appeal against that conviction and sentence. By notice of motion application dated 3rd April, 2020 the appellant seeks bail pending appeal.

2. The application is supported by an affidavit of the appellant's maternal uncle. He deponed that the appellant's appeal has high chances of success. He gave the following as the main points that will be raised in the appeal:-

- a. There was no proper identification.
- b. There were no independent witnesses but police officers.
- c. There was no proof of possession.
- d. The court did not interrogate the accused's defence of the malice.
- e. The sentence was excessive for *bhangi* valued at Kshs.1,280/=.

3. The application was opposed by the respondent on the main ground that the application was not merited since the appellant was subject of a valid conviction of a competent court and he therefore does not enjoy the presumption of innocence.

ANALYSIS

4. Under **Section 357(1)** of the Criminal Procedure Code the appellant has a right to apply for bail pending appeal. That Section 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.

5. As currently argued by the respondent, the appellant does not enjoy presumption of innocence. A case in point is **KIGORO MACHORO VS. REPUBLIC (2019) eKLR** where it was stated:-

“9. 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 Rthe punishment excessive, a recognition which is implicit in the legislation creating the right of appeal in criminal cases...”

6. The jurisprudence in respect to bail pending appeal has been restated very often. The applicant should prove that his/her appeal has overwhelming chances of success; the hardship the applicant faces are not exceptional or unusual circumstances; and the assertion that the applicant will not abscond is not sufficient ground to grant bail.

7. Having considered the trial court’s proceedings and judgment, I have formed the opinion that there is no merit, on *prima facie* basis of the application. Accordingly, the application fails and is dismissed.

RULING DATED, SIGNED and DELIVERED at KIAMBU this 6th day of JULY, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant: Ndege

Applicant/Appellant: N/A

For Appellant Ms. Anne Ngigi

Respondent: Ms. Kathambi

COURT

Ruling delivered virtually.

MARY KASANGO

JUDGE