



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. E160 OF 2021

BETWEEN

JAMES MUTHIORA alias KARINTA.....1ST APPELLANT/APPLICANT

FRIDAH KARIMI.....2ND APPELLANT/APPLICANT

AND

REPUBLIC.....RESPONDENT

RULING

1. **JAMES MUTHIORA alias Karinta and FRIDAH KARIMI (Appellants/Applicants)** were charged in **MERU CRIMINAL CASE NO. 2171 of 2018** and convicted of trafficking in narcotic drugs and each was fined Kshs. 4,635,000/- in default each to serve 5 years' imprisonment and in addition to serve a life sentence.

2. By a Notice of Motion dated 06.10.2021 filed on 07.10.2021 brought under Section 357 (1) of the Criminal Procedure Code, Appellants have moved the court for orders that they be admitted to bail pending the hearing and determination of the appeal. The application is mainly based on grounds **THAT**:

1) Appellants are aggrieved by the conviction and sentence

2) The sentence is excessive

3) Appellants have left behind young school going children

3. The application is supported by an affidavit sworn by the Kiogora Mugambi, Advocate for the Appellants on 06.10.2021 in which he reiterates the grounds on the face of the application. Counsel faults the trial Appellant and holds the view that the appeal has overwhelming chances of success.

4. The application is opposed on the basis of a replying affidavit sworn by B.N.Nandwa,..... a prosecution counsel who contends that the sentence was lawful. The state urges the court to find that a contention that the sentence is excessive does not entitle Appellants to bond pending appeal.

Analysis and Determination

5. I have carefully considered the application in the light of the affidavits on record.

6. Section 357 of the Criminal Procedure Code provides: -

(1) 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

7. This court is thus clothed with the power to grant bail/bond with or without sureties, or to suspend execution of any sentence imposed by the subordinate court pending the hearing of the appeal. In granting bail pending appeal, the court is obliged to consider the circumstances of

each case so that the discretion is exercised judiciously and not capriciously.

8. In the case of **Jivraj Shah -vs- Republic [1980] KLR 605**, the Court of Appeal set out the parameters to be considered by an appellate court in applications for bail pending appeal as follows: -

a) The principal consideration in an application for bail pending appeal is the existence of exceptional or unusual circumstances upon which the Court of Appeal can fairly conclude that it is in the interests of justice to grant bail

b) If it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of some substantial point of law to be urged and that the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail will exist.

c) The main criteria is that there is no difference between overwhelming chances of success and a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed and the proper approach is the consideration of the particular circumstances and weight and relevance of the points to be argued.

9. In **Mutua v R, [1988] KLR 497** the Court of Appeal stated thus:

“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 a real reason why the court should do so.”

10. In view of the foregoing, the onus is always on the Appellant to demonstrate to the court that there are good reasons why he/she should not be allowed to continue serving sentence but should be allowed to enjoy his/her liberty pending the hearing and determination of his or her appeal.

11. The contention that Appellants has young children who depend on them and are sickly are in my considered view not sufficient grounds in support of an application for bond pending appeal.

12. For the foregoing reasons, I have come to the conclusion that the Appellants not demonstrated that there exist circumstances that would warrant this court to grant them bond pending appeal.

13. The Notice of Motion dated 06.10.2021 and filed on 07.10.2021 is unmerited and it is accordingly dismissed.

DATED THIS 18TH DAY OF NOVEMBER 2021

WAMAE. T. W. CHERERE

JUDGE

Court Assistant - Kinoti

Appellants/Applicants - Present

For the Appellants/Applicants -Kiogora Mugambi Advocate

For the Respondent - Ms. Penina