



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CRIMINAL APPEAL NO E018 OF 2019

ROBERT NYAMBANE MABU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an application from the judgement and sentence of Hon. A. Towett, SRM, dated 06/07/2021 in the Principal Magistrate's Court at Eldama Ravine in Criminal Case No. 2109 of 2019, Republic v Robert Nyambane Mabu)*

**RULING**

Pursuant to the provisions of article 49 (1) (h) of the 2010 Constitution of Kenya, section 356 and 357 of the Criminal Procedure Code (Cap 75) Laws of Kenya, the appellant has applied for bail pending the hearing and determination of his appeal.

The application is supported by nine grounds that are set out on the notice of motion dated 15/07/2021, with the major grounds being the following. The appellant/applicant is a first offender. The appeal has overwhelming chances of success. The conviction is based on a bailable offence. The appellant is able to provide a suitable surety. The applicant religiously attended court for his trial after being released on bail pending his trial. The applicant is a student at Moi University doing his third year. There is a likely danger that the appellant will have served a greater part of his sentence before his appeal is heard and determined. The appellant undertakes to prosecute his appeal without delay.

In addition to the aforementioned grounds, the application is supported by a 15 paragraphs supporting affidavit of counsel for the applicant (Mr. Tom M. Getange), whose major averments are as follows. The appellant has already filed an appeal following his being sentenced to three years imprisonment without an option of a fine on 6<sup>th</sup> July 2021. The appellant's appeal has overwhelming chances of success. There is a risk that the appellant will have served a substantial part of his sentence before his appeal is heard and determined.

Furthermore, the applicant has a right to be released on bail, pursuant to the provisions of article 49 (1) (h) of the 2010 Constitution of Kenya. The applicant is not a flight risk in view of his history having religiously attended court without fail.

The other averments have been raised as grounds in support of the application and I therefore find it unnecessary to reproduce them here.

**The submissions of the appellant.**

Based on the decision of the Court of Appeal in *Dominic Karanja v Republic (1986) KLR 612*, Messrs Bw'oigara Getange & Co. Advocates, for the appellant have submitted that the appellant has to demonstrate the following. First, that the appeal has overwhelming chances of success. Second, the burden is upon the appellant to demonstrate that his appeal has high chances of success. Third, in the alternative, the applicant may also be released on bail if he demonstrates to the court there are exceptional or unusual circumstances in his appeal.

Counsel has also cited *Kigogo Machoro v Republic*, Criminal Appeal No. 11 of 2019, in which this court (Muchemi, J), sitting at Embu, released the applicant therein on bail pending the determination of his appeal on the ground that he was aged 90 years. That court observed that the age of 90 years old constituted a special circumstances.

**The submissions of the Respondent.**

Mr. Mongare, counsel for the Respondent, filed written submissions in which he did not oppose or concede the application. Counsel has submitted that the grounds which the court has to consider in an application of this nature include the following. The appeal has overwhelming chances of success in view of the material contradictions and essential points of law which were not properly considered.

The court may grant bail where an appellant has been sentenced to a relatively short sentence and is likely to serve the whole or a substantial part of the sentence before his appeal is heard and determined. The court may also grant bail where it appears that there are exceptional or

unusual circumstances involved in the appeal.

The court may also grant bail where, the applicant is able to demonstrate to the court that unless he is granted bail, his appeal may be rendered nugatory.

Counsel then cited *Chimambhai v Republic (No 2) (1971) EA 343* in which this court (Harris, J) observed that in view of the grant of a right of appeal to the person convicted, there is possibility of the conviction being erroneous or the punishment being excessive.

I have considered the foregoing submissions of both counsel and the affidavit of the applicant's counsel.

I find that the main considerations in an application of this nature are as follows:

First, that the applicant's appeal has overwhelming chances of success. Second, there are unusual or exceptional circumstances involved in his appeal. Third, if his sentence is short to the extent that he will have served a substantial part of his sentence before his appeal is heard and determined.

I find that in the instant appeal the trial court did not appear to have taken into account that the applicant was a first offender before sentencing him. In this regard, I am guided by the decision of the Court of Appeal in *Dominic Karanja v Republic (1986) KLR 612* in which that court held in part that there is no justification for depriving the applicant of his liberty if his appeal has overwhelming chances of success or where there exist exceptional or unusual circumstances.

In the instant application, I find that the sentence imposed is likely to be interfered with considering that the applicant is a first offender.

In the premises, the applicant's application succeeds and is hereby allowed. The applicant is hereby released on the same bail terms as in the trial court.

Additionally, the appellant is to appear before the Deputy Registrar of this court once at the end of every month on a working day until his appeal is heard and determined.

**RULING SIGNED, DATED AND DELIVERED IN OPEN COURT THROUGH VIDEO CONFERENCE AT NAIROBI THIS 7TH DAY OF DECEMBER 2021 IN THE PRESENCE OF MESSRS BW'OIGARA FOR THE APPELLANT/APPLICANT AND MR. MONG'ARE FOR THE RESPONDENT.**

**J M BWONWONG'A**

**JUDGE**