



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CR. APPEAL NO. 1 OF 2019

**(From Original Conviction and Sentence in Criminal Case No. 3 of 2018 of
the Senior Resident Magistrate's Court at Gichugu – G.K. Odhiambo – R.M**

KELVIN IRUNGU NDEGE.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

RULING

1. The application pending before me is the one dated 12/2/19 filed by the appellant and seeks orders that the court be pleased to grant him bail pending appeal under Article 49(1)(h) of the Constitution.

2. It is based on the grounds that the appellant was charged with the offence of rape contrary to **Section 10 of the Sexual Offences Act, No 3/2006**, and he was convicted then ordered to serve Fifteen years imprisonment. He has filed this appeal which he opines that it has high chances of success. He has also based the application on the ground of his health status. The respondent opposed the application and filed grounds of opposition through F. S. Ashimosi, Assistant Director of Public Prosecutions dated 4/11/2019. He submits that;-

- The applicant has not satisfied the conditions and principles for grant of bond/bail pending appeal.
- The appeal is not arguable and does not have overwhelming chances of success.
- There are no exceptional and unusual circumstances.
- The appeal is ready for hearing and there are no chances of delay.

3. The parties did not file submissions but urged the court to consider the application and give a ruling.

4. I have considered the application. The issue which arises for determination is bail pending appeal. **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: Provided that, where an application for bail is made to the subordinate court and is refused by that court, no further application for bail shall lie to the High Court, but a person so refused bail by a subordinate court may appeal against refusal to the High Court and, notwithstanding anything to the contrary in sections 352 and 359, the appeal shall not be summarily rejected and shall be heard, in accordance with such procedure as may be prescribed, before one judge of the High Court sitting in chambers. (2) If the appeal is ultimately dismissed and the original sentence confirmed, or some other sentence of imprisonment substituted therefor, the time during which the appellant has been released on bail or during which the sentence has been suspended shall be excluded in computing the term of imprisonment to which he is finally sentenced.

(3) The Chief Justice may make rules of court to regulate the procedure in cases under this section.”

The section provides that a person who has been convicted may be released on bail on such terms as to sureties as the court may deem just. A person seeking to be released on bail must satisfy certain conditions as bail pending appeal is not a constitutional right. It is a discretionary power under the section to order the release of a person pending the hearing and determination of the appeal. In the case of **Chimambhai –v- Republic (No. 2) 1971 E. A 343**, Harris J stated;-

“The case of an appellant under sentence of imprisonment seeking bail lacks one of the strongest evidence normally available to an accused person seeking bail before trial, namely, the presumption of innocence, but nevertheless, recognizes, to an extent at one time unknown, the possibility of conviction being erroneous or the punishment excessive, a recognition which is implicit in the legislation creating the right of appeal in criminal cases.”

5. This holding is in line with constitutional provision that an accused has the right if convicted to appeal, or to apply for review by, a higher court to a higher court as maybe prescribed under the law, **Article 50(2)(9) of the Constitution** refers.

6. I am guided by the case of **Somo –v- Republic (1972) E.A** where the court laid down the conditions to be met by a party who seeks release on bail pending appeal. These are:-

i) That there exists unusual or exceptional circumstances to warrant the courts exercise of discretion.

ii) There is a high probability of the sentence being served before the appeal is heard.

iii) Whether the appeal has overwhelming chances of success.

7. The Court of Appeal in the case of **Mutua –v- R 1988 KLR 497** it was 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. 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 real reason why the court should do so.”

8. It is for this reason that a different test is applied from the one applied in bail pending trial. See also the case of **Fivray Shah –v- Republic (1986) KLR 605**. In the case of **Raghibir Singh Lamba –v- R 1958 E. A 337** the court stated:-

“That neither the complexity of the case nor the good character of the applicant nor the alleged hardship to his dependants justified the grant of bail.”

9. In this case I have considered the proceedings before the trial court. I have also considered the application. I find that there are no exceptional or unusual circumstances raised to warrant the release of the appellant on bail pending appeal. All that the applicant is stating in his affidavit is that he be released because of his health status. This has not been disclosed nor has it been proved.

10. I also note that this appeal has been admitted and the record of the lower court received there is no possibility of the applicant serving the sentence before the appeal is heard and determined.

11. I find that the application lacks merits and is dismissed.

Dated at Kerugoya this 9th day of June 2020.

L. W. GITARI

JUDGE