

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

HIGH COURT CRIMINAL APPEAL NO 26 OF 2020

TITUS KIPTOOO KEMBOI..... APPLICANT

VERSUS

REPUBLIC RESPONDENT

RULING

1. By a notice of motion dated 11th May 2020, **TITUS KIPTOOO KEMBOI** (the applicant) who was convicted and sentenced on **4th March 2020** to 5 years imprisonment for the offence of **arson contrary to section 332**, prays to be released on bail pending the hearing of his appeal on grounds that:

a) The appeal has overwhelming chances of success, owing to the manner in which the trial was conducted and the inadequacy of the evidence presented as he

b) The appellant stands to suffer great prejudice as he will have served a substantial portion of the sentence by the time the appeal is heard

2. In the supporting affidavit, the applicant states that he is an employee of the Nandi County, and his continued incarceration may lead to losing his employment. That given the scaling down of court activities, he is likely to spend at least 1-2 years (resulting in serving a substantial part of the sentence) in prison before the appeal is heard.

3. An affidavit of service filed by the applicant's counsel indicated that the DPP had been served with the application, but no response had been e-filed

4. The Court of Appeal in the case of **Jivraj Shah -vs- Republic [1986] KLR 605**, held as follows: -

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

5. Also in **Dominic Karanja v. Republic [1986] KLR 612** the it was held: -

“The most important issue here is if the appeal has such overwhelming chances of success that there is no justification for depriving the applicant of his liberty. The minor relevant considerations would be whether there are exceptional or unusual circumstances. The previous good character of the applicant and the hardship, if any, facing the wife and children of the applicant are not exceptional or unusual factors: see Somo v. Republic [1972] EA 476. A solemn assertion by an applicant that he will not abscond if he is released is not sufficient ground, even with support of sureties, for releasing a convicted person on bail pending appeal.”

I have perused the trial court's decision as well as the evidence on record –without attempting to delve into the merits of the appeal, I note that the trial magistrate was conscious of the fact that the burden of proof never shifts onto the accused person, and gave reason why she rejected the evidence offered by the defence witness. I do not find that ground alone to constitute such an element of error as to conclude that the appeal has high chances of success.

As regards the lament that he will suffer prejudice as he is likely to lose his employment, I think that is a consequence which comes with the territory, but worse still, it is a lament which has not been supported with any submissions on the terms of the contract... does the employment contract provide that once convicted one retains their job, pending hearing of appeal? This court is left to guess

As regards serving a substantial part of the sentence, the least I can say is that the applicant is on panic mode – he has only served 2 two months of the sentence. Actually with the onset of the C19 pandemic, the court has scaled down on hearing of cases involving witnesses due to the requirement for social distancing as a safety measure, and scaled up on hearing of appeals as this can easily be done online and does not require attendance of witnesses. I find no basis to entertain the fear expressed and decline to grant bail pending appeal. It is in the applicant's interest to move quickly and have the appeal admitted for hearing, as dates are readily available

Delivered and dated this 3rd day of June 2020 at Eldoret

H. A. OMONDI

JUDGE