



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CRIMINAL APPEAL NO. 144 OF 2018**

**STANLEY MWITI MUREA.....APPELLANT**

**Versus**

**REPUBLIC.....RESPONDENT**

**RULING**

[1] The Notice of Motion dated 13<sup>th</sup> November 2018 seeks the following orders:

- 1. A declaration that the process that led to the conviction of the appellant is a nullity in law, and consequently summarily allow the appellant's appeal.**
- 2. In the alternative to prayer (2) above and without prejudice thereto, the Honorable Court be pleased to admit the appellant to bail pending appeal.**

[2] The grounds upon which the application is premised are stated in the application and the supporting affidavit of the applicant sworn on 13<sup>th</sup> November 2018. It is contended that the Director of Public Prosecutions terminated this case on 9<sup>th</sup> October 2018 on the grounds that there was no sufficient evidence but the trial court failed to terminate case. It was argued that the prosecution failed to participate in the proceedings and when he asked for direction from the trial court it closed his defence, cancelled his bond and proceeded to deliver its judgment at noon which was predetermined. The trial court had set the defence hearing at 11 A.M, yet, by then he had filed a revision case No. 377/18 before the honorable judge to revise the honorable court ruling of 9<sup>th</sup> October 2018. Either way the trial court proceeded to convict and sentence him to 10 years imprisonment which is in contravention of the Constitution and Criminal Procedure Code. That the appeal has overwhelming chances of success since the DPP did not take part in the lower court proceedings after they terminated the case.

[3] It was stated that, before he was charged the DCIO Tigania opened an inquiry file to investigate the incident and recommended that the complainant and her husband be charged with giving false information. It was forwarded for perusal by the DPP and on 28<sup>th</sup> January 2015 DPP wrote a letter to DCIO recommending going ahead and charging the complainant. The complainants were arrested and were released through police bond and to appear before P. M's court at Tigania on 7<sup>th</sup> May 2015. The bond was extended and to date they have not been charged. On 12<sup>th</sup> June 2015 the police took the case to court in his absence since he was never informed a warrant of arrest was issued.

**ANALYSIS AND DETERMINATION**

[4] Bail pending trial should not be confused with bail pending appeal. In the former case, the accused enjoys constitutional right to be presumed innocent until proven guilty as stated by **Article 49**. But in the latter case, the applicant has been found guilty. Therefore, the threshold for bail pending appeal is as was stated by the Court of Appeal in the case of **Jivraj Shah -vs- Republic [1986] KLR 605**, inter alia:

- “1. 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.**
- 2. 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] See also the case of **Dominic Karanja v. Republic [1986] KLR 612** where the Court of Appeal stated that:

- a. The most important issue was that if the appeal had such overwhelming chances of success, there is no justification for depriving the Applicant of his liberty and the minor relevant considerations would be whether there were exceptional or**

unusual circumstances. (Emphasis added)

**b. The previous good character of the applicant and the hardships, if any, facing his family were not exceptional or unusual factors. Ill health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners.**

**c. A solemn assertion by an Applicant that he will not abscond if released, even if it is supported by sureties, is not sufficient ground for releasing a convicted person on bail pending appeal.**

**d. Upon considering the relevant material in this case, there was no overwhelming chance of the appeal being successful.**

[6] The applicant has the burden of establishing that the appeal has high chances of success. However, I should state that, in deciphering whether the appeal has overwhelming chances of success, the court is not really determining the actual appeal and should therefore merely look at the record to establish whether there is an arguable point being raised. I have perused the petition of appeal and also the proceedings and judgment in this case. It seems the major argument is that the trial court refused to terminate proceedings. Here, I am forced to cite my position on the point as I understood it in the case of **Republic v Jared Wakhule Tubei & another [2013] eKLR** that:

**“[8] Section 87(a) of the CPC provides for discontinuance of a criminal proceeding, except it must be read in consonance with Article 157(6)(c), (7),(8) and (11) of the Constitution. Under Article 157(6) of the Constitution, the Prosecution may discontinue criminal proceedings at any stage before judgment is delivered. The discontinuance however must be done with the permission of the court. This practice is quite a departure from the notorious practice of nolle prosequere-an arbitrary decision by the prosecution to terminate proceedings whenever they felt like it without assigning any reasons. The constitutional requirement now is that, in making the application for discontinuance, the prosecution must be guided by Article 157(11) of the Constitution, the accused must participate, and then the court may or may not give its permission to the discontinuance of a proceeding depending on the circumstances of the case and the reasons given for the discontinuance.”**

[7] Consequently, the issue is not as formidable or nascent. As a result, but without pre-empting the outcome of the appeal, I am of the considered opinion that the applicant does not show that the appeal has an overwhelming chance of success. There are also no exceptional or unusual circumstances to warrant bail pending appeal.

[8] In the upshot, the court declines to grant the applicant bail pending appeal and his application thereto is dismissed. His appeal should however be fast tracked. It is so ordered.

**Dated, signed and delivered in open court this 21<sup>st</sup> day of January 2019**

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**F. GIKONYO**

**JUDGE**

In presence of

Rono for Naikuni for applicant

Chilule for Namiti for state

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**F. GIKONYO**

**JUDGE**