



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEALS Nos. 46, 47, 48, 49, 50 OF 2018**

**BETWEEN**

**FREDRICK MURIUNGI**

**GEOFFREYKIOGORA IKARIA**

**GEOFFREY MBAYA**

**SAMUEL BUNDI**

**ERICK MUTUMA.....APPELLANTS/APPLICANTS**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal against the Judgment, conviction and sentence by Hon. E. Ngigi (S.R.M) vide Nanyuki CMCRC.No. 360 of 2014 at Nanyuki Court delivered on 24<sup>th</sup> August,2018)*

**RULING**

These matters; Nanyuki HCCR Appeals No. 46,47,48,49 and 50 of 2018 came before me for the first time when I was the duty Judge during the September 2018 High Court recess when I heard the application for bail pending appeal. The file went back to High Court at Nanyuki. During the Christmas recess they showed up again, under certificate of urgency. When I directed them back to Nanyuki the Judge was on leave and the application for bail pending appeal proceeded before me.

The appellants-

Fredrick Muriungi Ikiara HCCRA no. 46/18

Geoffrey Kiogora Ikiara HCCRA no. 47/18

Geoffrey Mbaya HCCRA no. 48/18

Samuel Bundi HCCRA no. 49/18

Erick Mutima HCCRA no. 50/18

were charged in Nanyuki CMCRC case no.360/14 with the offence of Arson c/s 332 (a) of the Penal code.

It was alleged that on 22<sup>nd</sup> February 2014 at Karioko village within Nyeri County they jointly, willfully and unlawfully set fire to a semi-permanent house valued at Kshs. 2,000,000/- belonging to Justus Mwita Runjiru.

The matter was heard and determined vide a judgment dated 17<sup>th</sup> August 2018 by E. Ngigi SRM and delivered on his behalf by Hon. Njeri Thuku PM on 24<sup>th</sup> August 2018. She proceeded to sentence each accused to 2 years' imprisonment.

The accused persons dissatisfied with the conviction and sentence lodged separate appeals, and each filed an application for bail pending appeal. The separate applications were consolidated and argued in HCCRA file no 46 of 2018.

Upon hearing the application, and the rival by the applicants and the state, I made an order for Pre-Bail Report to be prepared by the Probation and After Services on each of the appellants.

The applications were brought by way of Notice of Motion, the first time on 6<sup>th</sup> September 2018 under certificate of urgency, and amended on 16<sup>th</sup> January 2019 and filed on 18<sup>th</sup> January 2019. They are brought under Article 159 (2) of the Constitution and sections 356 and 357 of the Penal Code and all enabling provisions of the law.

The prosecution is opposed to bail pending appeal for the appellants. In the Replying affidavit sworn by prosecution counsel Magoma Kennedy he deponed that in bail pending appeal there is no presumption of innocence as the appellant has already been convicted. That the appellants were likely to be tempted to abscond and that the appellants had no fixed abode he relied on **Republic- vs -Caleb Odhiambo KSM murder 38/2010, Misc. Criminal Appeal No.2 of 2005 Fredrick Mvale –vs- Republic.**

The applicants relied on the principles for bail pending appeal. **Peter Hinga Ngatho -Vs- Republic (2015) eKLR, Jeremiah Wachira Muchiri –Vs- Republic (2016) eKLR**

In support of the application Mr. Mutembei submitted that that the appeal had high chances of success, which the prosecution refuted, and demonstrated the points of law they intended to rely upon: the issue of identification, the non-compliance by the trial court with s. 200(3) of the Criminal Procedure Code, the trial magistrate's bias against the appellants as demonstrated by the judgment, all matters I would not wish to delve into considering that they will be canvassed before the judge who will hear the appeal.

Section 357 of the Criminal Procedure Code provides for admission to bail or suspension of sentence pending appeal. It states at sub section (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:*

Bail pending appeal is a recourse available in law to an accused person already convicted of an offence and serving sentence as are the applicants herein. **In Gerald Macharia Githuka vs Republic Criminal Appeal No. 119 of 2004,** the Court stated;

*‘The cornerstone of the justice system is that no one will be punished without the benefit of due process including the right to exhaust the right to appeal. Incarceration before trial or pending hearing of an appeal cuts against this principle... ‘*

My humble view is that the right to bail pending trial is also a Constitutional right under Article 49 of the Constitution which provides for the rights of arrested persons. These include the right;

*“(1) (h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.”*

The main difference between bail pending trial or charge as indicated at Article 49(1) h) and bail pending appeal under section 357 is that the appellant has already been found guilty and does not enjoy the presumption of innocence. This can be seen in the words of by Haris J in **Chimambhai vs Republic (No 2) {1971} E.A.343;**

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

These words are in resonance with the Constitutional provision that an accused person has the right, if convicted, to appeal to, or apply for review by, a higher court as prescribed by law at article 50(2) (q). This is among the constitutional rights under article 50 that collectively amount to the right to a fair trial.

Thus, although the right to bail pending appeal is not specifically provided for under this Article 49(1) (h), this provision has been applied in numerous cases to support the same. I would add that Article 51 of the Constitution which provides for the rights of persons detained, held in custody or imprisoned clearly states at sub article (1) that such a person;

*... retains all the rights and fundamental freedoms in the Bill of Rights, except to the extent that any particular right or a fundamental freedom is clearly incompatible with the fact that the person is detained, held in custody or imprisoned.*

The person who is imprisoned will appear in court on an application for review, revision, appeal or retrial. Hence, in my view, one of those rights referred to above, is the right to bail pending these proceedings, and the only limitation would be the existence of **‘compelling reasons’** or as they were cited with approval from **Chimambhai** in **Arvind** **‘particular circumstances’**.

These particular circumstances have been prescribed again in numerous cases as conditions for granting bail pending appeal. A search at **kenyalaw.org** brings up number of decisions that have cited the case of **Arvind Patel -vs- Uganda S.C Cr. Appeal No. 1 of 2003** from where I also draw guidance, where the Supreme Court of Uganda, Justice Oder, set them out as:

1. The character of the offender
2. Whether the applicant is or not a first offender;
3. Whether the offence of which the applicant is convicted involved personal violence;
4. The appeal must not be frivolous and has reasonable chance of success;
5. The possibility of substantial delay in the determination of appeal and;
6. Whether the applicant complied with bail conditions granted before the applicant's conviction during the pendency of the appeal.

The same court also stated that an applicant did not have to demonstrate all these considerations in order to be granted bail. A combination of two or more of the conditions would be sufficient. This is a clear movement from the previous very strict approach to the principles applicable to bail pending appeal where for instance an appellant would be required to establish the existence of exceptional and unusual circumstances.

(See ruling by Mativo J in **Samuel Macharia Njagi v Republic [2013] eKLR**).

The applicant would also need to demonstrate that his appeal had high chances of success.

I ordered for and have also considered the pre bail report on each of the applicants. This report is a PRE BAIL REPORT. It does not matter what bail or what stage. It is not all about the establishment of compelling reasons as visualized by Art 49 (1) (h). It is an independent source of information, expected to be neutral, which also serves the purpose of painting for the court, a social, familial and community picture of the applicant, for the court. These factors are a useful especially in terms of the conditions to accompany the bond or bail if granted, dealing with issues of fixed abode, family and community ties, and giving a sense of who the applicant is. Hence a PBR is not just relevant to the initial bond/bail application. In my view it serves a purpose not only there but also in the applications for review of bond terms, and in this case, bail pending appeal.

I have considered the PBRs filed on the 11<sup>th</sup> February 2019 by Mary Kiama Probation Officer Githongo, Meru Central. The complainant's views were not gathered as it was indicated that this was to be established by the Nyeri Probation Office as he hails from Nyeri County. However the state through the submissions of Mr. Magoma expressed fears that, the applicants if released considering the manner in which the offence was committed they would continue to instill fear and harm to the complainant.

However, the record of the lower court shows that the applicants were out on a bond of Ksh.20,000/- with one surety of similar amount or cash bail of Ksh.10,000/-. Three of them paid cash bail, two were out on bond. All were out on bond throughout the trial. This bond was granted in 2014. The trial needed last year. The submission by the state is therefore unfounded.

I have perused each of the Pre-Bail Reports. The applicants are aged 76 years, 56 years, 61 years, 59 years and 44 years respectively. Each of them lives in his rural home. 1<sup>st</sup> Appellant in Chaaria, the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> all in Kithirune within Meru Central.

Each report confirms that each of the applicants is a person with a fixed abode, with families both nuclear and extended, and, each is established in his community. The submission by the state that they are persons of no fixed abode is therefore not correct.

From the reports the Applicants do not reside within the area where the offence was committed, they are from Meru Central, the complainant is in Nyeri County. Hence they cannot be said to be a threat to the complainant. There is nothing in the report to indicate that the ground in their respective villages is hostile to them. Hence, even from the perspective of the social inquiry report, the prosecution fears that the applicant may endanger the complainant and that their own lives may be in danger is unfounded.

For each of the applicant, the family members are ready willing and able to stand surety and to ensure that he attends court. None of the applicant's is a flight risk. Hence the question will be whether from all the material before me I am persuaded that if released on bail the each of the applicants will attend court until the appeal is heard and determined? The answer is in the affirmative as there is no compelling reason to deny the applicants bail.

Taking into account that the accused persons were found guilty, convicted and charged, and each is serving a sentence of 2 years imprisonment, I make the following orders.

1. I allow the application for bail pending appeal. Each applicant may be released on bond of Ksh.100,000/- with one surety of similar amount.
2. The Deputy Registrar High Court of Kenya at Nanyuki to approve the sureties. The DR to give directions on mentions and appearance of the applicants before her during the pendency of the appeal.
3. The applicants are not to go anywhere near the complainant's home during the pendency of this appeal.
4. This file be returned to Nanyuki.

5. This ruling and order to apply in the five files HCCRA nos. 46,47, 48, 49 and 50.

**Dated, delivered and signed in open court at Nyeri this 14<sup>th</sup> Day of February 2019**

**Mumbua T Matheka**

**Judge**

In the presence of:

Court Assistant: Juliet

Mr. Magoma for state

Applicants: Absent in Custody in Nanyuki Prison.

For Applicants: Mr. Mutembei

**Mumbua T Matheka**

**Judge**

**14/2/19**