



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CRIMINAL APPEAL NO. 129 OF 2018**

**PABLO MURUNGA ALFRED.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

[1] The Notice of Motion dated **19 December 2018** was filed on behalf of the Applicant, **Pablo Murunga Alfred** by **Mr. Mogaka, Advocate**. It is expressed to have been filed pursuant to **Sections 144, 146, 147, 149, 150, 151 and 155** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya** for orders that the Applicant be released on bail pending appeal. The application was premised on the grounds that:

[a] The Appellant being dissatisfied with the judgment and sentence of the Chief Magistrate, **Hon. Obulutsa**, delivered on **30 November 2018** in **Eldoret CMCRC No. 2077 of 2017: Republic vs. Pablo Murunga Alfred**, has appealed against the same in its entirety;

[b] The appeal has high chances of success due to the availability of new and compelling evidence;

[c] The Appellant is of ill health and requires urgent/immediate medical attention/supervision;

[d] The Appellant was the only provider and breadwinner in his family who are now suffering due to his incarceration;

[e] The Appellant will not interfere with witnesses and will not cause danger to anybody and/or be a flight risk;

[f] The Appellant was on bond when he took plea at the magistrate's court and that at no point in time did he abscond the court sessions, threaten or intimidate or interfered with the Prosecution witnesses.

[g] The Respondent will not suffer any prejudice.

[2] The grounds aforesaid were explicated in the Applicant's affidavit sworn on **19 December 2018**. He averred that he is of ill health and requires urgent medical attention which cannot be provided in prison; and that he has visited the prison's health facility severally but his condition keeps deteriorating. He further averred that there is no hostility on the ground as a reasonable period of time has passed since the alleged incident took place.

[3] The application was urged on **7 March 2019** by **Mr. Ayieko**, Advocate. He relied on **Articles 49 and 50** of the **Constitution** and reiterated the Applicant's contention that the appeal has high chances of success; that he is unwell and has been on medication, including herbal medicine, which he cannot access while under incarceration; that he has a wife and children who depend on him; and that the Appellant has undertaken not to interfere with witnesses, should the need arise to have them recalled. Accordingly, **Mr. Ayieko** urged the Court to allow the application for the release of the Applicant on bail pending the hearing and determination of his appeal.

[4] **Mr. Mulamula**, Learned Counsel for the State, opposed the application contending that the Applicant was convicted of the offences of gang rape and robbery with violence; and that the chances of him jumping bail are high. He further submitted that since his was a case of recognition, it cannot be said that the Applicant's appeal has high chances of success. He posited too, that the Applicant's medical condition can be well taken care of in prison and therefore not a valid ground for his release on bail, granted that he has lost the presumption of innocence with his conviction.

[5] I have given due consideration to the application in the light of the lower court proceedings and the Grounds of Appeal filed herein.

Although the application is expressed to have been brought pursuant to **Sections 144, 146, 147, 149, 150, 151 and 155** of the **Criminal Procedure Code**, those provisions are irrelevant to the issues at hand, for they provide the procedure for summoning and examination of witnesses. That notwithstanding it is manifest from the record that the Applicant was jointly charged before the lower court with two others with various offences, including robbery with violence and gang rape. He was found guilty by the trial court and sentenced accordingly. He has filed this appeal because he was dissatisfied with his conviction and sentence. Hence, there is no gainsaying that, as an appellant, he is entitled to bail pending appeal; for **Section 357(1)** of the **Criminal Procedure Code** recognizes that:

**“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.”**

[6] Nevertheless, having been convicted, the provisions of **Articles 49 and 50** of the **Constitution**, on which Learned Counsel premised his submissions, are inapplicable to the Appellant's situation. Instead, it is a requirement of the law that the Applicant must meet certain conditions to be admitted to bail pending the hearing and determination of his appeal. These conditions are now well settled. For instance, in **Jivraj Shah vs. Republic [1986] KLR 605** the principles for grant of bail pending appeal were explained thus:

**“...the principal consideration is if there exist exceptional or unusual circumstances upon which the court can fairly conclude that it is in the interests of justice to grant bail. 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.”**

[7] A similar position was taken by the Court of Appeal in **Dominic Karanja v. Republic [1986] KLR 612** thus:

**“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.**

[8] In the premises, having given due consideration to the application in the light of the Grounds of Appeal and the evidence adduced before the lower court, while I would say the appeal is arguable, it cannot be said to have overwhelming chances of success. The nature and effect of the proposed new evidence is yet to be ascertained; and as noted herein above, issues about the effect of the Applicant's imprisonment on his family are not exceptional or unusual factors. Similarly, there is nothing to show that his medical condition is such that it cannot satisfactorily be attended to and managed at the prison.

[9] In the result, I am not satisfied that a good case has been made out for the release of the Applicant on bail pending appeal. I would, in the circumstances, dismiss his application dated **19 December 2018**.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 7<sup>TH</sup> DAY OF JUNE, 2019**

**OLGA SEWE**

**JUDGE**