



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 44 OF 2019

IN THE MATTER OF ARTICLE 49(h) AND 50(2) (q) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 357 OF THE CRIMINAL PROCEDURE CODE

CHARLES MUSAU MANG'ELI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. By an application brought before this Court by way of a Notice of Motion dated 28TH May, 2019 under Articles 49(h) and 50 (2) (q) of the Constitution of Kenya and Section 357 of the Criminal Procedure Code Cap 75, Laws of Kenya, the Applicant herein seeks the following primary orders:

- a) **THAT** the Appellant/Applicant be admitted to bail or bond on reasonable terms pending the hearing and determination of the appeal herein.
- b) **THAT** this Honourable Court be pleased to issue such other/further orders in the interest of justice.
- c) **THAT** the costs of this application be in the cause.

2. The application was supported by the affidavit of **Danson Kisini Mwema** sworn on 28th May, 2019.

3. The deponent alleges that he was on record for the appellant who was sentenced to life imprisonment for the offence of defilement and that the appellant is aggrieved by the same and has instructed the deponent to file this appeal (a copy of the Petition of Appeal was annexed to the affidavit and marked as "DKM1").

4. The deponent claims that the appeal proffered before this court has overwhelming chances of success and by the time the appeal is heard and determined, the appellant will have served a substantial part of his sentence and hence his application for Bond/Bail pending appeal.

5. The deponent further avers that the applicant is a sole bread winner, is aged and suffering from diabetes and that the applicant was granted bond during the trial and had never absconded court and further undertakes to attend court during the hearing of the appeal.

6. The Respondent herein did not respond to the application.

7. The application was canvassed vide written submissions. Learned counsel for the applicant submitted that the principles governing grant of bail pending appeal are first, a demonstration by the Applicant that the appeal has overwhelming chances of success and second, proof of exceptional circumstances that apply. According to counsel, the unusual circumstances that exist are that the applicant is aged 67 years and is suffering from diabetes and cited the case of **Kigoro Machoro v R (2019) eKLR** where the court held age and health as exceptional circumstances.

8. The state conceded to the application.

9. Having carefully considered the application and the oral submissions of the parties I find that the only issue for determination is whether the Applicant should be granted bail pending appeal.

10. Section 357 (1) of the Criminal Procedure Code provides admission to bail pending appeal as follows:

“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.”

11. In the case of **Jivraj Shah versus Republic [1986] KLR 605** that has been cited by the applicant the principles for grant of bail pending appeal were established as:

i. The existence of exceptional or unusual circumstances upon which the Court can fairly conclude that it is in the interest of justice to grant bail.

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

iii. The main criteria is that there is no difference between overwhelming chances of success and a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed and the proper approach is the consideration of the particular circumstances and the weight and relevance of the points to be argued.

These grounds can be narrowed down and stated as whether the appeal has overwhelming chances of success and whether there are exceptional circumstances warranting the release of the Appellant on bail pending appeal.

12. In this case the Applicant through his learned counsel, argued that the appeal has overwhelming chances of success. Learned counsel has filed a Petition of Appeal in which he raises nine (9) grounds for appeal. It is trite law that it is not for the court to delve into the merits of each ground but it should suffice that all the grounds are examined, and a conclusion is made that *prima facie* the prospects of success are dim or high.

13. I have carefully examined the grounds of appeal raised by the Applicant. The Applicant/Appellant raises issues such as the proof of the prosecution case, the failure to conduct a DNA test to connect the appellant with the offence and the manifestly harsh sentence. I could state that the appeal is arguable but cannot speak on the success of the appeal.

14. I have also carefully considered the case of **Kigoro Machoro v R (2019) eKLR** which was cited by learned counsel for the applicant and seek to distinguish the same since in that case, the learned judge had the benefit of a medical report so as to be able to establish the medical condition of the applicant. In the instant case, there is no such report that will speak about the medical condition of the applicant nor any form of identification document of the applicant that would assist the court to establish his age. In this regard, I find that the Appellant has not proved existence of exceptional or unusual circumstances warranting grant of bail pending appeal.

15. I note that the Appellant was sentenced to life imprisonment and was out on bond during trial. The Respondent herein has also not offered sufficient reasons to show that the Appellant will abscond if granted bail. These circumstances might work well in favour of the applicant. In that regard it is necessary to direct the applicant to furnish the requisite evidence regarding his medical condition as well as copy of his national identity card for the court's perusal and consideration.

16. In the result the ruling on the application is stayed pending the filing of the medical report and copy of the applicant's national identity card.

It is so ordered.

Dated and delivered at Machakos this 9th day of July, 2019.

D.K. KEMEI

JUDGE