



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 124 OF 2018

JOSEPHAT KITONGA KIMOLO.....1ST APPELLANT

TITUS NDONYE MIIO.....2ND APPELLANT

JOHN NZIOKA MUSEMBI.....3RD APPELLANT

PATRICK KIVINDYO KIKOVE.....4TH APPELLANT

JAPHETH MULINGE KIKOVE.....5TH APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The 2nd, 3rd, 4th and 5th Appellants have filed two applications dated 24/1/2019 and 10/06/2019 seeking for an order that they be admitted on bond/bail pending the determination of the appeal filed herein. The gist of the Appellants applications is that they have an appeal which has high chances of success and further that they will have served most of the sentences by the time their appeal is heard and determined. The applications are supported by affidavits in which they have averred that their appeal will be rendered nugatory if they continue serving sentence and eventually the appeal succeeds.

2. The Respondent did not oppose the two applications. Learned Counsel for the Respondent pointed out that an earlier ruling had been delivered by this court in which it granted one of the Appellants bond.

3. This court had received a similar application for bond and which was allowed vide the ruling dated 20/12/2018. All the Appellants herein had been jointly charged before Kithimani Principal Magistrate's court vide **Criminal case No.298 of 2016** and subsequently convicted and sentenced.

4. The principles upon which bail pending appeal is to be granted are well settled. The Court of Appeal in **Dominic Karanja =Vs= Republic [1986] KLR 612** laid down some of the guiding principles namely:-

(a) If the appeal has such overwhelming chances of success, then there is no justification for depriving the Applicant of his liberty.

(b) If there are exceptional or unusual circumstances affecting the Applicant would be a relevant consideration.

(c) The previous good character and the hardships, if any, facing his family or ill health would not constitute exceptional circumstances where there exists medical facilities for prisoners.

(d) 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.

5. It is not in doubt that the Appellants have already been convicted and sentenced by a court of competent jurisdiction and as such they do not enjoy the benefit of a presumption of innocence as compared to those seeking bail pending a charge or trial. That being the position the Appellants are expected to furnish sufficient reasons to warrant their release on bond pending the determination of the appeal herein. In essence bond pending appeal is not automatic but is at the discretion of the court.

6. The Appellants maintain that their appeal has high chances of success and might be rendered nugatory if they continue to serve the

sentence in the event of the appeal succeeding in the end. It is noted that the appeal is yet to be heard and it is too early to gauge whether or not it will succeed. I would not wish to get into that arena as at now as it is too early to establish the merits or demerits of the appeal.

The appeal involves several Appellants some of whom are yet to lodge their appeals. There is therefore a possibility that the appellants who have already lodged appeals might serve a substantial portion of the sentence before the appeal is concluded. This then merits an order for the Appellants released on bond pending appeal. In any event the first Appellant has already been granted bond pending appeal vide this court's ruling dated 20/12/2018. It would be against the provisions of the Constitution to deny them the request sought as it will amount to discrimination against them yet they had been jointly charged before the trial court and should therefore be entitled to equality before the law.

7. In the result, I allow the 2nd, 3rd, 4th and 5th Appellants applications dated 25/1/2019 and 10/06/2019 in the following terms.

(a) Each of the 2nd, 3rd, 4th and 5th Appellants is released on bond pending appeal in the sum of Kshs. 500,000/= plus one surety of like sum.

(b) The sureties shall be approved by the Deputy Registrar of this court.

(c) Once released, the Appellants must attend court during the hearing and mention dates without fail until the appeal is heard and determined or until further orders of the court.

(d) In default to adhere to these conditions the bond shall stand cancelled and both Appellant and surety called to account.

It is so ordered.

Dated and delivered at Machakos this 23rd day of July, 2019.

D. K. KEMEI

JUDGE