



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

MISC. CRIMINAL APPLICATION NO. 88 OF 2018

MICHAEL KASAMANIAPPLICANT

VERSUS

REPUBLIC RESPONDENT

R U L I N G

The applicant has filed an application dated 19th November, 2018 seeking to be admitted to bail pending the hearing and determination of his appeal filed herein. The application is premised on the grounds on the face of the application and is supported by the affidavit of the applicant.

The applicant was convicted of the offence of vandalism of the electrical apparatus contrary to Section 64 (4) (b) of the Energy Act and sentenced to a fine of Ksh. 5,000,000/= in default to serve 10 years imprisonment. He was aggrieved by the conviction and the sentence and filed an appeal herein. Meanwhile he filed the instant application seeking to be admitted to bail pending the hearing and determination of the appeal.

The grounds in support of the application are:-

- (a) That the applicant is a young man committed to the service of society.
- (b) That the applicant has a young family that is dependent on him for food, shelter, security, education and parental care of children.

The applicant states in his supporting affidavit that he was on bond during trial by the lower court. That he did not have a history of absconding and that he is not a flight risk. Further that the appeal has high chances of succeeding.

The court has powers under section 357 of the Criminal Procedure Code to grant a convict bond pending appeal. The principles applicable in an application for bond pending appeal are that the applicant has to demonstrate to the court that:

- (1) There exist exceptional circumstances to warrant grant of bail/bond.
- (2) The appeal has overwhelming chances of success.

In **Somo Vs Republic (1972) EA 476** the Court of Appeal held that the most important ground is that the appeal has an overwhelming chance of being successful, in which case there is no justification for depriving the applicant of his freedom.

These principles were re-stated by the same court in **Jivraj Shah Vs Republic (1980) eKLR** where the court stated that:

(a) 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 interest of justice to grant bail.

(b) If it appears prima facie from the totality of the circumstance 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.

(c) 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 weight and relevance of the points to be argued.

It has also to be borne in mind when considering an application for bond pending appeal that the applicant has at that stage been convicted of the offence and therefore that the presumption of innocence until proven guilty does not apply. In **Douglas Mutunga Muthenya Vs Republic (1988) KLR 497**, the court of Appeal held that –

“It must be remembered that an applicant for bail has been convicted by a properly constituted court and is undergoing punishment because of that conviction which stands until it is set aside on appeal. It is not wise or to set the applicant at liberty either from the point of view of his welfare or of the state unless there is a real reason why the court should do so.”

The evidence adduced against the applicant in the lower court is that he and others were found by members of the public vandalizing electric posts and wires. They had cut down some electric poles and placed them in a pick-up vehicle. When confronted by members of the public the pick-up took off. The applicant and another were arrested. One electric pole that had been cut was found lying on the ground. Seven electric poles were missing. The applicant and the other were taken to Butere Police Station. They were tried and convicted.

The most important ground when considering an application for bond pending appeal is whether the appeal has high chances of succeeding. The applicant was found at the scene where electric poles were cut down and stolen. Whether his defence is plausible will be determined during the appeal. I cannot say categorically at this stage that the appeal has high chances of succeeding.

In the premises the applicant has not adduced sufficient grounds in support of the application. There are no exceptional circumstances to warrant the applicant being released on bond pending appeal. The application is thus dismissed.

Delivered, dated and signed in open court at Kakamega this 3rd day of July, 2019.

J. NJAGI

JUDGE

In the presence of:

Mr. Juma for State

Applicant - present

Court Assistant - George