



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 17 OF 2019

MICHAEL NJAGI WANJA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

A. Introduction

1. This is a ruling on the application for bail pending appeal. The appellant was charged, tried, convicted and sentenced to five (5) years imprisonment for attempted arson contrary to **Section 33 (b) of the Penal Code**.
2. By an application brought before this Court by way of a Chamber Summons dated 1st July 2019, the applicant seeks to be granted bail pending the hearing of his appeal. The application was supported by the affidavit of **the appellant/applicant's advocate, Ann Nyambura Kithaka** sworn on 1st July 2019.
3. It is deponed that the appellant's appeal has a high probability of success and if bail is not granted, the appeal shall be rendered nugatory as the appellant will have served most of his sentence term. It is also deponed that the appellant has always attended court when required to do so and that he will continue to do so.
4. In rejoinder, the respondent, through their counsel, Ms. Mati, opposed the application on the grounds that the appellant was rightfully convicted and that the appellant had failed to demonstrate how his appeal had a high chance of success. It was further deponed that the appellant had failed to disclose what medical ailment he was suffering from and that the same could not be treated by the prison hospital. Ms. Mati further opposed the application for bail on the grounds that the trial magistrate had exercised his discretion rightly because the penalty set for the appellant's offence is imprisonment for a term of 14 years.

B. Analysis and Determination

5. 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**.
6. **Section 357 (1) of the Criminal Procedure Code** provides admission to bail pending appeal, it states 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.”

7. Once a trial court has made a determination and found an accused guilty of the offence, he is no longer considered innocent for his guilt has already been established. In this regard, if such a convict is dissatisfied with the outcome, his recourse is to appeal against the decision.
8. Consequently, the conditions applicable for bail pending trial and bail pending appeal are not the same as those for bail pending hearing and determination of a criminal case. Upon conviction, the accused can no longer be presumed as innocent and bail is no longer an automatic right. Such an applicant must demonstrate that his appeal has overwhelming chances of success to be entitled to bail pending appeal. Of course, there may be other considerations such as poor health of an applicant which the prisons health facilities may not be able to deal with or that the sentence is too short that by the time the appeal is concluded, the term may have been served.
9. In the case of **Jivraj Shah v Republic [1986] KLR 605**, the Court of Appeal held: -

“There is not a great deal of local authority on this matter and for our part such as we have seen and heard tends to support the view that 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.”

10. In **Dominic Karanja v. Republic [1986] KLR 612** the Court of Appeal also held: -

“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.”

11. Thus, the burden is on the applicant to demonstrate that he is entitled to be granted bail pending the hearing of his appeal. He is required to demonstrate that the appeal has overwhelming chances of success and that there are exceptional circumstances warranting the release of the applicant on bail pending appeal.

12. In this case the applicant through his counsel, Ms. Kithaka argued that the appeal has overwhelming chances of success. Ms. Kithaka has filed an amended Petition for Appeal dated 4th July 2019 in which she raises eleven (11) grounds for appeal. It is trite law that it is not for the court at this stage 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 either high or dim.

13. I have carefully examined the grounds of appeal raised by the Appellant. I have also carefully perused the proceedings and Judgment in **SPM Runyenjes Criminal Case No. 135 of 2017** and without pre-empting the appeal, I am of the considered view that the appeal cannot be said to have high success.

14. The claim that the appeal may take long to be heard by which time the applicant may have served the five (5) year sentence is not highly probable. Criminal appeals in this court are heard mostly within one (1) year unless the appellant fails to do what it takes to prepare his appeal for hearing. I am not convinced that the appeal will be rendered nugatory if bail is not granted herein.

15. I also find that the appellant has not in the alternative proved existence of any exceptional circumstances warranting grant of bail pending appeal.

16. It is my finding that this application has no merit and it is hereby dismissed.

17. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 8TH DAY OF OCTOBER, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Mr. Mogusu for A. Kithaka for Appellant