



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 18 OF 2018

MUIA KIVIDYO.....APPELLANT/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Appellant sought bail/bond pending determination of this appeal by a notice of motion filed on 15th February, 2018. The grounds upon which the motion is premised are that he was sentenced to serve a term of three (3) years imprisonment without an option of a fine. That unless he is granted bail/bond pending the hearing and determination of this appeal, he will serve a substantive part or whole of the sentence before his appeal is heard which will cause him irreparable damage and render his appeal a mere academic exercise. He stated that he has an arguable appeal with overwhelming probability of success.

2. Ms. Mogoi learned prosecutor on 7th March, 2018 intimated that she was not opposed to the application. On 8th March, 2018, she stated that her reason for not opposing the motion was due to the length of the sentence and the appellant may have served the term before the appeal is heard. The court however, directed that the appellant does file written submission on the application having noted from the trial court proceedings that the appellant at one point absconded while on bail.

3. The Appellant subsequently filed submissions on 16th May, 2018. It was his submissions that he satisfies the requirements for grant of bail for the reason that his appeal has high chances of success. That he is a father of two and his family's sole breadwinner; that his mother is old and ailing and depends on him thereby his liberty is crucial. That he during mitigation sought forgiveness and requested for time to refund the money but the two weeks period allowed by the court was insufficient. He further contended that a substantial or the full sentence will be served before the appeal is heard. He cited **Jiv Raji Shah v. Republic [1986] eKLR**, **Charles Owanga Aluoch v. Director of Public Prosecutions [2015] eKLR**, **Somo v. Republic [1972] E.A.** and **Peter Hinga Ngatho v. Republic, Nyeri HCCRA No. 2 of 2015** among others in support of his arguments.

4. The principles upon which bail pending appeal is to be granted were discussed in **Dominic Karanja v. Republic [1986] KLR 612** where the court of Appeal held:

a) The most important issue was that if the appeal had such overwhelming chances of success, there is no justification for depriving the Applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances.

b) The previous good character of the applicant and the hardships, if any, facing his family were not exceptional or unusual factors. Ill health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners.

c) 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. Applying the test, it is clear from the applicant's own averments in submissions that during mitigation he sought forgiveness and requested for time to refund the money but the two weeks period allowed by the court was insufficient. In my view this diminishes his chances of success in the appeal. I however, do not want to pre-empt the outcome of the appeal and shall consider the second requirement. The applicant was noted to have once absconded court and his reputation is thereby wanting bearing in mind also that he has not exercised good faith to explain why he did so. Considering the fact that the appeal might take time, it is possible to order the appeal fast tracked. Indeed most of the appeals are always canvassed by way of written submissions and hence it is possible to have the appeal concluded without delay.

6. In the result it is the finding of this court that the Appellant's Application lacks merit. The same is dismissed. The Appeal herein be heard on priority basis.

It is so ordered.

Dated and delivered at Machakos this 2nd day of May, 2018.

D. K. KEMEI

JUDGE

In the presence of:-

Muia Kivindyo - the Applicant

Saoli for the Respondent

Kituva - Court Assistant