



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 38 OF 2018

Arising from the conviction and sentence by Ms. Ndungu CM in Meru CR. NO. 159 of 2015 meted out on 20th March 2018

(CORAM: F. GIKONYO J)

JOHNSON KOBIA M'IPWI.....APPELLANT

-Versus-

REPUBLIC.....RESPONDENT

RULING

[1] The Appellant has sought for bail pending appeal in the Motion dated 3rd April 2018. The motion is expressed to be brought under Section 357 of the Criminal Procedure Code CAP 75 Laws of Kenya and all other enabling provisions of law. The grounds upon which the motion is premised are set out in the body of the motion and the affidavit sworn by Maureen Santa Munga, advocate for the Applicant, on 3rd April 2018. Those reasons include; (1) that the Applicant is sick and suffering from diabetes mellitus and the situation requires close monitoring; (2) that his appeal has overwhelming chances of success. He affirms that he will abide by the terms of bail that the court may attach. He did so in the initial bond granted to him by the lower court.

[2] The motion was canvassed by way of oral submissions. Rimita, counsel for the Applicant, reiterated what had been stated in the motion and affidavit. However, he made further submissions:-

1. That the proceedings were a nullity in that a person not qualified to prosecute was allowed to participate in the proceedings.
2. That the trial court refused the Appellant time to prepare for his defence; and the sentence given was harsh and excessive.
3. That the Appellant is a retired old man and the prison conditions are not conducive to his health and age.

Prosecution: appeal feeble

[3] The state counsel, Mr. Namiti told the court that the appeal has no overwhelming chances of success. He submitted that the case was registered in 2015 and it was in 2018 that the Appellant was seeking for adjournment. The case had already been delayed and the trial magistrate exercised discretion properly in refusing the adjournment. According to Section 129 of the Criminal Procedure Code it provides for the mandatory sentence of 3 years. Therefore, 24 months jail term given was on the lower side. The fine of Kshs. 500,000 was also fair. He stated that the Appellant is diabetic and this is an ailment manageable within prison facilities.

ANALYSIS AND DETERMINATION

[4] Bail pending appeal is measured on a different yardstick from the initial bail pending trial. The applicant has been convicted and may not claim to be "innocent until proven guilty". The Court of Appeal expressed this sentiment when it stated in the case of **MUTUA vs. REPUBLIC (1988) KLR 497** 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.

[5] The test therefore for bail pending appeal is as was set out in the case of **Jivraj Shah -vs- Republic [1986] KLR 605**, inter alia:

"1. 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 interests of justice to grant bail.

2. 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.”

[6] See also the case of **Dominic Karanja v. Republic [1986] KLR 612** where the Court of Appeal considered conditions for grant of bail pending and 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. (Emphasis added)

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.

d. Upon considering the relevant material in this case, there was no overwhelming chance of the appeal being successful.

[7] The Applicant is said to be diabetic. He claims that prison conditions are not conducive to his health. He relied on several cases such as **Shah v. Republic [1986] KLR 528**. In that case the Applicant suffered from an uncontrolled *diabetes mellitus* and according to the doctor’s letter neither the prison nor hospital diet was suitable for his condition. He was granted bail pending appeal for he could only obtain a diet suitable for his condition at home. In this case, the letter submitted by the Applicant states that ‘*he has been adviced (sic) on diabetic in line with medication so as to facilitate control*’. He needs to be on medication so as to facilitate control of his condition. Nothing shows that he cannot access medication or medication cannot be administered to him within the prison facilities. Therefore, the Applicant has not established any exceptional or unusual circumstances to warrant bail pending appeal.

[8] I leave determination of the potency of the appeal to the hearing. Having considered the application, I decline to grant the Applicant bail pending appeal. The application is dismissed. However, as the Applicant is ill, I order this appeal to be fast tracked and be heard immediately. It is so ordered.

Dated, signed and delivered in open court at Meru this 5th day of June, 2018.

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F. GIKONYO

JUDGE

In the presence of:

Mr. Namiti for State

Mr. Muchiri advocate for appellant

Appellant – absent

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F. GIKONYO

JUDGE