



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 77 OF 2018

FRANCIS MITHIKA..... APPELLANT/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. Before me is a Motion on notice dated 12th June, 2018 brought under **Section 123 of the Criminal Procedure Code CAP 75 of the Laws of Kenya**. The applicant seeks to be released on bond pending the hearing and determination of the appeal.

2. The grounds upon which the Motion is premised are in its body and the supporting affidavit of Francis Mithika sworn on 12th June, 2018. These are that; the appeal has high chances of success both on conviction and sentence; the applicant is aged 65 years and is very sick in prison; the applicant is not a flight risk as he has been on bond in the lower Court.

3. The application was canvassed by way of oral submissions. Counsel for the appellant submitted that the appeal has high chances of success, that the report on the damage of the barbed wire and posts were produced by an Agricultural Officer who cannot assess damage to posts and the barbed wire but only crops. On identification, it was submitted that the offence occurred at night and no evidence was tendered to show how the witness identified the accused. That the four counts were a duplication of each other which prejudiced the applicant and the totality of the evidence of all the offences was not proved.

4. Counsel for the applicant further submitted that the sentence imposed on the appellant was excessive as the Appellant was fined Kshs. 220,000/= and the offences charged do not provide for fines but a maximum of 5 years. The Appellant was sentenced to four and a half years imprisonment. Lastly, mitigation was not considered when meting out the sentence and the court was wrong in giving a deterrent sentence because the appellant stated in mitigation that the land was his.

5. Mr. Kiarie, Learned Counsel for the Respondent opposed the application. He submitted that on sentence, the same was discretionary and was well exercised as the appellant was given a fine. That under **Section 36 of the Penal Code**, the Court has the discretion to impose a fine instead of imprisonment. On the issue of duplicity, Counsel submitted that each count was independent and no prejudice was caused to the appellant.

6. When a person is charged in a court of law, he is presumed innocent until proven guilty. The burden is on the prosecution to prove that he is not innocent. In the process, such a person is entitled to bail or bond pending trial as provided for by **Article 49 (1) (h) of the Constitution** states that

“(1) An arrested person has the right—

...

(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.”

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 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. After trial and conviction, an 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 authorities may not be able to deal with in prison 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 -vs- 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 prove that he should be granted bail pending the hearing of his appeal. He should demonstrate that the appeal has overwhelming chances of success.

12. I have considered the application and the submissions of Learned Counsel. I have also considered the judgment of the trial court and the grounds set out in the petition of appeal. Without preempting the appeal, I am of the considered view that the appeal have an overwhelming chances of succeeding. In the premises, I find the application to be meritorious and allow the same.

13. The applicant is admitted to bond of KShs. 100,000/- with a surety of a similar amount.

DATED and DELIVERED at Meru this 12th day of July, 2018.

A. MABEYA

JUDGE