



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 30 OF 2018

JOHN NTORIBI LENTARI...APPELLANT/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. Before me is a Notice of Motion dated 17th April, 2018 brought under **Articles 49(1) (b) (d) and 50 (2) (a) and (4) of the Constitution of Kenya, Sections 123 (1), (2) and (3), 124 and 125 of the Criminal procedure code CAP 75 of the Laws of Kenya.** The applicant seeks to be released on bond on favorable terms and conditions at least with a surety of a reasonable amount or bond surety.

2. The grounds upon which this Motion is premised on are in its body and the supporting affidavit of John Ntoribi Lentari sworn on 17th April, 2018. He contended that the applicant is entitled to bail for it is his constitutional right. He is presumed innocent until proven guilty as well as the right to liberty for there are no compelling reasons as to why he should not be granted bail terms and conditions. That he is not a flight risk for he is a primary school teacher employed by the Teachers Service Commission (TSC) from 1st May, 1989 up to date. The applicant is of sound mind, understanding and law abiding citizen. He is currently married with four children who depend on him for he is the sole bread winner.

3. Counsel for the applicant submitted that the appeal has high chances of success for the complainant prepared two statements which were conflicting. The clinical officer admitted that he did not apply scientific clinical standards to make his conclusions. The age of the complainants were not ascertained and their liberty was not curtailed. Lastly, that there exists a grudge over a parcel of land.

4. Mr. Kiarie, counsel for the respondent opposed the application. He submitted that the appeal has no chances of succeeding for there were 7 witnesses who proved the offence. The likelihood of the appellant absconding is very high if bail is granted. On the issue of ages and coercion of the complainants these are issues to be addressed in the appeal.

5. An accused is always presumed innocent until proven guilty. The burden is on the prosecution to prove that he is not innocent. In the circumstances, an accused is entitled to bail or bond pending trial as provided for by **Article 49 (1) (h) of the Constitution.**

6. Once the trial court has made a determination and found the accused guilty of the offence, he is no longer considered innocent. Being dissatisfied with the outcome the accused is entitled to appeal.

7. Consequently, the conditions for bail pending trial and bail pending appeal are not the same. A convicted applicant has already been adjudicated guilty as opposed to an accused who awaits trial.

8. In an application for bail pending appeal, an applicant should demonstrate that the appeal has overwhelming chances of succeeding. The court of Appeal put this beyond peradventure in **Jivraj Shah -vs- Republic [1986] KLR 605**, as follows: -

“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.”

9. Further, in **Dominic Karanja v. Republic [1986] KLR 612** the same court 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] E A 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.”

10. Thus, the burden is on the applicant to prove to the court why he is to be granted to bail pending appeal by proving that the appeal has overwhelming chances of success.

11. I have considered the grounds that are proposed to be argued in appeal. I have carefully considered learned counsels submissions on the same. Without preempting the outcome of the appeal, I am unable to state at this juncture that the appeal has overwhelming chances of success.

12. In the premises, I find the application to be without merit and dismiss the same.

DATED and DELIVERED at Meru this 5th day of July, 2018.

A. MABEYA

JUDGE