



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CRIMINAL APPEAL NO.40 OF 2018

JOSEPH MUNYAKA NJOKI.....APPELLANT

- V E R S U S -

REPUBLIC.....RESPONDENT

RULING

Joseph Munyaka Njoki, the applicant, was convicted in Nyahururu Criminal Case No.535 of 2017 for the offence of Robbery with Violence Contrary to Section 295 as read with Section 296(2) of Penal Code. He was charged along with 2 others and all were sentenced to suffer death.

The applicant being dissatisfied with the conviction and sentence has preferred an appeal No.45/2018. In the meantime, he has filed an application under Section 357(1) of the Criminal Procedure Code seeking to be released on bond/bail pending the hearing and determination of the appeal. The application is premised on grounds found on the face of the application and his own affidavit.

The applicant contends that his appeal has high chances of success; that he was released on bond in the Lower Court and religiously attended court; that he is not a flight risk because he has a fixed abode and a family; that he is ready to abide by all the terms and conditions that the court may impose.

The application was not opposed by **Ms. Rugut**, learned counsel for the State. It is her case that there are high chances of the appeal succeeding but that the court should impose strict bond terms.

This is an application for bond after the applicant has been found guilty and convicted. It is unlike an application for bond by a person who has been charged with an offence who has a right to bond under Article 49(1) of the Constitution. In this instance, the primary consideration by the court is whether the appeal has high chances of success.

In the case of ***Jivraj Shah v Republic 1986 KLR 605***, the Court of Appeal considered the conditions precedent to grant of bail pending appeal.

The court said:

“The principle 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 interest 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.”

The applicant has deponed in his affidavit that he was on bond in the Lower Court, he has a fixed abode, he is not flight risk and will abide by all the terms the court will grant. However, these are not unusual and exceptional circumstances as most of the prisoners will have similar reasons.

As noted above, the principle consideration is whether the appeal has a likelihood of success (***see Ademba v Republic (1983) KLR 442.***)

The burden lies with the applicant to establish that the appeal has high chances of success. Apart from alleging that the appeal has high chances of success, the applicant did not bother to support that allegation with any evidence. Even though the state did not oppose the application, the onus still lies on the applicant to discharge that burden but there was no attempt to do so.

Another consideration may be likely to serve a substantial part of the sentence or the whole of it, before the appeal is heard. The applicant was sentenced to death. Most death now convicts are serving life sentences and there is no possibility of the applicant serving all of it or a substantial part of the sentence before the appeal is heard. See Chimanbai v Republic 1971 EA 343.

I have had a cursory look at the Petition of Appeal and the proceedings and I do not agree with the applicant's assertion that his appeal has overwhelming chances of success or that there will be an outright acquittal.

Such an application calls for the exercise of court's discretion based on the special facts and circumstances of each case. The applicant was only convicted on 27/4/2018 and there is unlikely to be any delay before the appeal is heard.

I find no merit in granting the application. It is declined and I direct that the applicant do remain in prison until his appeal is heard and determined.

The application is hereby dismissed.

Dated, Signed and Delivered at NYAHURURU this 5th day of September, 2018.

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R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Cheche for applicant

Ms. Rugut for State

Soi – Court Assistant