



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 88 OF 2017

TITUS MUUO KATIWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Appellant filed a notice of motion dated 28th July, 2017 essentially seeking bail/bond pending hearing and determination of this appeal. The Appellant's contention is that the trial magistrate erred in law and fact in analyzing the evidence adduced in convicting him. He further stated that his appeal has overwhelming chances of success and that he is serving an illegal sentence. He stated that his continued incarceration will be highly prejudicial and incompatible with his Constitutional rights especially in the event of the appeal being successful. He stated that he is willing to abide by the terms set by this court.

2. The Appellant's submissions to this application was a reiteration of his averments in the supporting affidavit and cited **Peter Hinga Ngatho v. Republic (2015) eKLR** and **Martin Gitonga v. Republic (2014) eKLR**. The Respondent submitted that the Appellant has not demonstrated that there are any exceptional circumstances that would warrant this court to exercise its discretion in his favour. That he only mitigated his case which is of no probative value. The Respondent relied on the cases of **Somo v. Republic (1972) E.A. 476**, **Dominic sibi Peter v. Republic [2014] eKLR** and **Dominic Karanja v. Republic [1986] KLR 612**.

3. The substantive law on grant of bail is Article 49 (1) (h) of the Constitution which stipulates:

“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.”

This provision is applicable to bail pending trial in which case an applicant is considered innocent until proven guilty. In an application for bail pending appeal such as in the case at hand, an applicant is one who has already been found guilty and the principles for consideration are whether or not the appeal is arguable and has a chance to succeed, there is an anticipation of delay in hearing of the appeal and there exists exceptional and unusual factors. Such was the holding in **Chimambai v. Republic [1971] E.A. 343** where it was stated :

“Anticipated delay in the hearing of the appeal together with other factors constitute good grounds for granting bail pending appeal.”

The Court of Appeal in **Dominic Karanja v. Republic [1986] KLR 612**, similarly held thus:

“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.

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

4. Applying the test, I have perused the petition of appeal, the proceedings and judgment of the trial court and without preempting the outcome of the appeal I find that there is no absolute success in the appeal. Further, the Appellant has not demonstrated any exceptional circumstances that would warrant this court to exercise its discretion to grant the orders sought. In the circumstances, I find no merit in this application and consequently dismiss it. The Appellant is directed to set down the appeal for hearing on priority basis.

Dated and Delivered at Machakos this 20th day of September 2018.

D.K.KEMEI

JUDGE

In the presence of:

J. N. Kimeu - for the Appellant

Machogu - for the Respondent

Josephine - court assistant