



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 52 OF 2017

JANE NYAMBURA NGARI Alias NESTA WANGIGI IRERI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

1. This is a ruling on the application dated 20/12/2017 seeking for bail pending appeal.
2. It is supported by grounds on the face of the application and in the supporting affidavit of the applicant.
3. It is stated that the applicant has an arguable appeal with chances of success. She is now serving a six (6) year imprisonment sentence. The applicant says she is an elderly woman and is sickly and that her appeal may take long to be heard and determined. It is also stated that the appellant has a right to bail.
4. Reference was made to the grounds of appeal. The trial magistrate was faulted for his finding that the appellant forged title for L.R. Gatari/Kithimu/2162 and that the language of the court during the trial was not understood by the applicant.
5. The application was opposed by the respondent relying on the replying affidavit of Leah Mati. It was deposed that the appellant was convicted of multiple offences and sentenced to a cumulative term of six (6) years imprisonment which convictions were based on cogent evidence. It was further stated that the issue of language of the court not being understood was an afterthought since it was not raised during the trial. The respondent further stated that the suffering of the victim ought to be considered in this application for bail.
6. In an application for bail pending appeal, the applicant must demonstrate that his appeal has high chances of success or that there exist extra-ordinary circumstances.

In **DOMINIC KARANJA VS REPUBLIC [1986] KLR 612**, the court held that:-

- *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.*
- *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.*
- *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.*

7. I have perused the judgment of the learned trial magistrate. In my view the appeal may be said to be arguable but its chances of success is a matter to be determined during the hearing of the appeal that is doubtful on the face of it. However, the full hearing of the appeal may bring different inclinations.

8. The applicant argues that bail pending appeal is a right which I do not agree with. An accused or arrested person has a right to bail under Article 49 of the Constitution but which right is limited in that the prosecution may demonstrate compelling reasons. In the event that it so happens, the matter is squarely at the discretion of the court.

9. Bail pending appeal is not a constitutional right of the accused person. Firstly, the applicant has lost the presumption of innocence for he

has already been convicted. Secondly, she has the burden of proving his grounds of appeal to convince the appeal court to quash the conviction in which she/ may not be successful.

10. The applicant in this case was convicted of six (6) counts of various offences. She therefore bears a heavier burden to convince the appeal court that the trial magistrate wrongly convicted her on the six counts.

11. I have considered the grounds relied on by the applicant and they do not disclose existence of any special extra-ordinary circumstances to justify granting bail at this stage.

12. It is my considered view that the applicant has not demonstrated that her appeal has high chances of success or that there exist special or extra-ordinary circumstances.

13. I find no merit in this application and I dismiss it accordingly.

14. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 17TH DAY OF OCTOBER, 2018.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mate for State

Ms. Ngige for Mugambi for Appellant

Appellant present