



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 58 OF 2018

JOSPHAT NYAMAI MULI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The appellant filed a notice of motion dated 9th July, 2018 seeking bail pending the hearing and determination of his appeal. The motion was based on grounds that his appeal has overwhelming chances of success, that he has a permanent abode and not therefore a flight risk, that he has good antecedents and is of high moral standing, that he is ready to abide by the terms set by the court, that he is a law abiding citizen, that there are no compelling reasons not to admit him to bail, that it is in the interest of justice to grant the orders sought, that no prejudice shall be occasioned upon any of the parties if the orders sought are granted and that the applicant shall serve substantial part of the sentence before the appeal is heard.

2. It was the appellant's submission that the trial magistrate made a vital finding that on the day of the alleged offence, the appellant was off duty but failed to analyze and consider the defence of alibi raised by the appellant. That the trial magistrate further made a finding that there was no prosecution witness who saw or placed him on the scene and that the prosecution failed to produce Mutuku wa Nganda whom the complainant claimed was in the room when the offence was being committed. That the trial magistrate convicted him on the basis of the evidence of the minor whose mental capacity was questioned by the state witness. That the trial magistrate ought to have conducted voire dire examination to ascertain the capacity thereof. That in view of the same his appeal has high chances of success. In support thereof he cited **Munjia Michubu v. Republic [2014] eKLR**, **Kyalo Mutua v. Republic [2014] eKLR**, **Johnson Muiruri v. Republic [1983] KLR 447**, **Darius Nyange Mboga v. Republic [2017] eKLR** and **Maripett Loonkomok v. Republic [2006] eKLR**.

3. The respondent on the other hand submitted that while the grant of bail is a Constitutional right, the appellant is now a person convicted and sentenced and no longer enjoys the absolute presumption of innocence. That in admitting such a person to bail, the court ought to, in addition to principles governing admission to bail pending appeal, bear in mind the possible dilemma of resending such a person to prison in the event his or her appeal fails. The respondent submitted that the appellant ought to demonstrate that his appeal has high chances of success and satisfy the conditions for granting bail as set out in **Jeremiah Mwangi Ngatia v. Republic Criminal Appeal No. 110 of 2011, Somo v. Republic (1972) E.A. 476**, **Dominic sibi Peter v. Republic [2014] eKLR** and **Dominic Karanja v. Republic [1986] KLR 612**. It was submitted that the appellant was convicted after a full trial where PW1 positively identified the appellant and narrated what happened to PW2 who was the Deputy Principal. That the clinical officer confirmed penetration. It was submitted that the appellant has not demonstrated any exceptional circumstances that would warrant this court to grant him bail.

4. The substantive law on grant of bail is found under Article 49 (1) (h) of the Constitution which states:

“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.”

5. The above provision is applicable to bail pending trial in which case such an applicant is normally considered innocent until proved guilty. On the other hand, in an application for bail pending appeal, an applicant is one who has already been found guilty in which case the principle for consideration is whether; 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. See: **Chimambai v. Republic [1971] E.A. 343** where the court held that:

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

And **Dominic Karanja v. Republic [1986] KLR 612** where the Court of Appeal held:

“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.”

6. I have taken the liberty to peruse the petition of appeal, the proceedings and judgment of the trial court. Without preempting the outcome of the appeal, I find that there may be no absolute success in the appeal. Secondly, I note that other than discussing his appeal, the appellant has not established any exceptional or unusual circumstances that exist for the court's consideration. I am not persuaded that the appellant has raised sufficient grounds to warrant a grant of bail pending appeal. The application is dismissed. The parties herein are hereby directed to proceed and work towards setting down the appeal for hearing and disposal.

Orders accordingly.

Dated and Delivered at Machakos this 13th day of **December**, 2018.

D. K. KEMEI

JUDGE