



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITUI
CRIMINAL APPEAL NO. 54 OF 2015

FESTUS MWONGELA MUTUKU.....APPLICANT

VERSUS

REPUBLIC RESPONDENT

R U L I N G

1. By way of Notice of Motion dated **9th November, 2015**, the Applicant seeks to be released on bail pending appeal and/or in the alternative he seeks an order suspending the whole or part of the sentence imposed by the Lower Court in **Criminal Case No. 584 of 2012** pending hearing and determination of the appeal.

2. The application is premised on grounds that;

a. The appeal has high chances of succeeding as:

i. There were manifold inconsistencies and contradictions in the evidence of the Prosecution witnesses.

ii. The charges were not proved beyond any reasonable doubt.

iii. The sentence imposed was excessive.

b. The Applicant is likely to serve a substantial part of the sentence before the appeal is heard and determined.

c. The Applicant is a family man who cannot abscond. He has sureties and is entitled to bail under **Section 123(1)** of the **Criminal Procedure Code** and **Article 40(1)(h)** of the **Constitution**.

3. In support of the application is an affidavit deposed by the Applicant who basically reiterates what is stated in the grounds upon which the application is premised.

4. In his submissions, Counsel for the Applicant, **Mr. Kimuli** stated that at trial the Applicant who was on bond did not abscond. He is apprehensive that he will serve a substantial part of the sentence unless released on bail.

5. In response thereto, **Mr. Njogu** learned Counsel for the State opposed the application. He relied on the case of **Munjia Michubu vs. Republic, (2014) eKLR** where the court cited the Court Appeal decision of **Jivraj Shah vs. Republic (1984)KLR 605** where it was stated that the principle consideration is if there

exists exceptional circumstances. He argued that the fact that the Applicant did not abscond at trial is not a ground to have him released on bail. He has a duty of demonstrating that the appeal will succeed.

6. It is not in dispute that the Appellant fulfilled his obligation upon which he was released on bail at the trial stage. At the stated stage of trial bail is automatic unless there are compelling reasons requiring the individual to be incarcerated. **(See Article 49(1)(h) of the Constitution of Kenya, 2010).**

7. The application herein has been made at an appellate stage. At this point in time, the Applicant having been found guilty of charges, convicted and sentenced there is no presumption of innocence. Conditions to be considered when it comes to releasing the Applicant on bail differ from those envisaged in **Article 49(1)(h) of the Constitution.**

8. In the case of **Jivraj Shah vs. Republic (1986) KLR 605** the Court of Appeal held:

“1. 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.”

9. The Applicant was charged and convicted of **three (3) counts of Stealing by Servant** and sentenced to serve **five (5) years imprisonment** in each count. Sentences were to run concurrently. I have perused the strength of evidence adduced. It cannot be dismissed as being weak.

10. It is contended that the Applicant is likely to serve a substantial part of his sentence before the appeal is heard. It is apparent that the Applicant deliberately chose not to prosecute his appeal expeditiously. It is within his knowledge that workload at an appellate stage in this station is negligible. Had he prosecuted the appeal instead of the application to be released on bail, this court would in actual sense have delivered judgment in the matter today.

11. In the result, I find the application lacking merit. It stands dismissed.

12. It is so ordered.

Dated, Signed and Delivered at Kitui this 13th day of September, 2016.

L. N. MUTENDE

JUDGE