



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**CRIMINAL APPEAL NO. 31 OF 2016**

*(From Original Conviction and Sentence in Criminal Case No. 3292 of 2013 of the SRM's Court at Maua)*

**HENRY KOBIA KABERIA..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**RULING**

The appellant, **Henry Kobia Kaberia** was convicted of the offence of grievous harm contrary to Section 234 of the Penal Code and was sentenced to 3 years imprisonment on 21/7/2010. He has preferred an appeal against both conviction and sentence. He has also filed an application dated 28/7/2016 seeking to be released on bail pending the hearing and determination of the appeal. The appellant is represented by Mr. Muriuki Advocate.

The grounds upon which the application is predicated are that the applicant is frail, suffering from chronic diabetes and needs specialized treatment. Mr. Muriuki also urged that due to the workload at this station, the appellant is likely to serve the 3 years before the appeal is heard; that the appellant was out on bond in the lower court before and even after conviction as the parties attempted at a reconciliation which failed and lastly that the appeal has high chances of success.

In reply, Mr. Mulochi, Counsel for the Respondent urged that in such an application, the determinant factor is whether the appeal has high chances of success; that he has perused the lower court proceeding and that the magistrate had observed that the case was riddled with contradictions yet he went ahead to convict; that since the appellant is said to be unwell, then the appeal has high chances of success.

There is now a host of authorities on what principles the court will consider in such an application for bail pending appeal. Some of these principles were espoused in **Abdi v Rep (1991) 1 KLR 171**, where the court held:

1. ***"An application for bail pending appeal is to be granted in rare and exceptional circumstances. (Emphasis mine)***
2. ***To admit an applicant to bail is the discretion of the court which must be judicially exercised keeping in sight all the facts relating to the application, all the matter material to the trial at the lower court, the grounds submitted in the petition and the chances of success and the nature of the trial. See also Ademba v Rep (1983) KLR 442.***
3. ***The time it would take for appeal to be prosecuted and determined is by itself not a sufficient***

**ground.**

4. In *Jivraj Shah v. Rep (1986) KLR 605* the court considered another ground to be:

*“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.”*

In *Some v Rep (1972) EA 4<sup>TH</sup>*, the court held that the most important ground is that the appeal has overwhelming chances of success. The applicant did not specifically allude to any specific evidence in support of that ground. It is only the learned State Counsel who stated that the court had observed in its judgment that the prosecution evidence was riddled with contradictions. But a reading of the judgment of the trial court does disclose that the court observed that the contradictions were not material viewed together with all the evidence. In my view, the applicant has not demonstrated that his appeal has high chances of success.

The applicant having been found guilty and serving sentence, the onus rests on him to demonstrate that his appeal has high chances of success. A cursory perusal of the proceedings and judgement of the trial court, does not show that the decision of the trial court is without basis, and that the appeal might result in an outright acquittal.

As regards the ground that the applicant was on bail in the lower court, before and after conviction, that may not be relevant now because, he has already been convicted and sentenced.

In such an application, the court is called upon to exercise its discretion, which it has to exercise judiciously. Ordinarily, the allegation that one is sick is not a ground for grant of bail pending appeal. This is because every other convict would raise the same ground. The applicant has to demonstrate that there exist exceptional circumstances. The applicant claims to have chronic diabetes. He raised the same ground in his mitigation. However, he has not availed any documentary evidence to support that allegation. The applicant was sentenced to 3 years imprisonment on 29/7/2016, 3 months ago. I do take note of the fact that the proceedings are already typed and what is left is the preparation of the record of appeal and admission to hearing. If that is done, this court does not envisage there being a delay in hearing of the appeal. Appeals are scheduled to be heard during the week of 14<sup>th</sup> to 29<sup>th</sup> November, 2016.

For the above reasons, this court finds that the application lacks merit and it is hereby dismissed. Let Counsel prepare the record of appeal, place it before the Judge for admission and it will be listed for hearing next month.

It is so ordered.

**DATED, SIGNED AND DELIVERED THIS 3<sup>RD</sup> DAY OF OCTOBER, 2016.**

**R.P.V. WENDOH**

**JUDGE**

**3/10/2016**

**In the Presence of:**

Mr. Mulochi for State

Mr. Muriuki for Accused

Ibrahim/Peninah, Court Assistants

Present, Accused