



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL APPEAL NO.48 OF 2016**

**JAPHETH MURIUNGI M' ANAMPIU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The applicant herein. **Japheth Muriungi M'Anampiu** was convicted of the offence of **obtaining money by false pretences contrary to Section 313 of the Penal Code** and **personating contrary to Section 382 of the Penal Code** and was sentenced as follows: **Count I** – Fine of KShs.200,000/= in default, 12 years imprisonment; **Count II** – Fine of KShs.1,000,000/= in default, 2 months imprisonment. Sentences were ordered to run consecutively.

The appellant was aggrieved by the said conviction and sentences thus provoking the instant appeal via a Petition of Appeal filed in court on 5<sup>th</sup> September 2016.

By a Notice of Motion Application filed in court in court on 5<sup>th</sup> September 2016, he urged the court to grant him bail pending the hearing and determination of the intended appeal.

The said application is premised on the grounds that the Applicant is the sole breadwinner fending for his unemployed wife and two children who are minors; that if he continues to remain in prison the affairs of his family will be jeopardized; that given the time it will take to hear the appeal and the nature of the sentence, if successful, the appeal will be rendered nugatory.

Mr. Otieno, Counsel for the applicant added that the application has high chances of success and that the Applicant had been on bond in the lower court and attended court without fail.

Mr. Mulochi, Learned State Counsel for the State in opposing the application urged that the primary consideration in applications of this nature is whether the appeal has high chances of succeeding. He further urged that the evidence against the Applicant was overwhelming and that the appeal had not the slightest chance of succeeding. He urged the court to decline the application.

I have carefully considered this application and the rival submissions by the parties.

There is a wealth of authorities on the conditions precedent to the grant of bail pending appeal some of

which I will refer. In Abdi v Rep (1991 KLR 171) 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.**

**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. Republic (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.”**

The applicant has already been found guilty by the trial court and is serving sentence. It is unlike an application for bail pending trial where the applicant has a constitutional right to be considered innocent until proved guilty. It is irrelevant that the applicant was on bond in the lower court. Then he had not been found guilty by a competent court of law.

The applicant had deposed that his appeal has high chances of success. In Some v Rep 1972 EA 476 court held:

**“iii) the most important ground is that the appeal has an overwhelming chance of being successful; in that case there is no justification of depriving the applicant of his freedom.”**

The onus rests on the applicant to demonstrate that his appeal has high chances of success. In this case the applicant did not attempt to discharge that burden. A cursory perusal of the proceedings and judgment of the trial court does not show that the decision of the trial court was without basis and the appeal may result in an outright acquittal. As to whether the sentence may be served before the Appeal is heard, I have observed that the applicant was only convicted on 25<sup>th</sup> August 2016 and so far, he has served barely 3 months. The proceedings have already been typed and the record of appeal is ready. I do not anticipate any delay in the hearing of the appeal if the appeal is admitted to hearing and given a hearing date.

The Applicant claims to be the sole bread-winner and that his family will suffer due to his continued incarceration. But that is not one of the considerations in such an application.

In Dominic Karanja V Rep 1986 KLR 612, the court of appeal said:

**“(a) The most important issue was that if the appeal had such overwhelming chances of success, there was 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.”**

In such an application for bail pending appeal, the court is called upon to exercise its discretion which is to be exercised judicially. From the circumstances of this case, the applicant has not satisfied any of the conditions precedent for the grant of bail pending appeal. I decline to grant the application and the applicant should remain in prison pending the hearing and determination of his appeal. The application is hereby dismissed.

**DATED, SIGNED AND DELIVERED THIS 10<sup>TH</sup> DAY OF NOVEMBER, 2016.**

**R.P.V. WENDOH**

**JUDGE**

**10/11/2016**

**PRESENT**

Mr. Mulochi for State/Respondent

Ms. Nelima Holding Brief for Mr. Otieno for Applicant

Ibrahim/Peninah, Court Assistants

In Person, Applicant