



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CRIMINAL CASE NO. 23 OF 2015

ELIUD MUKHWANA APPLICANT

VERSUS

REPUBLIC..... RESPONDENT

RULING

1. The appellant herein **Eliud Mukhwana** was convicted and sentenced for the offence of causing grievous harm for 3 years on the 16th of February, 2012. Being aggrieved by the conviction and sentence he preferred this appeal, now pending hearing and determination.

2. The application is dated 4th March 2015 brought under Section 357 of the Criminal Procedure Code. The appellant is seeking to be released on bond pending hearing of the appeal on the grounds that, the appeal is arguable with an overwhelming chance of success and he was on bond during trial.

His application is supported by an affidavit dated 4th March 2015 reiterating his arguments that his appeal has an overwhelming chance of success, he was on bond during trial, he is willing to abide by the terms set and the appeal will be rendered nugatory and/or an academic exercise if he serves the sentence.

In a further affidavit filed on the 13th of March 2015, the applicant stated that he has been sick since his incarceration.

Mr. Otsiula appearing for the applicant reiterated the above points adding that the appellant is 67 years.

3. The application was opposed by Miss Koech appearing for the State. She filed grounds of opposition stating that the appeal does not have any chance of success and there are medical facilities available to prisoners. In her submission, argued that the appellant is likely to abscond if released considering the sentence now facing him.

4. I have considered the rival submissions by counsel on record. So as not to prejudice the appeal I will not comment on whether there is an overwhelming chance of success or not but will safely say that this is an arguable appeal. In arriving at this ruling I am 4. guided by the following decisions.

Dominic Karanya vs. Republic 1986 [KLR] at page 612 where the Court of Appeal stated inter alia

1. ***“The most important issue was that if the appeal had such overwhelming chances of success there is no justification for depriving the appellant his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances.***

2. *The previous good character and the hardships, if any facing the family were not exceptional or unusual factors. His health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners.*
3. *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 *Abdi vs. Republic [1991] KLR at 171* the court held inter alia,

1. *“An application for bail pending appeal is to be granted in rare and exceptional circumstances.*
2. *To admit an applicant to bail is the decision 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. The time it would take for the appeal to be prosecuted and determined is by itself not a sufficient ground.”*

5. The applicant by virtue of the sentence meted out lost the presumption of innocence. He has a sentence hanging over his head and the consideration for the bond is different from consideration for one awaiting trial.

The applicant cited 3 reasons

- Health
- Overwhelming chances of success
- Willingness to abide by terms of bond.

6. From the above cited authorities the above 3 reasons do not qualify an admission to bail. The prison has medical facilities and in cases of extreme need prisoners are availed health facilities in other institutions. Second it cannot be said that one can deduce from the grounds a clear chance of success, this is a matter that will be argued at some stage for the courts determination. Thirdly there are no exceptional circumstances demonstrated. Guided by the authorities cited above this application must fail. It is therefore dismissed.

Dated at Bungoma this 12th day of May 2015.

ALI-ARONI

JUDGE.