

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.69 OF 2015

PETER KAMAU NDEGWA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Peter Kamau Ndegwa was convicted of the offence of **causing grievous harm** contrary to **Section 234** of the **Penal Code**. He was sentenced to life imprisonment. He was further convicted of assault causing actual bodily harm. He was sentenced to serve three (3) years imprisonment. Aggrieved by his conviction and sentence, the Applicant has filed an appeal to this court. The appeal is pending hearing and determination. Pending the hearing and determination of the appeal, the Applicant has applied, pursuant to the provisions of **Section 356** of the **Criminal Procedure Code** to be granted bail pending the hearing of the appeal. The grounds in support of the application are stated on the face of the chamber summons. The Applicant contends that his appeal is arguable and has overwhelming chances of success. He stated that he was an old man aged more than 70 years and was currently ailing with hypertension. His medical condition had deteriorated since his conviction and incarceration. The application is supported by the annexed affidavit of Peter Mwaura Kamau, the Advocate of the Applicant.

During the hearing of the application, Mr. Njiru for the Applicant reiterated the contents of the application. He submitted that the sentence that was meted out on the Applicant was excessive. The Applicant was sick. His condition could not be managed while in prison. The Applicant was of the view that his appeal had a high chance of success. The Applicant promised to abide by any terms that the court may impose to secure his release on bail pending appeal. For added measure, learned counsel stated that the Applicant was not a flight risk. Ms. Kimiri opposed the application. She submitted that the Applicant had not established sufficient grounds to enable the court exercise its discretion in his favour. She stated that the prosecution had established its case on the charges of causing grievous harm and assault to the required standard of proof. She submitted that the Applicant had assaulted his sister-in-law over a land dispute with his brother. He caused the complainant to sustain a fracture of the skull. The complainant is now permanently incapacitated as a result of the assault. She is paralyzed. She has lost the power of speech to the extent that she could not even testify during trial. She was of the view that the punishment fitted the crime. The Applicant's sickness was not a sufficient ground for the Applicant to be released on bail pending appeal. She urged the court to dismiss the application.

This court has carefully considered the rival submission made by the parties to this application. The principles to be considered by this court in deciding whether or not to release the Applicant on bail pending appeal were set out by the Court of Appeal in **Jivraj Shah –vs- Republic [1986] KLR 605** at page 606:

*“There is not a great deal of local authority on this matter and for our part such as we have seen and heard tends to support the view that the principal consideration is if there exist exceptional or unusual circumstances upon which this court can fairly conclude that it is in the interest of justice to grant bail. If it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of some substantial point in law to be urged, and that the sentence or a substantial part of it, will have been served by the time the appeal is heard, conditions for granting bail will exist. The decision in **Somo –vs-***

Republic [1972] E A 476 which was referred to by this court with approval in Criminal Application No.NAI 14 of 1986, Daniel Dominic Karanja –vs- Republic where the main criteria was stated to be the existence of overwhelming chances of success does not differ from a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed. The proper approach is the consideration of the particular circumstances and the weight and relevance of the points to be argued. It is almost self-defeating to attempt to define phrases or to establish formulae. There is a helpful passage in Archbold, Criminal Pleading Evidence and Practice, 41st Edition page 783, paragraph 7 – 86.”

In the present application, having perused the grounds of appeal and the judgment annexed to the application, it was clear to this court that *prima facie*, the appeal lodged by the Applicant against conviction may not likely to succeed. This court is of the view that the Applicant’s appeal in that regard does not exhibit any overwhelming chances of success. However, on sentence the Applicant may have a case. His appeal may result in reduction of the period that he has been sentenced to serve in prison. It may not result in the release of the Applicant from prison. This court agrees with the State that the fact that the Applicant is ailing from a controllable medical condition of hypertension does not constitute exceptional or unusual circumstance that would lead this court to hold that the Applicant should be released on bail pending appeal. That condition can be managed and indeed is manageable while the Applicant is serving his term in prison.

In the premises therefore, this court holds that the Applicant failed to establish a case for this court to release him on bail pending appeal. His application is dismissed. However, the Applicant is hereby directed to prepare and file the record of appeal within thirty (30) days of today’s date so that the appeal can be admitted to hearing and thereafter listed for hearing as a matter of priority. It is so ordered.

DATED AT NAIROBI THIS 14TH DAY OF OCTOBER 2015

L. KIMARU

JUDGE