



**No. 296/2014**

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL MISCELLANEOUS NO. 181 OF 2013**

**FRANCIS MAKUU KIVINDYO....1<sup>ST</sup> APPLICANT**

**MUNYASYA KASILU.....2<sup>ND</sup> APPLICANT**

**MATULO PATRICK .....3<sup>RD</sup> APPLICANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**RULING**

1. In an Application dated 27<sup>th</sup> September, 2013, the applicants herein seek to be released on bail pending appeal.
2. Application is premised on grounds that the applicants have been convicted and sentenced to life imprisonment; being dissatisfied with the judgment and sentence thereof an appeal shall be lodged.
3. In support of the application is an affidavit deponed by **Okenyo Omwanza George**, Counsel, retained to conduct the matter who avers that the appellants are dissatisfied with the conviction and sentence and intend to lodge an appeal that has a high probability of success; the appellants are apprehensive that their constitutional rights will be traversed and they are sole bread winners of their respective families. Further he stated that the 1<sup>st</sup> applicant in particular suffers from an asthmatic condition whereby he requires to see a specialist twice a month.
4. The application was canvassed by way of written submissions. It was submitted on behalf of the applicants that the appeal has an overwhelming chance of success; bail is a constitutional guarantee and the applicants will not abscond.
5. In a response thereto, the State opposed the application. It was submitted that the applicants were no longer suspects therefore the presumption of innocence no longer applied. They had not demonstrated that their appeal had overwhelming chances of success and there was no demonstration that the 1<sup>st</sup> applicant was asthmatic.
6. Conditions that would guide a court in a case of bail pending appeal were considered in the case of **Dominic Karanja versus Republic [1986] KLR 612** where the Court of Appeal held thus-

***“i) the most important issue ... is if the appeal has such overwhelming chances of success, there is no justification for depriving the applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual***

*circumstances.*

*ii) The previous good character of the applicant and hardships, if any, facing his family were not exceptional or unusual factors. Ill health perse would also not constitute an exceptional circumstance where there existed medical facilities for prisoners.*

*iii) A solemn assertion by an applicant that he will not abscond, even if it is supported by sureties, is not sufficient ground for releasing a convicted person on bail pending appeal”*

7. First and foremost, I wish to point out that the applicants were convicted and sentenced to serve life imprisonment for the offence of causing grievous harm contrary to **Section 234** of the **Penal Code** on the **18<sup>th</sup> September, 2013**. Submissions to the application were filed on the **1<sup>st</sup> November 2013**. Until then there was no indication if an appeal had been preferred against the decision of the Lower Court.
8. I have perused proceedings of the Lower Court where the trial magistrate analyzed evidence adduced prior to reaching a conclusion to convict the applicants. It cannot be said with certainty that the appeal has overwhelming chances of succeeding.
9. Bail is a constitutional right as stipulated in **Article 49** of the **Constitution of Kenya 2010** to persons who are arrested and presumed innocent, but for persons who are convicted like the instant applicants it cannot be said to be automatic.
10. Whether or not the applicants may abscond is not a condition to be considered at this stage. It has been alleged that the 1<sup>st</sup> applicant has ill-health. No medical document has been annexed to establish the allegation. In any case there are medical facilities in prison that he would benefit from if indeed he is ill.
11. From the foregoing the application lacks merit. Accordingly, it is dismissed.

**DATED, SIGNED and DELIVERED at MACHAKOS this 3<sup>RD</sup> day of JUNE, 2014**

**L.N. MUTENDE**

**JUDGE**