



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL APPEAL NO. 11 OF 2013

Wendoh, J

HASBON KIRUJA MURITHI.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

RULING

The applicant herein is Hesborn Kiruja Murithi who was convicted of the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act number 3, 2006. He was sentenced to serve life imprisonment by SRM'S Court Nkubu. The appellant filed an appeal to this court on 21.2.2013 by way of petition of appeal dated 10.2.2013.

By the undated Chamber Summons filed in court on 5/8/2014, he prays that this court do release him on bond pending the hearing and determination of his appeal on grounds that he is ailing from a complex disease whose medication cannot be offered in the prison; that this appeal has high chances of success and that he had been on bond in the lower court where he attended faithfully. He reiterated the same grounds in the affidavit sworn in support of the application. He promised to abide by any orders that the court will grant.

The application was opposed by the Learned Counsel for the state who urged that the applicant had not demonstrated what kind of disease he suffers from which cannot be treated in the medical facilities provided to inmates in the prison. He also argued that since he did not have the record of appeal he was not in a position to tell whether or not the appeal has high chances of success.

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. Republic (1991 KLR 171)** the court held.

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 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.

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 Appellant has deposed that he is suffering from a complexity of diseases. He did not disclose which diseases, they were. He told the court that his treatment documents were taken away during a search at the prison. This court has no idea if the appellant has any complex disease that cannot be taken care of in the medical facilities available in the prisons. The court is aware that there are medical facilities in prison where complex diseases are treated and if every prisoner were to come up with allegations of suffering from complex diseases and therefore should be released, it would mean emptying our prisons of all the inmates because every other one would complain of illness. Whereas I sympathize with the applicant's condition if any, he has not shown that his condition exceptional or unusual.

This is an application for bail pending appeal. 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. In this application, one of the principle consideration is whether the appeal has a likelihood of success. See Ademba V. Republic (1983) KLR442. The applicant had deposed that his appeal has high chances of success. In Some V. Republic 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.”

In Dominic Karanja V. Republic 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.**

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. The fact that he says that he was on bond in the trial court and that he will abide by the courts order is not sufficient to have him released on bond pending appeal. I have earlier observed that the applicant was only convicted in 2013 and has only served 1 ½ years. The proceedings have already been typed and the appeal has been admitted for hearing. I do not anticipate any delay in hearing the appeal.

In such an application for bail pending appeal, the court is called upon to exercise its discretion which is to be exercised judicially. In the exercise of my discretion, I am satisfied that the applicant has not satisfied any of the conditions required for grant of the 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 AT MERU THIS 16th DAY OF OCTOBER 2014.

R. P .V. WENDOH

JUDGE

.....Appellant

.....Respondent

.....Court Assistant