



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 28 OF 2014

KENNEDY MWENDA NKANATA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

By a Notice of Motion Application brought pursuant to section 357 of the Criminal Procedure Code CAP 75 of the Laws of Kenya, the appellant has sought to be granted Bail pending the hearing of the Appeal in High Court Criminal Case Number 28 of 2014.

The said application is premised on the following grounds:

- 1. The applicant has been convicted and sentenced to death by the Hon Kimingi CMS in Criminal Case Number 965 of 2011.**
- 2. The applicant being dissatisfied with the judgment and sentence has lodged an appeal vide High Court Criminal Appeal No. 965 of 2011.**
- 3. Given the time it will take to hear the appeal and the nature of the sentence, if successful the appeal will be rendered nugatory.**
- 4. The applicant has a medical condition that may jeopardize him if he continues to remain in prison.**

Mr. Otieno Learned Counsel for the appellant contended that the appeal has high chances of success and that the appellant has a fixed abode and that he will attend court wherever required. Mr. Kariuki for the state on the other hand intimated to court he did not object to the application as the appellant had all long attended court throughout his trial and stated that leaves it to the court.

In the case of **Abdi V. Republic (1991 KLR 171)** the court held as follows as regards an application for bail pending appeal:

- 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.

The time it would take for appeal to be prosecuted and determined is by itself not a sufficient ground.

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 arrested persons have a constitutional right to be released on bond or bail under Article 49 (1) (h) of the Constitution. The presumption of innocence against the appellant at this stage has already been lost.

In a more recent case which was decided after the promulgation of the new Constitution, namely **JOSEPH MAINA KARIUKI V REPUBLIC NAIROBI CRIMINAL APPEAL NO. 18 OF 2010**, the Court of Appeal sitting in Nairobi while rejecting an application for bail pending appeal held inter alia that indeed the Constitution gave the right to be granted bail. However, that right was for persons arrested in respect of alleged crimes and was not applicable to those already convicted because the convicted ones had lost the presumption of innocence. I am guided by the above authority.

Counsel for the appellant deposed that the appellant suffers severe asthma a medical condition that requires him to see a specialist periodically and that his health is likely to deteriorate if he continues to be incarcerated. The court is aware that there are medical facilities in prison where complex diseases are treated. Whereas I sympathize with the applicant's condition, he has not shown that his condition is exceptional or unusual.

The contention by the State Counsel that he was not opposing the application for the reason that the appellant during trial attended court without fail is not sufficient reason to have him released on bond pending appeal. He should have demonstrated that the appeal has high chances of success.

The onus rests on the applicant to demonstrate that his appeal has high chances of success. There was an attempt made by the applicant to demonstrate that the appeal has high chances of success. 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 proceedings in this case have already been typed and I do not anticipate any delay in the hearing of this appeal.

In the end result and for the above reasons, I find 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 in its entirety.

DATED SIGNED AND DELIVERED THIS 5TH DAY OF DECEMBER, 2014

R. P .V. WENDO

JUDGE

.....**For accused**

.....**For State**

.....**Court Assistant**

.....**Accused**

