

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.116 OF 2014

(An Appeal arising out of the conviction and sentence of M. KIVUTI – RM delivered on 8th September 2014 in Kiambu CMC. CR. Case No.2927 of 2013)

PETER KIARIEAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Appellant, Peter Kiarie was charged with the offence of **malicious damage to property** contrary to **Section 339(1)** of the **Penal Code**. The particulars of the offence were that on 25th November 2013 at Kahawa West in Nairobi County, the Appellant, together with others not before court, willfully and unlawfully destroyed or damaged a kiosk, the property of Leah Wanjiku valued at Kshs.30,000/-. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged and sentenced to serve eight (8) months imprisonment. The Appellant was aggrieved by his conviction and sentence and has filed an appeal to this court.

Contemporaneous with filing the appeal, the Appellant filed an application pursuant to **Sections 356 and 357** of the **Criminal Procedure Code** seeking to be released on bail pending appeal. The application is supported by the annexed affidavit of Simon Gitonga Wachira, the advocate of the Appellant. The Appellant states that his appeal has overwhelming chance of success. He impressed upon the court the fact that if he is not released on bail pending appeal, his appeal would be rendered nugatory because by the time the appeal is heard, he would have served his term in prison. The Appellant further stated that he suffers from mental disease which requires special care and attention. He attached a copy of a medical report prepared by his doctor which indicated that the Appellant suffers from mood disorder and HIV induced psychosis. The report indicated that the Appellant requires regular medication and follow up supervision. The application was opposed. Ms. Njuguna for the State explained that the Appellant's appeal did not have an overwhelming chance of success. This was because the prosecution had established its case against the Appellant on the charge of **malicious damage of property** to the required standard of proof. She submitted that there existed a land dispute between the Appellant and the complainant. The Appellant chose to take the law in his hands by demolishing the complainant's kiosk. Counsel was particularly irked that the Appellant had not expressed remorse throughout the trial. It is on these grounds that she stated that the court should decline the Appellant's application to be released on bail pending appeal.

The court has considered the facts of this application. For the Appellant to succeed in his application to be released on bail pending appeal, he must establish that he has an appeal with overwhelming chance of success. He must also establish the existence of exceptional or unusual circumstances that will persuade this court to exercise its discretion in his favour. Another factor that the court will take into consideration is the length of custodial sentence that the Appellant has been ordered to serve. In the present application, the Appellant argued that his appeal had an overwhelming chance of success. The State is of contrary view. This court did not have the benefit of reading the proceedings before the trial court. The Appellant only annexed a copy of the judgment of the trial court to the affidavit in support of his application. This court cannot therefore state, one way or the other, if the Appellant's appeal has an overwhelming chance

of success. As regard whether there exists exceptional or unusual circumstances, this court was persuaded by the argument advanced by the Appellant that if he is not released on bail pending appeal, by the time his appeal is heard, he would have served the custodial sentence that was imposed by the trial court. The court also took into account the health of the Appellant.

In the premises therefore, this court holds that the Appellant established a case for this court to release him on bail pending appeal on condition that he deposits a cash bail Kshs.30,000/-. He shall be required to appear before the Deputy Registrar of this court, for mention, at least once a month until the hearing of the appeal. The Appellant shall also be required to prepare and file the record of appeal within sixty (60) days of the date of this ruling. It is so ordered.

DATED AT NAIROBI THIS 5TH DAY OF DECEMBER 2014

L. KIMARU

JUDGE