



REPUBLIC OF KENYA

High Court at Eldoret

Criminal Appeal 140 of 2012

EDWIN ODHIAMBO OKOTH ..... APPLICANT

VERSUS

REPUBLIC ..... RESPONDENT

*(Being an appeal from original conviction and sentence in the Judgment of Hon. F. N. Kyambia  
(Principal Magistrate) in Eldoret Chief Magistrate's Court Criminal Case No. 5852 of 2010)*

**RULING**

In the application dated 26th September, 2012 the Appellant/Applicant prays that he be admitted to bail pending the hearing and determination of the appeal.

His two main grounds are that, the application has overwhelming chances of success and that there are exceptional circumstances that exist to warrant the grant of bail.

The application is supported by the affidavit of the Applicant sworn on 26th September, 2012.

In submissions, Counsel for the Applicant reiterated the content deponed in the Supporting Affidavit.

In both the Supporting Affidavit and the oral submissions by counsel for the Applicant, only one ground is raised; that the appeal has high chances of success. In paragraph six (6) of the Supporting Affidavit, it is deponed that the evidence of the P3 form could not sustain the conviction, the medical evidence rendered could not support the charge of defilement and that the evidence of the witnesses who testified was not corroborated to sustain a conviction.

On the other hand, the state counsel vehemently opposed the application arguing that the appeal is hopeless and is unlikely to succeed. He submitted that the P3 form by the doctor corroborated the evidence of the complainant and it provided sufficient prove for the offence with which the Appellant was charged.

In the **CRIMINAL APPLICATION NO. 5 OF 2008 (NBI) BONIFACE NGANGA -VS- THE REPUBLIC (on application for bail pending the hearing and determination of appeal in CRIMINAL APPEAL NO. 13 OF 2008)**, the Court of Appeal declined to grant bail pending appeal on grounds that the Applicant had not demonstrated any exceptional and unusual circumstances to warrant his being released on bail pending appeal. In that application, Counsel for the Applicant had argued that, the appeal had high chances of success, that the Magistrate who had heard the witnesses is not the one who wrote the Judgment and that the Applicant was in a poor state of health and he required further surgery.

In dismissing the application, the Judges said:-

**“The likelihood of success in the appeal is a factor to be taken into consideration. But it must also be reiterated that an applicant seeking bail has been convicted by a properly constituted court and is undergoing punishment because of the conviction which stands until it is set aside.”**

The court, in the application, referred to the cases of **ADEMBA -VS- R (1983) KLR, 442** and **MUTUA -VS- R (1985) KLR, 497**.

In the **ADEMBA** case, court held, inter alia, that:-

- 1. Bail pending appeal may only be granted if there are exceptional or unusual circumstances.**
- 2. The likelihood of success in the appeal is a factor taken into consideration in granting bail pending appeal. Even though the Appellant showed serious family and personal difficulties, in view of the unlikelihood of success in this appeal, the application could not succeed.**

In the **Mutua** case, court held as follows:-

- “1. The main problem was whether the appeal had overwhelming chances of success for if it did not, then this Court would not grant bail pending the appeal by virtue of the Court of Appeal Rules, rule 5 (2) (a).**
- 2. The test was whether there were exceptional or unusual circumstances, the most important being whether the appeal had overwhelming chances of being successful.**
- 3. It must be remembers that an applicant for bail has been convicted by a properly constituted court and is undergoing punishment because of that conviction which stands until it is set aside on appeal. It is not wise to set the Applicant at liberty either from the point of view of his welfare or of the state unless there is a real reason why the court should do so.**
- 4. There was no overwhelming probability that the sentence would be reduced since the Appellate court could not deal with the issue of sentence, and on the other grounds, it was not apparent as a matter of law that the Appellant would succeed.”**

A scrutiny of the above case law clearly demonstrates that courts are cautious not to address themselves as to the merit of the pending appeal for obvious appeal; that an appeal may be disposed of at an interlocutory stage. My view is similar. I would be extremely cautious to rule that an appeal has high chances of success, unless on the face of it, such conclusion should be inferred.

A similar scenario obtains here as in the case law I have referred to. No exceptional circumstances have been demonstrated by the Applicant to warrant his being granted bail pending the hearing of the appeal.

In the result, this application is dismissed.

**DATED and DELIVERED at ELDORET this 2nd day of May, 2013.**

**G. W. NGENYE – MACHARIA**

**JUDGE**

Mr. Mwinamo Advocate for the Appellant/Applicant

Mr. Mulati for the State/Respondent