



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**MISCELLANEOUS CRIMINAL APPLICATION NO. 96 OF 2012**

**AGGREY MASINDE KISEMBE ..... APPLICANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**RULING**

By way of Chamber Summons dated 13th July, 2012, the Applicant prays that he be released on bond pending the hearing and determination of the appeal. It is supported by the Applicant's affidavit sworn on 17th July, 2012 and a further affidavit also sworn by himself on 20th November, 2012.

In the Supporting Affidavit, he depones that he pleaded guilty due to coercion by the arresting officer and that he suffers from a hearing impairment so that at the time he took the plea, he did not hear and comprehend the charges read to him.

In the Further Affidavit, he depones that his appeal has high chances of success. That he is currently on anti-retroviral medication for which he consistently attends therapy. That since his incarceration in prison, his health has deteriorated as the prison has not accorded him conducive environment to continue attending the therapy.

Mr. Mulati, the prosecuting counsel opposed the application. He submitted that it was not true that the Applicant has a hearing problem as proceedings before the lower court were conducted in the Kiswahili language which he said he understood. That accordingly, the Appellant understood what was happening in court.

The Applicant filed the application in person. He thereafter instructed M/s. Athung'a and Company Advocates to act for him. It is these advocates who filed the Further Affidavit on his behalf. At the time of hearing the application, a Mr. Obina Advocate appeared for the Applicant while Mr. Mulati was the prosecuting counsel. The said application was canvassed on 9th May, 2013.

I have now considered the respective submissions made before me. It is an established principle that in an application for bond/bail pending appeal the Applicant must demonstrate that there exists exceptional circumstances that warrant the court to grant him the bond. It is the discretion of the court to consider what these exceptional circumstances are. In lieu thereof, the Applicant must

demonstrate that the appeal has a very high chance of success.

In this application, the applicant submits that he brings this application on two main grounds. First that the appeal has a very high chance of success and second, that he is ailing and his condition may not improve under the prison environment.

In **ADEMBA -VS- R (1983) KLR, 442**, the Court held:-

**“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.”**

I have had an opportunity of looking at the Memorandum of Appeal vis a vis the proceedings of the lower court. Whereas it may be dangerous to analyse the merits of an appeal in an application of this nature, it must be noted that, a court will rule as to the likelihood of the appeal succeeding if, prima facie, it is obvious that the prosecution's case was hopeless. In this instance, the Appellant was convicted on a plea of guilty and in my view, prima facie, the court strictly followed the procedure of taking a plea.

I am therefore unable to find for the Applicant in this respect.

As regards his health in **MUTUA -VS- R (1985) KLR, 497**, it was held that **“it was 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 reason why court should do so.”**

Matters of health constitute issues of welfare of the individual. They are not exceptional and unusual circumstances as to warrant the grant of bail, unless for very good reason. In this respect, the treatment the Applicant is undergoing, is offered in all government health facilities, and to a large extent, for persons financially disabled for free. The Applicant can easily access the Anti Retroviral drugs even while in prison. I would not therefore find it prudent to accord him bail/bond.

I do accordingly find that the Applicant has not demonstrated any exceptional and unusual circumstances. I do accordingly dismiss the application.

I direct that the Deputy Registrar facilitates the immediate admission of the pending appeal so that the same is heard before the Appellant completes serving his jail term.

**DATED and DELIVERED at ELDORET this 4th day of July, 2013.**

**G. W. NGENYE - MACHARIA**

**JUDGE**

**In the presence of:**

Mr. Omboto holding brief for Athung'a for the Applicant

Mr. Wainaina for the Respondent