



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CRIMINAL APPEAL NO. 55 OF 2012**

**SIMON RUKOO ..... APPLICANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal from original conviction and sentence in the Judgment of Hon. H. M. Nyagah (Senior Principal Magistrate) in Kabarnet Senior Principal Magistrate's Court Criminal Case No. 48 of 2012)***

**RULING**

By Notice of Motion dated 20th September, 2012 the Appellant/Applicant seeks to be released on bail/bond pending the hearing and determination of the appeal.

It is based mainly on grounds that the appeal has high chances of success and that the Applicant will furnish security and abide with terms and conditions to be set by the court.

It is also supported by his own affidavit sworn on 20th September, 2012 in which he depones that the sentence meted on him of sixteen (16) years was harsh as he was a first offender, that he suffers from cancer and Tuberculosis (TB), whose treatment is difficult to get in prison, that the appeal has high chances of succeeding and that he shall abide by the terms the court sets.

Mr. Mulati, the prosecuting counsel opposed the appeal. He submitted that the appeal has no high chances of succeeding and that the Applicant has not demonstrated any unusual and exceptional circumstances that would warrant him to be granted the bail/bond.

The application was canvassed before me on 9th May, 2013. I have now considered the same together with submissions made by counsel for the Respondent. Over time, the guiding principle before an applicant is granted bail/bond is that he/she must demonstrate exceptional and unusual circumstances that would warrant the court to rule in his favour. The question whether such circumstances exist is in the discretion of the court.

In this application, the Applicant majorly complains that he is of poor health which condition may not improve under the prison environment. He also contends that the appeal has high chances of success.

The above principles have been well enunciated in the case **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.”**

Further in **DONOMIC KARANJA -VS- REPUBLIC (1986) KLR, 612**, the Court of Appeal stated:-

**“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 circumstances. The previous good character of the Appellant and the hardships, if any facing the family were not exceptional or unusual factors.**

**A solemn assertion by the Applicant that he will not abscond if released, even if supported by sureties is not sufficient ground for releasing a convicted person on bail pending appeal.”**

I am aware that in prison, the prison authorities facilitate the prisoners to access health facilities. The Applicant has not demonstrated that he was denied that opportunity to access the facility. He has also not placed before me for consideration any evidence of his ill health. As to the success of the appeal, shall be a question of determination by the court that will hear the appeal.

On the whole, I find that the Applicant has not demonstrated any unusual or exceptional circumstances that would warrant him to be released on bail.

I accordingly dismiss the application.

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

**G. W. NGENYE – MACHARIA**

**JUDGE**

**In the presence of:-**

Applicant in person

Mr. Wainaina for the State/Respondent