



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E.M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, JJA.

CRIMINAL APPEAL (APPLICATION) NO. 6 OF 2017

BETWEEN

SALIM HAMISI ALIAS WEPUKHULU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an Appeal from the judgment of the High Court of Kenya at Bungoma,

(Ali-Aroni, J.) dated 2nd March, 2017

in

H.C.CR.C. NO. 10 OF 2012)

RULING OF THE COURT

[1] This is an application for bail pending the hearing of **Criminal Appeal No. 77 of 2017**.

The application is brought by **Phaustine Makhoha** who claims to be an attorney of the appellant under a power of Attorney. However, the application is supported by the affidavit of **Salim Hamisi** alias **Wepukhulu**, the applicant himself.

[2] The applicant states in the supporting affidavit that he was convicted by the High Court of the offence of Murder contrary to **section 203** as read with **section 204** of the **Penal Code** and sentenced to death; that he has filed Criminal Appeal No. 77 of 2017; that he suffers from tuberculosis and diabetes; that the appeal has high chances of success and that during his trial he had been released on bail pending trial.

[3] Mr. Mule, the learned counsel for the respondent asked the Court to dismiss the application stating that it is difficult to say that the appeal has overwhelming chances of success in the absence of the record of appeal.

[4] The application is brought under **Rule 5 (2) (b)** of the **Court of Appeal Rules**.

It should have been brought under **Rule 5 (2) (a)** which gives this Court power to order an appellant to be released on bail. The error is technical and does not prevent the Court from exercising jurisdiction conferred by Rule 5 (2) (a).

Section 379 of the Criminal Procedure Rules which governs appeals to this Court from the decision of the High Court in exercise of its original jurisdiction provides in **section 379 (4)**:

“Save in a case where the appellant has been sentenced to death, a judge of the High Court or of the Court of Appeal, may, where an appeal to the Court of Appeal has been lodged under this section, grant bail pending the hearing and determination of the appeal.”

[5] The Court of Appeal Rules are a subsidiary legislation which is subordinate to the statute – that is - the Criminal Procedure Code.

Thus Rule 5 (2) (a) is subject to section 379 (4) of the Criminal Procedure Code which denies a right to bail pending appeal to persons sentenced to death.

Article 49 (1) (h) of the Constitution which gives an arrested person a right to be released on bond or bail on reasonable conditions pending charge or trial does not apply to the appellant who is convicted for murder and already sentenced to death.

[6] For the foregoing reasons, the application being incompetent is struck out.

DATED and Delivered at Kisumu this 25th day of October, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy

of the original

DEPUTY REGISTRAR