



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 18 (E021/21) OF 2021**

**EVANS KEBASO MWARI.....APPELLANT/ APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. *Evans Kebaso Mwari* ('the applicant') seeks the following orders in his Motion dated 13<sup>th</sup> October 2021. That the court be pleased to admit the applicant on bond and/ or grant bail to the applicant pending the hearing and determination of KISII HCCRA No. 18 (E021/21) of 2021. That in the alternative the Court be pleased to order that the execution of the sentence and/or decision Appealed against be suspended and/or stayed pending the hearing and determination of KISII HCCRA No. 18 (E021/21) of 2021.

2. The application is supported by the affidavit of the applicant. He depones that he was found guilty and convicted of the offence of defilement on the 27<sup>th</sup> May 2021 vide KISII CMCC No. 3 of 2019 by Hon. S. Lutta Chief Magistrate. He was sentenced to 20 years imprisonment. That he has lodged his appeal against the conviction and sentence vide HCCRA No. 18 (E021/21) of 2021 Evans Kebaso Mwari vs. Republic. His appeal raises salient and pertinent issues of law. That if he is released on bond he undertakes to attend court during the hearing of the appeal. That he is likely to suffer and/ or serve a substantial portion of his sentence before the appeal is finalised. That he is employed and is the sole breadwinner of his young family and may lose his job if he is still in prison.

3. Mr Ochoki for the applicant/ appellant reiterated what is deponed in his affidavit at the hearing of the application.

4. The application was opposed. Mr. Kaino for the Respondent submitted that the application lacks merit. That the grounds advance by the applicant are the usual grounds of appeal and that his innocence was compromised when he convicted. That there are no exceptional and unusual circumstances which he has pointed out nor has he demonstrated that his appeal has any chances of success. Mr. Ochoki in response argued that they have met the threshold of the principles required. That the appeal has high chances of success.

5. I have considered the application brought by the applicant. The guiding principles in this application were clearly set out in the case of Jivraj Shah -vs- Republic [1986] KLR 605, the court held that;

**“1. The principal consideration in an application for bail pending appeal is, the existence of exceptional or unusual circumstances upon which the court of Appeal can fairly conclude that it is in the interests of justice to grant bail.**

**2. If it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on an account of some substantial point of law to be urged and the sentence or substantial part of it will have been serve by the time the appeal is heard, conditions for granting bail will exist.**

**3. The main criteria is that there is no difference between overwhelming chances of success and a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed and the proper approach is the consideration of the particular circumstances and the weight and relevance of the points to be argued.”**

In the case of **Dominic Karanja v. Republic [1986] KLR 612** where the Court of Appeal held that:

**b. The previous good character of the applicant and the hardships, if any, facing his family were not exceptional or unusual factors. Ill health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners.**

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

**d. Upon considering the relevant material in this case, there was no overwhelming chance of the appeal being successful.**

**6.** I agree with Mr. Kaino that the applicant has failed to show the exceptional or unusual circumstances in his case. To say that he could lose his job is not sufficient. The fact that he attended court during the hearing in the lower court is not a good reason or sufficient ground to release him on bail pending appeal. I also find that the applicant has failed to show an important element in his appeal to establish the fact that his appeal has a high chance of success. He claims that he will suffer substantial loss in that by the time the appeal is heard he will have served a substantial part of his sentence. These lower court proceedings are ready. Appeals in this court are heard expeditiously. I find no merit in the application and it is dismissed. The matter will be mentioned in 2 weeks for purposes of taking directions on the hearing of the Appeal.

**DATED, SIGNED AND DELIVERED AT KISII THIS 16<sup>TH</sup> DAY OF MARCH 2022.**

**R. E. OUGO**

**JUDGE**

**Miss Ndemo For the Applicant/ Appellant**

**Mr. Kaino State Counsel ODPP For the Respondent**

**Aphline Court Assistant**



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