



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 7 OF 2020

JOYCE NJERI MUCHIRI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An application for bail pending appeal from the decision of M. Wachira, Chief Magistrate, in Cr. Case No. 1673 of 2018 at Murang'a dated 26th February 2020]

RULING

1. The appellant was adjudged guilty of *assault* contrary to section 351 of the **Penal Code**. She was sentenced to *three years imprisonment*.
2. The particulars were that on 14th October 2018 at Kimathi Location within Murang'a County, she assaulted Kelvin Gakuru causing him actual bodily harm.
3. The appellant lodged a *petition of appeal* on 4th March 2020 challenging both the conviction and sentence.
4. Pending the hearing and determination of the appeal, the appellant has presented a *notice of motion* dated 5th March 2020 pleading for bail. It is supported by a deposition of his counsel.
5. The appellant contends that the appeal has overwhelming chances of success. The appellant's learned counsel submitted that the complainant went into the home of the accused at night and that a dispute ensued. He was of the view that an affray and not an assault occurred. He argued that the burden of proof was unfairly shifted to the appellant. In a word, his case is that the offence was not proved beyond reasonable doubt.
6. Regarding the sentence, he submitted that the sentence was draconian taking into account the mitigation tendered; and, that the accused was a first offender.
7. In a synopsis, the appellant's case is that there are exceptional circumstances that warrant grant of bail.
8. The application is contested by the Republic. Learned prosecution counsel submitted that the evidence of the three prosecution witnesses was overwhelming; and, that the defence was unpersuasive. He also submitted that the sentence was lenient considering that the appellant showed no remorse for her conduct.
9. The legal parameters in an application of this nature were well stated by the Court of Appeal in ***Jivraj Shah v Republic*** [1986] KLR 605-

*If it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of some substantial point of law to be urged, and that the sentence or a substantial part of it, will have been served by the time the appeal is heard, conditions for granting bail will exist. The decision is **Somo v Republic** [1972] EA 476 which was referred to by this court with approval in Criminal Application No. NAI 14 of 1986, **Daniel Dominic Karanja v Republic** where the main criteria was stated to be the existence of overwhelming chances of success does not differ from a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed.*

10. I resist the temptation to comment about the merits of the appeal. It will be the duty of the first appellate court to *re-evaluate* the evidence; and, determine whether it was *reliable*. The court will also consider whether the punishment was deserved.
11. But I have studied the evidence of PW2 who witnessed a "*struggle over the jembe stick between the accused and the complainant*". The complainant's family and that of the accused seem to have been bitter neighbours. The learned trial magistrate noted that there "*was a*

seriously strained relationship between the accused and the mother of the complainant". From the evidence, the complainant went into the appellant's homestead at night to enquire why the appellant had quarreled with the complainant's mother earlier in the day.

12. The appellant testified on oath and called two witnesses. Her case was that the complainant was the aggressor and that she was injured in the process. The lower court was unimpressed with her version of events.

13. From the materials before me, I find that a substantial point of law and evidence arises on two fronts: whether all the ingredients of the offence were laid out; and, whether the lower court flipped the burden of proof onto the defence.

14. It is common ground that the appellant was a first offender. The record shows that she did not however express any remorse. But she did say in mitigation that her children depended on her. On the face of it, the sentence handed down was *not* illegal. But remains the province of the appellate court to interrogate the sentence.

15. I find that the points raised in the petition of appeal are *arguable* and that they disclose *exceptional grounds; or, substantial points of evidence*. I am thus minded to grant bail pending appeal.

16. The appellant *may* be released upon executing a cognizance in the sum of Kshs 50,000 together with *one* surety of a similar sum. The appellant *must* appear at the mention or hearing of the appeal.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 28th day of July 2020.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of-

No appearance by counsel for the appellant.

Mr. S. Mutinda for the Republic instructed by the Office of the Director of Public Prosecutions.

Ms. Dorcas Waichuhi and Ms. Susan Waiganjo, Court Assistants.