REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL NO. 145 OF 2015

JAMES NTHUSI WAMBUA...APPLICANT

VERSUS

REPUBLIC..RESPONDENT

RULING

The Applicant was charged in Kilungu Law Courts with the offence of assault causing bodily harm contrary to section 251 of the Penal Code. The particulars were that on 14th January 2015 at about 7.00 pm at Ngaamba village, Kiima Kiu Location, Malili Division in Mukaa District within Makueni County, he unlawfully assaulted John Kyalo Muthoka, thereby occasioning him actual bodily harm. The Applicant was convicted by the trial court, and thereafter sentenced to imprisonment for eight (8) months without the option of a fine on 6th October 2015.

The Applicant subsequently filed an appeal against the judgment of the trial Court, and also filed an application by way of a Notice of Motion dated 15th October 2015 seeking orders that he be admitted to reasonable bail and/or bond pending the hearing and determination of the appeal.

The Applicant urged his grounds for the application in the said Notice of Motion, and in a supporting affidavit sworn by his Advocate, Joseph T. Nzioki on 15th October 2015. These grounds are that his appeal has overwhelming chance of success because and that the Applicant will be prejudiced if bond is not granted as there is a likelihood that he would have served a substantial part if not full sentence I by the time the appeal is heard and determined. Further that the Applicant was granted bond of Kshs 20,000/= in the lower Court and he never absconded.

The Applicant's learned counsel J. T Nzioki & Co Advocates in written submissions dated 22nd December 2015 submitted that the trial magistrate erred in law and fact by convicting the Applicant on contradictory evidence, and particularly on medical evidence that dis not corroborate the evidence of the complainant. He relied on the decision in **Evans Mathenge Wachira vs Republic, (2014) e KLR** where it was held that medical evidence is crucial in proving the offence of assault.

The learned Prosecution Counsel, Rita Rono opposed the application in a replying affidavit she swore on 9th December 2015 , wherein she deponed that the Applicant had not demonstrated that his appeal has high chances of success and that Article 49 of the Constitution no longer applies to him since he was tried and convicted by a Court of competent jurisdiction. Further that the assertion by the Applicant that he will not abscond if released is not sufficient to release a convicted person on bail pending appeal.

The learned Prosecution counsel filed written submissions dated 17th December 2015 wherein she contended that the grounds raised by the Applicant which are said to raise overwhelming chances of

success of his appeal are arguable during the hearing of the appeal, and that the sentence for the offence of assault is 5 years with no option of a fine. It was further submitted by the counsel that the Applicant's application lacks any exceptional circumstance to warrant the grant of bail pending appeal, and reliance was placed on the decision in **Somo vs R [1972] E.A 476.**

I have considered the pleadings and submissions by the Applicant and Prosecution. I note that unlike an application for bail pending trial where the Applicant has a constitutional right to be considered innocent until proved guilty, an Applicant for bail pending appeal stands on the premise that he has already been found guilty of the offence. In **Mutua vs R, [1988] KLR 497** the Court of Appeal stated thus:

> **" It must be remembered 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 or 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."**

A different test from that applied in bail pending trial is therefore applied in bail pending appeal. When considering an application for bail pending appeal, the court has discretion in the matter which must be exercised judicially taking into consideration various factors as follows:

a. Whether the appeal has overwhelming chances of success. See **Ademba vs Republic (1983) KLR 442, Somo vs R [1972] E.A 476, Mutua vs R [1988] KLR 497** in this regard;

b. There are exceptional or unusual circumstances to warrant the court's exercise of its discretion. In this regard see **Raghbir Singh Lamba vs R [1958] E.A 337; Somo vs R (supra.); Mutua vs R (supra.)**

c. There is a high probability of the sentence being served before the appeal is heard as held in **Chimabhai vs R, [1971] E.A 343.**

In the instant application, I have perused the record of the trial Court, and read section 251 of the Penal Code. The Court notes that the Applicant was sentenced on 15th October 2015 to imprisonment for eight months, and it is therefore likely that he might serve a substantial part of his prison term before the appeal is heard and determined. I however note that the offence that the Applicant was convicted of does not have the option of a fine, and that there was medical evidence adduced in the lower court.

Given the above circumstances, I am not satisfied that this is a proper case in which to exercise this court's discretion in favour of the Applicant. I accordingly decline to grant the prayer for bond pending appeal in the Applicant's Notice of Motion dated 15th October 2015.

There shall be no order as to costs.

It is so ordered.

DATED AT MACHAKOS THIS 25TH DAY OF JANUARY 2016.

P. NYAMWEYA

JUDGE