



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 61 OF 2016

AMOS KIPLAGAT KITUR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an application for bail pending appeal from the original conviction and sentence in

Criminal Case No. 3198 of 2014 Republic v Amos Kiplagat Kitur in the Senior Resident Magistrates'

Court at Kapsabet by G. Adhiambo, Senior Resident Magistrate, dated 3rd May 2016)

RULING

1. The appellant was convicted of *causing grievous harm* contrary to section 234 of the Penal Code. He was sentenced to *three years* imprisonment.
2. The offence was committed on 21st November 2014 at Samoo Village, Chemundu Location, Nandi County. The appellant assaulted Noah Robon with a wooden stick on his left hand and head.
3. The appellant has preferred an appeal against the conviction and sentence. The petition of appeal was filed on 10th May 2016. It raises *thirteen* grounds. Pending the hearing and determination of the appeal, the appellant has presented a notice of motion dated 12th May 2016 praying for bail. It is supported by a deposition sworn by the appellant's counsel on even date.
4. He contends that the appeal has overwhelming chances of success. The appellant's learned counsel submitted that the appellant was the *one* who was assaulted; and, that his witnesses affirmed it. He submitted that the appellant's defence was dismissed off-hand. He said the appellant was suffering from poor health. Counsel submitted that the appellant had been admitted to bail in the lower court; and, that he will abide by any conditions set by this court. Lastly, it was submitted that unless bail is granted, the appellant will have served the whole or a substantial part of the sentence. In a synopsis, the appellant's case is that there are exceptional circumstances that warrant grant of bail.
5. The application is contested by the Republic.
6. 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.”

8. It would be prejudicial to comment about the merits of the present appeal or the veracity of the evidence presented at the trial. I would be pre-empting the hearing of the appeal. However, I note from the annexed proceedings that the offence took place during the day. There was evidence from the clinical officer (PW3) confirming the injuries to the complainant. I have also studied the final judgment. The learned trial magistrate devoted two typed pages to the evidence of the defence witnesses DW1, DW2 and DW3. In her final analysis, the learned trial magistrate found that the testimony did not cast doubt on the case for the Republic. It will now be the duty of the first appellate court to re-evaluate that corpus of evidence and draw its independent conclusions. The less I comment about the matter, the better.

9. As to whether the points raised in the petition are *arguable*, I would say *yes*. Like I have stated, it will be the true province of the appellate court to re-evaluate all the evidence. But I am not persuaded that there are *exceptional grounds* or that a *substantial point of law or evidence* has been urged to sway the court to grant bail pending appeal.

10. The appellant was sentenced to *three years* imprisonment. It will be for the appellate court to determine whether the sentence was lawful considering all the circumstances of this case; the fact that the appellant was a first offender; and, the mitigation proffered by the appellant. On the face of it, the sentence handed down is not *illegal*. It is true that a *substantial part* of the sentence *may be served before* the appeal is heard and determined. But from what I have stated, I am not persuaded that the appeal has an *overwhelming* chance of success. See Somo v Republic [1972] EA 476, Jivraj Shah v Republic [1986] KLR 605.

11. I appreciate that the appellant may be suffering *ill-health*; and, that his condition may deteriorate in prison. But that is not an *exceptional* circumstance that would entitle him to bail. It is also true that he had been admitted to bail during his trial. But the *presumption* of innocence no longer holds pure. The considerations for grant of bail at this stage are thus markedly different.

12. In the end, there are no *exceptional* circumstances to warrant grant of bail pending appeal. It follows that the notice of motion dated 12th May 2016 is devoid of merit. It is hereby dismissed.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET this 23rd day of June 2016.

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of-

Appellant.

Mr. Omboto for the appellant.

Ms. G. Mokuia for the Republic.

Mr. J. Kemboi, Court Clerk.