



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**CRIMINAL APPEAL NO. 23 OF 2016**

**JACOB ROTICH ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The appellant was convicted of the offence of causing grievous harm contrary to **Section 234** of the **Penal Code**. Following his conviction, he was sentenced to serve four years imprisonment.
2. Being aggrieved by his conviction and sentence, the appellant proffered an appeal to the High Court. While awaiting the hearing of his appeal, through his advocates *Ms Chemwok and Company Advocates*, the appellant presented a Notice of Motion dated 25<sup>th</sup> February, 2016 seeking that he be admitted to bond pending the hearing and determination of his appeal.
3. In the alternative, the appellant prays that the sentence appealed against be suspended pending the hearing and determination of the appeal.
4. The application is premised on the main ground that the appeal has high chances of success as the appellant's conviction was based on evidence of identification at night by a single witness implying that the evidence was insufficient to sustain a safe conviction. The application is also supported by an affidavit sworn by the appellant's counsel *Mr. Michael K. Chemwok*.
5. At the hearing of the application, learned counsel *Mr. Chemwok* in a bid to demonstrate that the appeal has high chances of success submitted that the offence was committed at night and that the appellants conviction was based on the evidence of the complainant's evidence alone who claimed to have identified him as his assailant; that the complainant framed the charges against the appellant since they were neighbours and there was bad blood between them and that the prosecution's failure to produce in evidence any exhibit was fatal to its case. Lastly, counsel averred that the appellant was ready and willing to comply with any bond terms that may be imposed by the court.
6. The application is opposed by the state. Learned prosecuting counsel *Ms Mutheu* in her submissions disputed the claim that the appeal has high chances of success. She contended that every element of the charges were proved in the lower court beyond any reasonable doubt as the appellant was positively and correctly identified as the complainant's assailant and the medical evidence confirmed that the complainant had suffered grievous harm.
7. I wish to begin by observing that under **Section 357** of the **Criminal Procedure Code**, the High Court has unfettered discretion to either admit a convict to bond or suspend his or her sentence pending the determination of an appeal. That discretion being a judicial one must however be exercised judiciously within the parameters set by the law.
8. There are two main legal principles that guide the court in the exercise of its discretion in deciding whether or not to release an appellant on bond pending an appeal. The appellant must demonstrate to the satisfaction of the court that his or her appeal has high or overwhelming chances of success

or that there are unusual or exceptional circumstances which warrants his or her release on bond pending appeal.

9. These legal principles have been elucidated in several judicial pronouncements. It will suffice to cite just two of them. In *Jivraj Shah V Republic (1986) KLR 605*, the Court of Appeal held as follows:-

***“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 interest of justice to grant bail. 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 substantial part of it will have been served by the time the appeal is heard, conditions for granting bail will exist. 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 weight and relevance of the points to be argued...”***

Similarly, in *Dominic Karanja V Republic (1986) KLR 612*, the Court of Appeal also held that:

***“The most important issue was that if the appeal had such overwhelming chances of success, there is no justification for depriving the applicant his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances.***

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

***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....”***

10. The above two principles are anchored on the presumption that an appellant was properly convicted by the lower court unless and until his or her appeal is overturned on appeal. It is pertinent to note that unlike an accused person, an appellant does not enjoy the presumption of innocence guaranteed by the Constitution. The presumption of innocence is removed by the fact of conviction.
11. The appellant’s main contention is that he deserves to be granted bond pending appeal as his appeal has high chances of success.

I have considered the grounds of appeal, the evidence tendered before the lower court as well as the judgment of the learned trial magistrate. At this stage, it would be imprudent to comment on the veracity or credibility of the evidence presented before the trial court for fear that doing so might prejudice the hearing of the appeal. I have however noted that the complainant testified that he was able to recognize the appellant who was his neighbour as his assailant on that fateful night through moonlight. It will be upto the appellate court to subject his evidence alongside that of the other witnesses in the trial to draw its own conclusion on whether or not that identification was reliable and credible given the circumstances surrounding the commission of the offence and whether the trial magistrate’s findings on the appellant’s identification ought to be upheld or overturned.

12. It is also the true province of the appellate court to determine whether or not the failure to produce as exhibits the weapons allegedly used in assaulting the complainant was fatal to the prosecution’s case.
13. Given the evidence on record, though it can be said that the appellant has an arguable appeal, I am

not satisfied that it is one which has overwhelming chances of success. It is also noteworthy that the appellant did not place any material before the court from which the court can conclude that there are unusual or exceptional circumstances in his case to entitle him to the privilege of being released on bond pending the determination of his appeal.

14. In view of the foregoing, it is quite clear that the appellant has failed to meet the legal threshold for grant of bond pending appeal.

15. With regard to the alternative prayer, the same appears to have been abandoned by the appellant since no reference was made to it during the hearing of the application. It is however important to note that the offence with which the appellant stands convicted attracts on conviction the maximum penalty of life imprisonment. In this case, the appellant was sentenced to four years imprisonment. I do not find anything in the pre-sentence notes by the trial court or in the actual sentence itself that would warrant its suspension pending the determination of the appellant's appeal.

16. For all the above reasons, I have come to the conclusion that the appellant's Notice of Motion dated 25<sup>th</sup> February, 2016 is not merited. It is consequently dismissed.

**C. W GITHUA**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 9<sup>th</sup> day of June 2016**

In the presence of:

The Appellant

Mr. Chemwok for the appellant

No appearance for the state

Lesinge – Court Assistant