



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CRIMINAL APPEAL NO. 121 OF 2016**

**ELIJAH KIPKENEI KIMAGAI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***[Being an application for bail pending appeal from the original conviction and sentence***

***in Criminal Case No. 221 of 2015 Principal Magistrates' Court at Kabarnet by S. O. Temu,***

***Principal Magistrate, dated 18th November 2015]***

**RULING**

1. The appellant was found guilty of possessing *ammunition* without a firearms licence contrary to section 4A (1) (a) of the Fire Arms (Amendment) Act 2010. He was sentenced to *seven years* imprisonment.
2. The offence was committed on 16th March 2015 at Yatia Location of Baringo County. The appellant was found in possession of 11 rounds of ammunition calibre *7.62 mm special*.
3. The appellant has preferred an appeal against the conviction and sentence. Pending the hearing and determination of the appeal, the appellant has presented a notice of motion dated 16th November 2016 praying for bail.
4. The appellant contends that the appeal has overwhelming chances of success. The appellant's learned counsel submitted that the appellant was charged under the *wrong* provision of the Act; and, that there was *variance* between the particulars and the evidence. Learned counsel also submitted that the learned trial magistrate erred by *not* complying with section 169 of the Criminal Procedure Code. 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.”*

7. It would be prejudicial to comment about the merits of the 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 appellant was suspected by the public of planning an attack. He was arrested by an Administration Police officer (PW1) at Yatia. It was about 2:00 p.m. Upon being searched, he was found with the ammunition hidden inside a torch. The torch was inside his bag. When he was placed on his defence, the appellant made an *unsworn* statement. He said the police arrested him for no reason. He did not shed any light on the circumstances under which he came into possession of the ammunition. His sole witness did not do so either. It will now be the duty of the first appellate court to re-evaluate the corpus of evidence and draw its independent conclusions. The less I comment about the matter, the better. I agree that the provision of the law cited in the charge sheet *may* be erroneous. But I remain alive that under section 382 of the Criminal Procedure Code, errors of that nature *may* be curable.

8. 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.

9. The appellant was sentenced to *seven years* imprisonment. It is *unlikely* that a *substantial part* of the sentence *will* be served *before* the appeal is heard and determined. 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, his plea for leniency. On the face of it, the sentence handed down was not *illegal*. 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.

10. In the end, there are no *exceptional* circumstances to warrant grant of bail pending appeal. It follows that the notice of motion dated 16th November 2016 is devoid of merit. It is hereby dismissed.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET this 15th day of December 2016.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of-

Appellant.

Mr. Kagunza for Mr. Omboto for the appellant.

Ms.. B. Oduor for the Republic.

Mr. J. Kemboi, Court Clerk.