



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA
CRIMINAL APPEAL NO. 53 OF 2014

DAVID SIMIYU.....APPELLANT

VRS

REPUBLIC.....RESPONDENT

(Appeal from Conviction and Sentence by Hon. Mr. I. T. Maisiba, Senior Resident

Magistrate in Bungoma Cr. Case No.715 of 2014)

RULING

1. David Simiyu (“*the Applicant*”) was on 11th May, 2010 arraigned before the Chief Magistrate's Court, Bungoma with the offence of grievous harm contrary to Section 234 of the Penal Code. It was alleged that on 30th April, 2010, at Sango Area, Bungoma South District, he unlawfully did grievous harm to Andrew Mechumo. After trial, he was found guilty and was convicted of the offence. He was sentenced to 3 years imprisonment.
2. He has now preferred an appeal to this court. On 23rd June, 2014, he filed an application to be granted bail pending the hearing and determination of his appeal. This ruling is in respect of that application.
3. The Applicant contended that he is dissatisfied with the judgment of the trial court (Hon. I. T. Maisiba), that he has already lodged the **BGM H. C. Criminal Appeal No.53 of 2014** against that judgment; that the appeal will take long to be determined whereby he might have served the sentence thereby rendering the appeal nugatory; that he had lodged the application timeously and that there are no good or compelling reasons why he should not be admitted to bail.
4. Mr. Murunga, Learned Counsel for the Applicant submitted that the Appeal has overwhelming chances of success; that the injuries were not proved to be grievous harm; that the court failed to consider the probation report that was favourable to the Applicant. Counsel relied on the Cases of **Judy Waruguru Kagai -vs- Republic [2014] eKLR** and **Edwin Ndwiga Justus -vs- Republic [2010] eKLR** in support of his submissions. He urged that the application be allowed.
5. The State opposed the application through the grounds of opposition dated 7th July, 2014. Mr. Jesse Kamau, the Learned State Counsel submitted that bail pending appeal is not a Constitutional right envisaged by Article 49 (h) of the Constitution; that the Applicant's right to presumption of innocence has fallen with his conviction and bail is therefore not as of right; he urged that the application be dismissed.

6. I have considered the Affidavit in support of the application. I have also carefully examined the grounds in the Petition of Appeal; the proceedings and Judgment of the trial court. I have also considered the submissions of counsel. In an application for bail pending appeal, the principles are well settled. That an Applicant must establish that the appeal has high chances of succeeding or that there are exceptional circumstances that warrant the court to grant bail in the interests of justice. See **Edwin Ndegwa Justus - vs- Republic [2010] eKLR.**

7. Since I am not hearing or determining the appeal, it will be inappropriate for me to examine the grounds of appeal in extenso at this stage. The Applicant failed to annex to his application copies of the exhibits produced at the trial. The P3 form which was the basis of the injuries was never exhibited. The proceedings show that an unidentified witness had testified that the injuries were harm. Since it was the Applicant to bring to the attention of this court the proper record and evidence he is to rely on to discredit the judgment, I am unable to hold whether or not the offence of grievous harm was proved beyond reasonable doubt with the material before me. Suffice it to state that in the judgment, the trial court stated:-

“PW3 was Dr. Mulianga Ekesa.... he had a P3 for the Complainant He had a cut wound on the left forehead which was swollen and tender. The patient had a fracture of 10 (4) The possible type of weapon used was both sharp and blunt..... The degree of injury was assessed to be grievous harm.”

With the foregoing, in the absence of a copy of the P3 form produced at the trial, I cannot hold that the charge was not proved. I have examined the evidence tendered at the trial, the judgment of the trial court and the grounds of appeal and I am not satisfied that the appeal has any overwhelming chances of succeeding. I am also not satisfied that the Applicant has established the existence of any exceptional circumstances to warrant the granting of bail.

8. I am therefore satisfied that the application is without merit and the same is hereby dismissed.

DATED and DELIVERED at Bungoma this 22nd day of September, 2014.

A. MABEYA

JUDGE