



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CRIMINAL APPEAL NO.72 OF 2013**

**FLAVIONO WAHINYA NDIRANGU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**From original conviction and sentence in Cr. Case No. 213 OF 2012 at the Principal Magistrate's Court at Wanguru by Hon. B.M. OCHOI – RM on 30/1/2013**

**RULING**

The Appellant/Applicant filed the Notice of Motion dated 28/2/2013 which was brought under section 357 Criminal Procedure Code for an order to grant him bond pending appeal. He has raised his grounds on the face of the application namely;

1. ***The appeal has overwhelming chances of success.***
2. ***The conviction is based on a bailable offence.***
3. ***The Appellant has never jumped bail during the hearing in Wang'uru Court.***

He has also supported the application with his affidavit sworn on 28/2/2013. In it he says he is on medication for various illness.

The application is opposed by the State through Mr. Omayo who has filed a replying affidavit. He raises two issues namely;

1. ***The appeal has no chances of success.***
2. ***No exceptional circumstances have been raised by the Applicant/Appellant.***

Both M/s Thungu for the Applicant and Mr. Omayo for the State made oral submissions when this matter came for hearing.

I have carefully considered the submissions and the affidavits filed herein. M/s Thungu referred the Court to a Ruling in ***Criminal Application No.1 of 2003 between Arvind Patel -vs- Republic (SCU)*** where an application for bond pending appeal was considered.

In the Court below four witnesses testified. PW1 was the complainant and only eye witness. The time was 9pm. As PW1 walked home he was held by someone from behind and assaulted. There was electricity light on the street he was walking on. And he recognized the person as a neighbour and this was the Appellant/Applicant. PW2 and PW3 did not witness the incident. PW1 explained the injuries he

received as a result of the assault. Dr. Wekesa (PW4) examined the complainant. He said PW1 received 3 cuts on the face (Naisal bridge) lower left eye lid, and left side of nostril. In his evidence he does not explain how these cuts were classified as Grievous Harm and not Harm by Him.

The Applicant gave an unsworn statement in his defence and called two (2) witnesses. He claimed the incident was framed up on him. I would not wish to discuss this evidence further as the Court which will hear the appeal will deal with it especially the degree of injuries suffered. The principles governing the grant of bail pending appeal were stated in the case of *JIVRAJ SHAH -VS- REPUBLIC [1986] KLR 605*. They are;

- 1. 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.***
- 2. 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 argued 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.***
- 3. 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, weight and relevance of the points to be argued. The Court bears in mind that the Applicant has been convicted and sentenced by a competent Court. The presumption is that she was properly convicted and sentenced.***

After analysis of the material before me I find that the Applicant has not brought himself into any special/exceptional circumstances that would entitle him to bond pending appeal. He did not produce any evidence to prove any of the many illnesses he is suffering from. However considering the issue of the degree of injuries sustained one would say he has an arguable appeal.

Secondly due to the fact that the Resident Judge Kerugoya is away in Malindi doing Election Petitions it may take quite a bit of time before he is heard. My finding is therefore that he may serve a substantial part of his sentence before he is heard. I will allow the application dated 28<sup>th</sup> February 2013. The Appellant/Applicant may be released upon deposit of cash bail of KSh.15,000/= to appear. The Deputy Registrar to give a schedule of mentions once he deposits the cash bail.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 7<sup>TH</sup> DAY OF JUNE 2013.**

**H.I. ONG'UDI**

**J U D G E**

**In the presence of;**

**Mr. Wanyonyi for State**

**Mr. Mungai for M/s Thungu for Applicant**

**Njue c/c**