



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CRIMINAL APPEAL NO. 244 OF 2012**

**BOKE CHACHA ..... APPELLANT**

**-VERSUS-**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. By a Notice of Motion dated 19<sup>th</sup> March 2013, the applicant seeks bail pending appeal from the original conviction and sentence of the Kehancha Resident Magistrate Court delivered on the 1<sup>st</sup> October 2012 in Kehancha RMCCR. Case No. 490 of 2011 where the applicant was, together with three others, convicted on a charge of grievous harm contrary to section 234 of the Penal Code and sentenced to imprisonment for 14 years.

2. In urging the application for bail, Mr. Kisera, learned counsel for the applicant submitted that:

***“[The] applicant seeks bail pending appeal or in the alternative that his sentence be suspended. Applicant suffers a health condition that is not conducive to confinement. I refer to a letter dated 2<sup>nd</sup> October 2012. The appellant’s appeal has high chances of success in that the appellant was a passerby when the complainant was assaulted. I refer to page 13-19 of the Judgment. The appellant was a saviour providing the money for the minor to be taken to hospital. The findings of court are not compatible with the conduct of the appellant. The appellant has an arguable appeal for purposes of the appeal. The appellant was on bond during the trial which bond he never tried to breach. He is ready to abide by any conditions on bond. The sentence of 14 years is a long time and his continued serving on the sentence while the appeal is pending is inappropriate. Asthmatic condition is chronic. I urge the court to consider that even though the appellant is a convict he has appealed and he has the rights of the accused under the new Constitution.”***

3. Counsel for the State, Mr. Majale, opposed the bail application and submitted that:

***“I confirm that the appellant was on bond of kshs. 30,000/=. The issue of his health appears to be supported but it is not clear whether the condition persists upto this date. The letter is dated 2<sup>nd</sup> October 2012. The prospects of the appeal is not really relevant to the bail application. The State does not have any compelling reasons to deny the accused bail and the appellant being a convict serving 14 year jail sentence. I leave the matter to the discretion of the court but pray for strict terms on bond to compel the appellant to comply with his duty to attend court.”***

4. According to authorities on bail pending appeal, bearing in mind that the applicant has now been convicted by a competent court and is on punishment for the conviction which stands until it is set aside on appeal, the criteria for consideration is:
  - a. Whether there exists exception or unusual circumstances which justify grant of bail in interests of justice. See *Jivraj Shah v. R* (1986) KLR 605.
  - b. Such exceptional circumstances exist where the appeal has overwhelming chances of success or where a set of circumstances exist which disclose substantial merit in the appeal and that the sentence or a substantial part of it will have been served by the time the appeal is heard. See *Jivraj Shah* supra; *Mutua v. R* (1988) KLR 497; and *Somo v. R* (1972) E.A 476.
  - c. The previous good character of the applicant and the hardships facing his family, and his ill health, where there existed prison medical facilities for prisoners, are not exceptional or unusual circumstances. See *Dominic Karanja v. R* (1986) KLR 612.
  - d. A solemn assertion, even if supported by sureties, that the applicant will not abscond if released is not sufficient ground for releasing a convicted person on bail pending appeal. See *Dominic Karanja*, supra.
5. In his Judgment, the learned trial Magistrate carefully considered the evidence before him as relating to the applicant and held as follows:

***“Having understood and appreciated the entire evidence of Boke’s cross-examination, the Court finds as facts the following crucial points:***

1. ***Boke arrived at about 12noon to find the girl already tied up and beaten;***
2. ***Boke lowered the girl from the suspended capture and went with her to the rear of the house to retrieve the cash;***
3. ***Boke did not find the cash and was told by PW1 that she had only intended to be liberated;***
4. ***Boke tied her up again;***
5. ***Boke stayed in as the fire was being prepared;***
6. ***Boke pushed her over the fire to ensure that the flames got her***
7. ***Boke left for the market after the event;***
8. ***Boke provided fare for her transport to hospital and went away.***

***Had Boke abandoned the girl after the abortive retrieval of the cash, it would have been easier for the court to find that this mistake would have amounted to the misdemeanour of failing to prevent the completion of an on-going felony contrary to section 392 of the Penal Code.***

***DW2’s account is of no sufficient defence because DW2 claims to have left the scene the moment Boke arrived.***

***The court’s conclusion on Boke’s role is that he transformed from a saviour to an enforcer of the event; he not only re-tied her but stayed to ensure, by pushing her over the fire, that she caught the fire whose fuel had been provided by Mbingiri. He is guilty of the offence and shall be convicted under section 215 of the Criminal Procedure Code.”***

6. I have considered the evidence presented before the court, and ***prima facie***, without analyzing the applicant’s grounds of appeal in detail so as not to prejudice the hearing of the appeal, I am not prepared to hold that the learned magistrate’s finding was not supported by the evidence and that, therefore, the appeal has **overwhelming** chances of success such as to amount to an exceptional or unusual circumstance in the appeal.
7. The applicant’s asthmatic condition has not been shown to be of such nature as to be exacerbated as alleged under prison conditions and the prison authorities are incapable of its management and or treatment in the Prison health facilities. The Doctor’s letter in this regard was done on the 2<sup>nd</sup>

October 2012, for an examination allegedly conducted on 17<sup>th</sup> January 2012, obviously as a response to the judgment and sentence rendered the previous day, the 1<sup>st</sup> October 2012.

8. Accordingly, for the reasons set out above, the applicant's application for bail pending appeal herein is declined.

**Dated and delivered this 7<sup>th</sup> day of JUNE 2013**

.....

**EDWARD M. MURIITHI**

**JUDGE**

**In the presence of: -**

..... **for the Applicant**

..... **for the Respondent**

**Mr. Edwin Mongare – Court Clerk**