

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT MISC. CRIMINAL APPLICATION

NO. 145 OF 2013

BONIFACE ATEKA ONGARA APPLICANT

VERSUS

REPUBLIC RESPONDENT

(From original conviction and sentencing in Criminal Case No. 287 of 2013 of the Chief Magistrate's Court at Kibera by Ochenja, CM)

R U L I N G

This is an application by way of Notice of Motion under Section 357(1) of the Criminal Procedure Code Cap 75 Laws of Kenya, seeking an order that the applicant be admitted to bail pending the hearing and determination of his Criminal Appeal No. 50 of 2013.

The grounds upon which the said order is based are that he has already lodged an appeal which has high chances of success. The applicant is also ready to abide by any conditions that the court may impose to ensure his attendance.

The application is supported by an affidavit sworn by Mr Kennedy Araka Nyachoti, the learned counsel for the applicant. Other than the grounds set out herein above, the applicant is apprehensive that his appeal may not be determined soon and that he may serve the substantial part of the sentence unless he is released on bail as prayed. Also annexed to the application is a copy of the charge sheet and a certified copy of the proceedings of the lower court, alongside the petition of the appeal lodged by the applicant.

The applicant was charged with the offence of attempt to murder contrary to Section 220 of the Penal Code. The record shows that there was interpretation from English to Kiswahili and that the charge was read to him whereafter he replied; "It is true." The prosecutor then set out the facts of the offence to which the applicant replied, "Facts are correct." He was then convicted of his own plea of guilty and after a brief address by the prosecutor and his mitigation, he was sentenced to 20 years imprisonment.

Both the learned counsel for the applicant and the Republic have filed written submission. These I have read. The thrust of the application is that the plea recorded by the applicant was not unequivocal. It is his case that the trial court did not inform him that it was his Constitutional right to have legal representation on a serious charge like the one he faced.

The learned trial magistrate is also faulted for not recording verbatim the question and answers put to the appellant to determine whether or not he understood the charge and also that the court did not indicate in which language the plea was taken.

The applicant is rightly before this court under Section 357 (1) of the Criminal Procedure Code aforesaid, but the discretion to give the order sought lies with the court. The applicant must at this stage demonstrate that the appeal he has filed has overwhelming chances of success for him to be entitled to the order sought.

I note that the applicant was not represented by counsel when he appeared before the learned trial magistrate. However, going by the record before me, it appears the learned trial magistrate complied with

all the requirements of Section 207 of the Criminal Procedure Code and that no prejudice was occasioned to the applicant. I consider the proceedings and the final determination by the learned trial magistrate to be in full compliance with the law and that the learned trial magistrate may not be faulted. To that extent the applicant has not demonstrated that his appeal has overwhelming chances of being successful.

As the appeal is still pending determination I say no more, as to delve any deeper may prejudice that appeal. I see no merit in this application which is hereby dismissed.

Order accordingly.

SIGNED, DATED and DELIVERED in open Court this 25th day of September, 2013.

MBOGHOLI MSAGHA

JUDGE