



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**MISCELLANEOUS CRIMINAL APPLICATION NO. 474 OF 2011**

**ABDI MOHAMED AHMED.....APPLICANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**R U L I N G**

1. The appellant/Applicant **Mr. Abdi Mohamed Ahmed** was, on the 25<sup>th</sup> July 2011, convicted and sentenced to a term of 10 years imprisonment on his own plea of guilty, according to the court record in **SRM Criminal Case No. Wajir 347 of 2011.** This was for the offence of causing unlawful grievous harm to one Sadia Warsame Hussein.
2. Being dissatisfied with the conviction and sentence, the applicant filed an appeal and while it is pending he has brought this application by way of Chamber Summons under **rule 3** of the **High Court** (Practice and Procedure Rules) and the **Judicature Act, Cap 8 Laws of Kenya.**
3. Properly framed, the application should have been brought under **Section 357** of the **Criminal Procedure Code.**
4. However in the interest of justice I have considered the grounds upon which the application is predicated.
5. Mr. Mosotah learned counsel for the applicant, urged the court on three grounds, that the applicant's appeal has overwhelming chances of success, that there's a high probability that the sentence will be reduced or altogether quashed, and that bail is a constitutional right which if denied the applicant, he will be prejudiced.
6. Bail is indeed a constitutional right. **Article 49(1)(h)** of the **Constitution** provides as follows:

***“An arrested person has the right to be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons.”***

In the circumstances of this case, the appellant has already been convicted and has therefore lost the presumption of innocence that was available to him prior to the conviction. At the hearing of his appeal the burden will be upon him to convince the court that he was convicted wrongly. I must therefore look at his appeal to establish the first and second points urged by the learned counsel. I note that Mr. Mulati learned counsel for the State conceded the application on the ground that the plea was defective.

7. I am minded of the case of **Jivraj Shah vs. Republic [1986] LLR 605** in which the Court of Appeal stated *inter alia* that:

***“1. The principle 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. 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 substantial part of it will have been served by the time the appeal is heard, conditions of 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 and weight and relevance of the points to be argued.”***

8. I have also considered the list of authorities submitted by learned counsel for the applicant. I am of the view that in the circumstances of this case the manner in which the plea was taken does not amount to exceptional circumstances. It however renders the appeal arguable with a high chance of success, on account of there being a substantial point of law to be urged.

9. For those reasons and without appearing to determine the merits and demerits of the appeal, I grant the application sought.

**SIGNED DATED and DELIVERED** in open court this **8<sup>th</sup>** day of **March 2012**.

**L. A. ACHODE**

**JUDGE**