



**REPUBLIC OF KENYA**

**High Court at Machakos**

**Criminal Appeal 34 of 2012**

**BENJAMIN MUMO MWOV.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the original conviction and sentence in Machakos Traffic Case No. 320/2011***

***by Hon. S.M. Mungai, SPM on 22/2/2012)***

**RULING**

The appellant seeks to be admitted to bail pending the hearing and determination of his appeal. Apparently, the appellant was charged with the Traffic offence of causing death by dangerous driving contrary to section 46 of the Traffic Act. It was alleged that on 11<sup>th</sup> July, 2010 at about 8.15pm along Muthetheni Miu road in Machakos District of the Eastern Province, being the driver of motor vehicle registration number KAW 666D, Mitsubishi minibuss, he drove the same on the same road without due care and attention to other road users by driving off while passengers were alighting and as a result ran over one, **Simon Mutia** who fell while alighting from the said vehicle and died on the spot.

After a full trial, the learned magistrate held that;

***“in the circumstances and looking at the evidence in totality I do not hesitate to find that the guilty of the accused has been brought home to him beyond any reasonable doubt. I dismiss his defence as a pack of lies. I proceed to find him guilty and convict him accordingly for causing death by dangerous driving as charged...”***

Upon conviction the appellant was sentenced to serve 2 years imprisonment and disqualified from driving for 3 years after completion of the sentence.

Aggrieved by the conviction and sentence, the appellant lodged the instant appeal faulting the learned magistrate for convicting and sentencing him on evidence that did not support the charge, based his findings on presumptions, failed to appreciate that it was not demonstrated the manner in which the appellant drove dangerously, admitted a medical document in contravention of section 33 of the Evidence Act, dismissed the appellant’s defence without due consideration and lastly, the sentence imposed was excessive in the circumstances.

In support of the application, **Mr. Andrew Makundi**, Esq, learned counsel deposed that the appeal had overwhelming chances of success and it was only fair and just that the appellant be released on bail pending the hearing of the appeal lest he serve the whole or a substantial part of the sentence.

When the application came before me for hearing, **Mr. Makundi** appeared for the appellant, whereas **Mr. Mukofu**, learned State Counsel appeared for the State. They agreed to canvass the application by way of written submissions. Subsequently, they filed and exchanged the written submissions which I have carefully read and considered alongside cited authorities.

Section 357 of the Criminal Procedure Code empowers this court to grant bail after the entering of an appeal by an appellant. However, the grant of such bail is governed by certain rules. First, the burden is with the appellant to prove that there are overwhelming chances of the appeal succeeding or that there are exceptional or unusual circumstances warranting the grant of bail. The often cited case in this respect and the leading authority on this subject is **Dominic Karanja v Republic [1986] KLR 612**. Once it is shown that there are overwhelming chances of the appeal being successful, then there is no justification for depriving the appellant his freedom.

I have looked at the proceedings as well as the judgment of the learned magistrate and I am satisfied that the appeal has no overwhelming chances of success. It is not in dispute that the appellant drove the subject motor vehicle on the material day. The appellant admitted that much in his own defence. It is also common ground that an accident involving the said vehicle and one, **Simon Matia** occurred. Apparently, the appellant blames his conductor for signaling him to drive on before the passengers who were to alight had safely alighted. Liability for the offence under those circumstances cannot be shared.

Are there any unusual or exceptional circumstances warranting the grant of bail? The appellant has not alluded to any nor do I see any. However, the appellant has deposed that he may serve a substantial part of the sentence by the time the appeal comes up for hearing. However that assertion cannot amount to exceptional or unusual circumstances. In any event, this court is already hearing appeals filed this year. It is therefore unlikely that the appellant would have served a substantial portion of his 2 years imprisonment by the time the appeal comes up for hearing.

On the whole, I find no merit in the application and is accordingly dismissed.

**DATED, SIGNED and DELIVERED at MACHAKOS this 31ST day of OCTOBER, 2012. ‘**

**ASIKE- MAKHANDIA**

**JUDGE**