

REPUBLIC OF KENYA

High Court at Machakos

Criminal Appeal 74 of 2012

MUSA KITUSA DAVID APPELLANT/APPLICANT

VERSUS

REPUBLIC RESPONDENT

RULING

Before me is an application by way of **Notice of Motion** dated 27th June 2012. It is an application filed under **Section 357** of the **Criminal Procedure Code (Cap 75 of the Laws of Kenya)**. It is an application for bail pending hearing and determination of appeal.

The application was filed with an affidavit sworn on 27th June 2012 by **Andrew Makundi** Advocate for the applicant. It was deponed in the said affidavit, *inter alia*, that the appeal had overwhelming chances of success and it was only fair and just that the applicant be released on bail pending appeal. The application was also filed with a memorandum of appeal which I have perused.

The counsel for the applicant and the State Counsel filed written submissions.

An applicant for bail pending appeal, has to show that the appeal has overwhelming chances of success – *See Dominic Karanja –vs- Republic (1986) KLR 612*. This is a case where the applicant was convicted by the subordinate court on his own plea of guilty. He was sentenced to seven (7) years imprisonment. Before being sentenced, he was recorded as having stated that the complainant was with his wife at night and he **“came out with a panga and I cut him before he could cut me”**. However, the learned magistrate convicted him as having pleaded guilty to the charge.

The burden is always on the prosecution to prove an accused person guilty beyond reasonable doubt. Where there is a plea of guilty, such plea has to be unequivocal. It has to be clear that the accused actually pleaded guilty to the charge beyond any reasonable doubt. In my view, considering the statement made by the applicant before he was sentenced, the learned magistrate should have entertained doubts on the unequivocal nature of the plea, and asked for clarification before proceeding further. He did not. In my view, the appeal has overwhelming chances of success. Consequently, I find no reason to detain the applicant in prison custody further. I will release him on bail pending appeal.

As a result, I allow the application. I order that the applicant be released on signing a bond of Kshs.200,000/= with one surety of similar amount. He will attend all mentions of the appeal as well as the hearing of the same. The first mention will be before the Deputy Registrar on 20/12/2012.

Dated and delivered at Machakos this **10th** day of **December** 2012.

George Dulu
Judge

In presence of:-

Mr Makundi for Applicant present

Applicant present

N/A for State

Mutinda – Court clerk