REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL CASE NO. 51 OF 2011

MICHAEL KIMANI...APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Appeal arising from the original conviction and sentence by H. N. Ndungu (Miss) Senior Principal Magistrate in the Nanyuki

Senior Principal Magistrate's Criminal Case No.127 of 2007 delivered on 27th April 2010 at Nanyuki)

RULING

MICHAEL KIMANI, the appellant/applicant herein and one Patrick Matheri, were tried on a charge of attempted murder contrary to *Section 220 (a)* of the Penal code. The particulars of the charge are that on 8th December 2006, at Majengo Estate in Nanyuki, Laikipia District, within Rift Valley Province, the duo jointly attempted unlawfully to cause the death of Victor Mwaniki Kiama by hitting him on the head with an iron bar. After undergoing a trial, the duo were convicted and each sentenced to serve ten (10) years imprisonment. The Appellant was aggrieved hence this appeal. On appeal he put forward the following grounds in his Petition of appeal:

1. That the learned magistrate erred in law and fact for failing to find that the prosecution had totally failed to proof its case beyond reasonable doubt as required by law.

2. That the learned Magistrate erred in law for totally failing to take into account the appellants evidence and his witness in her judgment.

3. That the learned Magistrate erred in law for relying wholly on hearsay evidence and proceeding to convict the appellant.

4. That the learned magistrate erred in law and fact for holding that the appellant was properly

identified whereas no such evidence was produced and/or the circumstances pertaining were such that such identification could not have been free of error.

5. That the learned Magistrate erred in law and fact for failing to find that the evidence of the prosecution witnesses was highly inconsistent and contradictory.

The subject matter of this ruling is the Motion dated 17th March 2011 in which the Appellant has sought to be released on bail/bond pending Appeal. The main ground argued by the Appellant in support of the motion is that his appeal has overwhelming chances of success hence there is no need for him to be kept in prison. The Motion was opposed by Mr. Makura, learned Senior State counsel, on the basis that the appeal has slim chances of success.

I have considered the rival submissions. The principles to be considered in such applications are well settled. It suffices to cite the case of **Jivraj shah =Vs= Republic [1986] K.L.R. 605** in which the Court of Appeal held *interalia* as follows:

1. "The principal 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 interests of justice to grant bail.

2. ***If 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 for 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."***

I have already stated that the Appellant has specifically argued that his appeal has overwhelming chances of success. In determining such an issue it is important to examine critically the grounds set out on the Petition of Appeal. Some of the grounds sought to be relied upon on appeal include *interalia*: First that the Appellant was convicted on hearsay evidence. Secondly, that the Appellant was not properly identified and thirdly that the case was not proved to the required standards of beyond reasonable doubts. Those grounds are arguable on appeal. The record shows that **Victor Mwaniki Kiama** (P.W.1), the complainant in this appeal, was unable to coherently testify before the trial court. The Complainant's mother, **Kagendo Eunice Kiama** (P.W.2), appears to have retold the trial court what the Complainant told her regarding as to what happened to him on 8th December 2006. She told the trial court that on 8th December 2006, she gave permission to the Complainant to accompany Patrick Matheri to attend a circumcision graduation party of another boy. The complainant did not return that night. P.W.2 said she managed to trace her son, the Complainant herein, in Nanyuki Police cells with a swollen head. P.W.2 took P.W.1 to hospital where he found the Appellant already admitted in hospital. P.W.2 said she overheard the Appellant say that he had been stabbed the previous night and she became suspicious. She then reported him (appellant) to the Police who in turn arrested him. Patrick Matheri was later arrested within Nanyuki town. A careful consideration of the evidence will reveal that the Appellant and his accomplice were convicted on the evidence of P.W.2. The evidence of P.W.2 appear to have substantially originated from P.W.1 who was unable to properly testify due to his poor health. It is therefore possible in the circumstances of this case that the evidence of P.W.2 may turn out to be hearsay evidence. In short, I am convinced that the Appellant's appeal has overwhelming chances of success. In such a case, the court is bound to admit him to bail. I hereby direct that the Appellant be released on bail/bond pending Appeal upon him signing a bond of Ksh.300,000/= with one surety of like sum before the Deputy Registrar.

Dated and delivered at Nyeri this 27th day of May 2011.

J. K. SERGON

JUDGE

In open court in the presence of Mr. Ng'ang'a for Appellant and Mr. Makura for the State.