



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CRIMINAL APPEAL NO. 56 OF 2011**

**SEBASTIAN OGANDA ARUM.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The appellant/applicant was charged in the lower court with the offence of manslaughter contrary to Section 202 as read with 205 of the Penal code. He was tried by the lower, court found guilty, convicted, and sentenced to serve a life imprisonment. The appellant/applicant became aggrieved and he has appealed to this court vide an own appeal which had been dated 23<sup>rd</sup> day of February 2011 and filed on the 28<sup>th</sup> day of March 2011, and currently supplemented with one by his counsel dated 21-9-2011 and filed simultaneously with the record on 23<sup>rd</sup> day of September 2011.

On the appeal, the appellant/applicant has anchored an application dated 9<sup>th</sup> day of March 2011 and filed on the 26<sup>th</sup> day of September 2011. It is by way of notice of motion brought under section 46 of the constitution and section 357 (1) of the Criminal Procedure Code. Four reliefs have been sought namely:-

- (a) This application be certified urgent and service upon the other parties here to be dispensed with in the first instance.**
- (b) The honourable court be pleased to admit the applicant to bail pending hearing of this appeal.**
- (c) This honourable court do stay execution of the sentence imposed by the subordinate court pending the hearing of the appeal.**
- (d) This honourable court do issue further other order as are fit and just.**

The grounds in support are set out in the body of the application, supporting affidavit and oral highlights in open court and the major ones stressed are as follows:-

**(1) The appellant/applicant's constitutional rights are violated in that he was held in police custody beyond the statutory period required before he was arraigned in court and for this reason, the appeal has high chances of success.**

**(2) Contends that his rights were further violated by reasons of the appellant/applicant not having been given witnesses statements in order to enable him prepare his defence and for this reason the appellant / applicant was prejudice in his defence.**

**(3) The appellant /applicants rights were further violated by the fact that Section 211 Criminal Procedure Code was not complied with before he was called upon to give his defence.**

**(4) He was also not accorded ample opportunity to call witnesses.**

The state conceded to the application by reason of the fact that the appellant /applicant was not given witness statements and documents and this may have prejudice his case. They do not however agree that Section 211 Criminal Procedure Code was not complied with. It was complied with and for this reason this ground should not count towards the courts consideration for granting or with holding bail. Further that if any constitutional rights were violated then this is a ground for seeking compensation and not to be used as one of the grounds for seeking bail.

This court has given due consideration to the aforesaid rival arguments and the same considered in the light of the statutory provisions on which the application is premised as well as the constitutional provision in the Bill of rights namely Articles 46, 49, 50 and 51 and the Court proceeds to make the following findings on the same:-

**(i) The offence for which the appellant / applicant faced in the lower court is bailable.**

**(ii) It is evident that the appellant was admitted to bail in the lower court, for this same offence and no adverse reports were made against him with regard to his admission to bail in the lower court .**

**(iii) He has become aggrieved of the conviction handed out to him and has filed this appeal which is his constitutional right to exercise.**

**(iv) This court has judicial notice of the fact that admission to bail is available both at the trial as well as the appellate stage.**

**(v) The court also has judicial notice of the fact that the right of a court to withhold or grant bail / bond is a matter of discretion on the part of the court which discretion this court has judicial notice of that the same is unfettered with the only fetter being that the same should be exercised judiciously and with a reason.**

**(vi) There is good course shown for this court to grant the appellant /applicant bail/bond pending appeal because:-**

**(a) He was previously on bond and observed bond terms.**

**(b) He has an arguable appeal**

**(c) The state has no objection**

**(d) The court has jurisdiction to grant the same**

For the reason given above, prayer (b) of the appellant / applicants' application dated 9<sup>th</sup> March 2011 and filed on 26<sup>th</sup> September 2011, be and is hereby allowed on terms that the appellant / applicant is admitted to bail/bond of Kshs. 200,000/= with one surety of like amount on condition that he readies the appeal for disposal within ninety (90) days of today since the proceedings are typed.

(2) The surety will be approved by the Deputy Registrar in the usual manner.

**Delivered, dated and Signed at Kisumu this 26<sup>TH</sup> day of September, 2011**

**R. N. NAMBUYE  
J U D G E**

RNN/aao