



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISC. APPLICATION NO. 359 OF 2011**

**PATRICK ANGWENYE SHIMEKA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The applicant, **PATRICK ANGWENYE SHIMEKA**, was charged with 3 counts of robbery with violence **contrary to section 296 (2) of the Penal Code**; and one count of being in possession of an imitation firearm contrary to **section 34 (1) (2) of the Firearms Act**.

He was acquitted on the charge of being in possession of an imitation firearm.

Meanwhile, the learned trial magistrate convicted the applicant for 3 counts of simple robbery, **contrary to section 296 (1) of the Penal Code**.

The applicant was then sentenced to 10 years imprisonment.

He has now brought this application for bail pending appeal. He asserts that his pending appeal has overwhelming chances of success.

His first reason for saying that the appeal has overwhelming chances of success is that the charge sheet was defective. The alleged defect stems from the fact that the offence was committed on 26<sup>th</sup> May 2007, whereas the charge sheet indicates that the applicant was arrested almost one year earlier, on 26<sup>th</sup> June 2006.

Secondly, the trial court is faulted for making a finding that was not consistent with the evidence tendered. In particular, the court is said to have held that the offence was committed in broad-daylight, whereas the evidence on record shows that the offence was committed at night.

Finally, the applicant complained that he was sworn, whereas he had wanted to give unsworn evidence.

In answer to the application, the Respondent submitted that the appeal was not arguable.

In the respondent's view, the evidence on record was overwhelming.

As regards the date of arrest, which is shown on the charge sheet, the respondent submitted that that was an error. However, the said error is said to have not been prejudicial to the applicant.

In any event, the issue regarding the date was not raised by the applicant during the trial.

The respondent pointed out that the learned trial magistrate erred when she convicted the applicant for simple robbery. It was the respondent's view that the evidence adduced proved the offence of robbery with violence.

Therefore, the respondent intends, at an appropriate moment, to issue notice to the applicant, of its intention to invite the appellate court to enhance the conviction to one of robbery with violence.

As far as the respondent was concerned, the fact that the victims of the robberies sustained minor injuries was not reason enough to warrant the finding that the offence committed was simple robbery.

The respondent conceded that the trial court had erred when it found that the offence was committed during the day. However, the respondent still thinks that that error did not affect the conviction.

That submission is founded upon the fact that there was sufficient electricity lighting at the scene of crime, which enabled the complainant to positively identify the applicant.

In my assessment, the appeal is definitely arguable, contrary to what the respondent submitted. However, I do not share the applicant's optimism about his chances of success. In other words, I would not describe the appeal as one with overwhelming chances of success.

I am also concerned about the fact that the applicant was not a first offender, by the time he was convicted in the current case.

I consider that fact to be relevant to the application for bail pending appeal. I say so because it does not engender confidence in the applicant. Therefore, I decline to grant him bail.

However, I do direct the prison authorities to provide the applicant with all necessary medical attention, to address the ailments he is suffering from.

**Dated, Signed and Delivered at Nairobi, this 26<sup>th</sup> day of October, 2011**

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**FRED A. OCHIENG**  
**JUDGE**