

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 294 of 2008

SISTO KIMARU KINGARA APPELLANT

Versus

REPUBLIC RESPONDENT

RULING

The appellant has filed a notice of motion brought under **Section 357 (1)** of the Criminal Procedure Code. He seeks that he be admitted to bail pending the hearing and the determination of this appeal the application is supported by an affidavit sworn by his counsel. His counsel deponed that the appellant was convicted by the lower court on 2 charges of obtaining money by false pretences contrary to **Section 313** of the Penal Code. He deponed that the appellant has overwhelming chances of success in that the lower court case should have been resolved in his favour. That the learned trial magistrate erred in shifting the burden of proof from the prosecution to the appellant. The application was opposed by the learned state counsel who began by stating that the practice now presently in this court has been to hear appeals expeditiously. He therefore was of the view that the appellant need not be granted bail since the appeal is likely to be heard soon. He further stated that the part in which the appellant played in the lower court case and the grounds of appeal raised by him show that he is relying on facts and not on law in his appeal. I have considered the appellants application. Indeed as correctly stated the most important issue is whether the appeal has overwhelming chances of success. If there are high chances of success then there would be no justification for depriving the appellant of his liberty. In the case of *MUNDIA V REPUBLIC* (1986) KLR PAGE 623 the court held as follows:-

- “1. The Criminal Procedure Code (Cap 75) Section 356 permits admission to bail pending appeal.***
- 2. Admission to bail pending appeal is a discretionary power which the court must exercise judicially in accordance with laid down principles.***
- 3. Once a person has been convicted and sentenced, his application for bail pending appeal will be granted only in exceptional circumstances.***
- 4. There is a presumption that once a person is convicted he was properly convicted.***
- 5. The chances of the appeal succeeding is a factor for consideration in arriving at a decision in an application for bail pending appeal.***
- 6. Bail pending appeal may be granted where there is a risk that the sentence will have been served by the time the appeal will be heard but there must exist the major issue of overwhelming chances of the appeal in the first instance.”***

I have considered the lower court’s evidence. I have also considered the appellants application and the affidavit in support. I find that there is no exceptional circumstance to move this court to grant bail pending appeal. As correctly stated by the Learned State Counsel the appeals in this court are now being heard expeditiously. For that reason and because I am of the respective view that the appeal does not have overwhelming chance of success I do hereby dismiss the notice of motion dated 21st November

2008.

Dated and delivered this 27th day of January 2009

MARY KASANGO

JUDGE