



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CRIMINAL APPEAL 164 OF 2008**

**DAVID MURIUNGI M'ARIMI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(An application for Bail pending appeal from conviction and sentence in the judgment of S. Mwenda Esq. Resident Magistrate, Maua SPM's Court Criminal Case No.1296 of 2008)***

**R U L I N G**

By an Application dated 15.10.2008 brought under a certificate of urgency, the Appellant David Muriungi M'arimi seeks one order, release from jail pending the determination of his Petition of Appeal dated 9<sup>th</sup> September 2008.

The Application is supported by the Applicant's Supporting Affidavit and the following main grounds:-

- (1)that the appellant/applicant was sentenced on 28.08.2008 to serve a jail term of three (3) years;
- (2)that the charge against the applicant was read over to him in a language that he did not understand or comprehend and therefore there was a miscarriage of justice;
- (3)that the Applicant/Appellant risks serving the jail term unless this application is granted;
- (4)that the Applicant/Appellant has filed an appeal against his conviction and sentence;

When this matter was argued before me on 13.11.2008, Mr. Mwirigi learned Counsel for the Applicant/Appellant reiterated the above grounds. He also first sought and was granted leave to amend his Summons in Chambers by making reference to Section 356 instead of Section 357 of the Criminal Procedure Code (Cap 75, Laws of Kenya). As outlined above, the Applicant's/Appellant's main ground of the Petition of Appeal and this Application is that the charge against the Appellant was read over and

explained in a language that he did not understand or comprehend and therefore there was a miscarriage of justice.

In expounding this ground learned Counsel for the Appellant/Applicant argued that failure to explain and record the answer of Applicant/Appellant to the charge in a language he understands and comprehends was contrary to section 77 (2) (b) of the Constitution which requires that an accused person must be informed and have explained to him, in a language which he understands and comprehends of the charge against him.

In addition to that main ground, Counsel also argued that the learned trial magistrate did not analyse in particular the evidence of provocation, and noted that the evidence of PW2, was inconsistent with that of PW1 the complainant, that the nature of the offence was minor, that it was a mere scuffle over undone or unfinished furniture, that the appellant was willing to deposit any necessary sum in court as security for his release on bail pending appeal. For those reasons Counsel submitted that the Petition of Appeal had overwhelming chances of success. He relied on the decision by my brother, **Hon. Mr. Justice F. Ochieng in KAGUMA VS REPUBLIC [2004] 1 E.A.** where the learned Judge held *inter alia*.

**“For the Applicant to obtain bail pending appeal, he had to demonstrate overwhelming chances of success. Relevant considerations would be whether there were exceptional or unusual circumstances. Previous good character of the Applicant, hardship facing the wife and children, mere ill-health or even a solemn assertion that the applicant would not abscond, were not exceptional circumstances (Karanja vs Republic [1986] K.L.R 612 adopted). However in this case, the Applicant’s ill-health and advanced age, coupled with the nature of the offence and the harshness of the sentence justified the granting bail pending appeal.”**

In opposition to the application, Mr Muteti, learned Senior State Counsel submitted **firstly** that the appeal had no overwhelming chances of success. Counsel submitted that it was clear from the record that the proceedings were conducted in English and translated into Kimeru, that this was not a plea of guilty where the applicant/appellant may not have understood the proceedings. In the current case, the applicant was self-represented. He cross-examined the prosecution witnesses.

**Secondly**, Mr. Muteti reiterated that the appeal had no chances of success. Counsel submitted, if the applicant/appellant was provoked, then that alone is an admission, and that the charge of assault was proper. From the evidence, the complainant (PW1) went for the furniture he had paid for, from the applicant/appellant. That, the Counsel submitted, cannot be considered as provocation.

**Thirdly**, Counsel submitted, the trial magistrate did consider the defence evidence, and in particular the evidence of provocation and said at p.2 para 2 of the judgment –

“As to whether the accused was provoked into attacking him (the complainant), I find the attack unlawful and wrong conduct..”) and he cannot be said to have failed to consider the applicant/appellant’s evidence.

**Finally** Counsel submitted that the appeal had no basis, that the sentence of three years is time enough to allow the appeal to be heard, and he would not have served his term, and urged the Court to dismiss the application.

Those are the rival arguments. I have considered them in light of both the evidence, the law and the authorities cited to me. I am satisfied that the appeal has no overwhelming chances of success. Reference to breach of Section 72 (2) (b) of the Constitution is merely a red herring.

**Firstly** as Mr. Muteti learned Senior State Counsel quite properly pointed out the applicant/appellant pleaded not guilty, and a plea of not guilty was entered. Evidence was adduced for the prosecution. The applicant/appellant cross-examined the prosecution witness. Where would an accused person who did not understand the charge or the language of the proceedings get the miraculous inspiration to **plead not guilty** and to cross-examine the prosecution witnesses in the **Kimeru** language if he did not understand or the evidence was not translated to him in Kimeru Language? I am satisfied as stated above, that the

charge was read over and explained to the accused in Kimeru, a language he both understood and sufficiently comprehended to enable him conduct cross-examination of ten prosecution witnesses.

**Secondly**, I am satisfied that the learned trial magistrate considered the evidence by the Defence. At p. 2, para.2 of the judgment, the learned trial magistrate said –

**“As to whether the accused was provoked by PW1 into attacking him, I find the attack was unlawful and out of wrong conduct.”**

**Thirdly** an assault causing actual bodily harm cannot be said with any stretch of imagination to be a minor scuffle. The complainant sustained panga cuts and injuries on his face measuring 4x2x2 cm, and a cut wound on right upper arm of 4x2x½ cm. Such injuries cannot come out of a scuffle. They would only come from well-aimed and calculated blows using a blunt/sharp object, in this case, a panga (machete) which both PW1 and PW2, and indeed the applicant/appellant himself, in cross-examination said at p.5, second sentence:-

“It is true there was a quarrel and there was a panga at my workshop. The panga cut PW1 on the face and right hand shoulder area.”

It is only the incorrigible pastor, liar timber merchant DW2 (Kennedy Koome) who testified in cross-examination that –

**“I did not see anyone injured at the scene.”**

He must have been at a different scene from that in which his friend the applicant/appellant was and indeed the complainant and PW2 were, and the injuries described by PW3, Peter Koome, a clinical officer must have been some **phantasmagoria, conjured up by some supreme magician.**

That being the state of affairs, and the law and evidence, I am unable to subscribe to the Applicant/Appellant’s Counsel’s submission that the appeal has overwhelming chances of success. It does not in my respectful opinion.

For those reasons, the Applicant/Appellant’s Chamber Summons dated 15<sup>th</sup> October 2008 is dismissed with a direction that the lower court’s file be brought up urgently for perusal and directions as to the admission or otherwise of the Petition of Appeal.

There shall be orders accordingly.

Dated, delivered and signed at Meru this 27<sup>th</sup> day of February 2009.

**M. J. ANYARA EMUKULE**

**(JUDGE)**