REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

Criminal Appeal 118 of 2008

JAIRUS MALIMU ……..……... APPELANT

VRS

REPUBLIC ……..…….RESPONDENT

RULING

The applicant was convicted for the offence of causing grievous harm contrary to section 234 of the Penal Code. He was then sentenced to seven (7) years imprisonment.

Being dissatisfied with the conviction and sentence, the applicant lodge an appeal to the High Court. Simultaneously with the Memorandum of Appeal, the applicant filed an application for bail pending appeal.

According to the applicant, the offence for which he was convicted is bailable. Therefore, as he feels that his health was deteriorating in custody, the applicant asks that he be granted bail pending the hearing and determination of his appeal.

He says that he is ready to comply with any terms and conditions which the court may impose.

Meanwhile, he believes that his appeal has overwhelming chances of success.

In answer to the application, the learned senior State Counsel, Mr. D. Karuri submitted that the applicant's appeal does not have an overwhelming chance of success. His reason for so submitting was that the offence was committed during day-time.

I presume that the learned State Counsel implied that the applicant was positively identified, because the offence was committed during the day.

Secondly, the respondent submitted that the applicant had failed to provide the court with any material which would show that he was suffering from ill-health, as alleged.

Having given due consideration to the application, I note that the applicant was convicted on 4th December, 2008. Therefore, as at the date this ruling was being delivered, the applicant had been in prison custody for six months. Whilst I do not wish to suggest that that is a very short period of time, it is nonetheless much shorter than the one year which the applicant made reference to in his submissions.

The applicant did not swear an affidavit to support his application. The supporting affidavit was sworn by Mr. Edwin W. Wafulah, advocate.

As Mr. Wafulah was also appearing in court, as the advocate for the applicant, it would have been more desirable that he should have limited his role to that of the advocate for the applicant. By swearing the supporting affidavit, the advocate has now exposed himself to the possibility of being contradicted on factual matters, about which the court can only make a decision on, based on facts. That is a situation which advocates ought to learn to avoid.

Although I am not striking out the affidavit of Mr. Wafulah, I nonetheless find that it fails to provide the court with adequate factual information, which the court could use to make its own informed assessment on the applicant's state of health.

The court has no idea why or what has caused the deterioration of the applicants' health. Also, there is no information regarding when the deterioration begun.

However, in my understanding, the ill – health of a person who is serving sentence cannot, by itself, constitute a basis for granting him bail pending appeal. I say so because even though a person be a convict, who is serving prison sentence, he is entitled to receive appropriate medical treatment, provided by the state.

Meanwhile, on the issue of whether or not the offence for which the applicant was bailable, I find that it is a bailable offence.

However, that cannot form the basis of the decision on whether or not to grant bail herein, because the applicant has already been convicted.

A distinction must be made between an accused person who was facing trial, and a person who had already been tried and convicted.

On the one hand, an accused person still enjoys the legal presumption of innocence until and unless he was proved guilty. On the other hand, a person who has been convicted is presumed guilty until and unless he satisfies an appellate court that his conviction should be quashed.

In the event, a person who has been convicted is not entitled to bail, as a matter of right.

The incident giving rise to the charge against the applicant, occurred at about 5.00 pm. It would appear that PW2 identified the applicant positively, as the applicant was beating up the complainant, using a big rungu.

PW5 produced the P3 form, which verified the injuries sustained by the complainant. The doctor who examined the complainant assessed the degree of harm as maim.

Having given a prima facie assessment to the evidence on record, I am satisfied that the applicant's appeal cannot be said to have overwhelming chances of success.

In the result, I have come to the considered opinion that the applicant is not deserving bail pending appeal. The application is therefore dismissed.

Dated, signed and delivered at Kakamega this 28th day of April, 2009.

FRED A. OCHIENG'

JUDGE