

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

Criminal Appeal 3 of 2009

JOHN MOKAMBA NYANGAU APPELLANT

VERSUS

ATTORNEY GENERAL RESPONDENT

RULING

The Applicant was charged and convicted by the Resident Magistrate, Nyamira of the offence of assault causing actual bodily harm contrary to **section 251** of the **Penal Code**. The particulars were that on the 9th September, 2005 at Morako sub location in Nyamira District within Nyanza Province he unlawfully assaulted **Rose Kemunto Omwenga** thereby occasioning her actual bodily harm. He was sentenced to serve two years in jail. He appealed against conviction and sentence. The present application is for bail pending the hearing and determination of that appeal. The application is on the ground that the appeal has overwhelming chances of success. **Mr. Obure** prosecuted the application.

Mr. Mutai who represented the state did not oppose the application. In his view, the trial court did not observe the usual standard of proof in a criminal case and that the defence was not considered before conviction. The appeal court will certainly deal with these issues.

When a person is awaiting trial his innocence is presumed and he is therefore entitled to bail. Once he has been convicted and sentenced there is the usual presumption that he has been properly convicted and sentenced and is therefore not entitled to bail (**Mundia vs Republic [1986] KLR 623**). Such a person can only be released on bail if he can demonstrate that he has an appeal which has overwhelming chances of success and that the circumstances presented by his application are exceptional and unusual (**Somo vs Republic [1972] EA 476**). There is little point in granting the application if the appeal is thought to have an overwhelming chance of being successful, at least to the extent that sentence will be interfered with so that applicant will be granted his liberty by the appeal court.

The evidence produced during the trial of this case was that the Applicant bit the complainant above the left eye and caused it to swell and that the injury amounted to “*harm*”. The complainant was treated and discharged. It is evident that this was not a serious injury. In the Grounds of Appeal, the Applicant complained that the learned trial magistrate erred by sentencing him to two years in jail without considering the option for a fine. The record shows that the applicant was a first offender. It is only in exceptional cases that such an offender would be denied non-custodial treatment.

Applying the principles of law above, and considering the particular facts of this case, I admit the applicant to bail. He will deposit cash bail of Kshs.10,000/= as a condition for his release to await the resolution of his appeal.

DATED at KISII this 29th day of May, 2009

A. O. MUCHELULE

JUDGE