

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
OF KISII
Miscellaneous Criminal Application 71 of 2009

MONICA KEMUNTO JACKSONAPPLICANT

VERSUS.

REPUBLIC RESPONDENT

RULING

The Applicant was convicted on own plea of guilty of the offence of assault causing actual bodily harm contrary to **section 251** of the **Penal Code** by Resident Magistrate, Kisii. The particulars were that on 17/5/09 at Suneka township in Kisii South District within Nyanza Province she willfully assaulted **Aska Nyaboke** thereby occasioning her actual bodily harm. She has appealed against the conviction and sentence and presently requests to be released on bail pending the hearing and determination of the appeal. In the Petition of Appeal, the Applicant contents the plea was equivocal and the charge sheet on which she was convicted was defective. She further states that the facts narrated by the prosecution did not disclose the ingredients of the offence. Lastly, she indicates the sentence meted out by the trial court was manifestly harsh and excessive in all circumstances of the case.

In the instant application the Applicant argued that the appeal had overwhelming chances of success and yet, given the sentence of 8 months that was ordered to be served, it is likely that by the time the appeal is heard and determined the sentence will have been served. The Application was prosecuted by **Mr. Kaburi** whereas **Mr. Kemo** appeared for the State and opposed it. **Mr. Kemo's** position was that the appeal did not have overwhelming chances. He indicated that it was possible for the Appeal to be fast-tracked, given the fears of the Applicant that it may be rendered nugatory.

When an accused is awaiting trial he is presumed to be innocent and is therefore entitled to bail. At this stage, however, the Applicant has been convicted and sentenced. He is not entitled to bail. There is the presumption that he was properly convicted and sentenced (**Mundia v. Republic [1986] KLR 623**). For him to be released on bail pending appeal he has to demonstrate that his appeal has overwhelming chances of success (**Somo v. Republic [1972] EA 476**). The fact that the sentence is short and may be served by the time the appeal is ultimately heard may be something to consider in deciding the bail application but that, taken in isolation, does not demonstrate the circumstances herein are exceptional or unusual. It was indicated the Applicant is hypertensive and diabetic and may not survive the conditions of prison. Prisons have medical facilities for conditions like those described, and arrangements are usually made for transfer to hospitals whenever specialized treatment has become necessary or has been recommended.

In short, the application has not presented any exceptional or unusual circumstances and, having perused the proceedings of the trial court and having heard submissions, do not think the Applicant has demonstrated the appeal will have overwhelming chances of success. I dismiss the application.

Dated, Signed and Delivered at Kisii this 17th Day of June, 2009

A. O. MUCHELULE

JUDGE

17/6/2009

Before A. O. Muchelule Judge

Mongare c/c.

Mr. Kaburi present

Mr. Kemo present

Court: Ruling in open court.

A. O. MUCHELULE

JUDGE

17/6/09