

THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Criminal Appeal 75 of 2009

JAMES MURIUKI MUTHANGA APPLICANT

VERSUS

REPUBLIC RESPONDENT

RULING

This is an application under *section 357* of the Criminal Procedure Code. In the application, **James Muriuki Muthanga**, hereinafter referred to as “*the applicant*” seeks to be admitted to bail pending the hearing and final determination of his appeal.

Apparently, the applicant was arraigned before the Chief Magistrate’s Court, Nyeri (**L.W. Gitari presiding**) on seven counts of causing death by dangerous driving contrary to *section 46* of the Traffic Act. The applicant pleaded not guilty to the charge and he was tried. At the end, he was found guilty, convicted and sentenced to 5 years imprisonment on each count. The sentence was ordered to run concurrently. Aggrieved by the conviction and sentence, the appellant lodged the instant appeal in person but which has since been taken over by **Messrs Wahome Gikonyo & Co. Advocates**. The said firm prosecuted the instant application for bail pending appeal.

At the hearing of the application, **Mr. Wahome** submitted that the appeal as filed had overwhelming chances of success. The evidence on record had a lot inconsistencies and contradictions. That the learned magistrate had found that the applicant attempted to overtake other vehicles when it was not safe to do so. Overtaking per se is not dangerous driving. It has to be looked at alongside other prevailing circumstances. Accordingly there was no basis for that finding. He also submitted that the learned magistrate had shifted the burden of proof to the applicant and casually dismissed his defence.

In response, **Mr. Orinda**, learned Senior Principal State Counsel submitted that the appeal was arguable. That was the furthest he could go. There may also have been the shifting of burden of proof.

I have carefully considered the application, the supporting affidavit and rival oral submissions. In an application of this nature, the applicant must satisfy the court that the appeal as filed has overwhelming chances of success and also minor consideration as to whether there were exceptional and unusual circumstances. **See Dominic Karanja V Republic (1986) KLR 612**. In this case, I am not satisfied that the applicant’s appeal has overwhelming chances of success though it may be arguable as correctly submitted by **Mr. Orinda**. There may have been contradictions here and there in the evidence of the complainants and their witnesses. Contradictions and inconsistencies are bound to occur in criminal nay, traffic proceedings depending on how those witnesses perceive events. The perception can never be the same. As long as those contradictions are not major and do not go to the route of the prosecution case, they can be tolerated. I will leave it at that. There may or may not have been the shifting of burden of proof. However this is an issue that will be addressed if at all by the appellate court when hearing the appeal. For now I do not think that it is an issue I should delve into. No exceptional and or unusual circumstances in the appeal have been brought to my attention as would tilt my hand towards allowing the application.

In the end I do not think that the applicant has demonstrated to my satisfaction that his appeal has overwhelming chances of success. Accordingly the application is denied.

Dated and delivered at Nyeri this 30th day of November, 2009.

M.S.A. MAKHANDIA

JUDGE

