REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(Coram: Ojwang, J.)

MISC. CRIMINAL APPLICATION NO. 670 OF 2007

NYAMWENCHA AKUMA……APPLICANT

-VERSUS-

REPUBLIC……RESPONDENT

RULING

The applicant comes before this Court by Notice of Motion dated 18th September, 2007 and brought under s.357 of the Criminal Procedure Code (Cap.75, Laws of Kenya). He comes with one prayer: "*THAT the Applicant be granted bail pending the hearing and determination of the Applicant's Appeal*."

The general grounds upon which the application is based are as follows: (i) that the appeal has excellent and overwhelming chances of success; (ii) that the appellant's appeal would be rendered nugatory, were he to serve the full sentence during the pendency of the appeal; (iii) that the appellant is willing to meet the terms of bail, and is not inclined to abscond while the appeal pends.

The application is supported by the affidavit of the applicant's advocate, who depones as follows. The applicant had been charged with the offence of assault causing actual bodily harm in Crim. Case No. 3024 of 2007 at Makadara Law Courts, and was convicted and sentenced to 15 months' imprisonment, on 13th July, 2007. The applicant thereafter dutifully filed a petition of appeal, on 27th July, 2007. It is deponed that since appeals often take some time before being heard and concluded, the applicant runs the risk that he will have served full term, by the time his appeal is heard. The applicant is a married man and the breadwinner for a large family with eight children, ranging in age from 4 months to 18 years; and it is deponed that such an enlarged family status, establishes reliable social and cultural rootage for the applicant who, consequently, is unlikely to abscond from the due process of law. It is stated, in those circumstances, that it is just and meet that the applicant be granted bail pending the hearing and determination of his appeal.

Learned counsel ***Ms. Nyarango***, after presenting the prayers and the evidence, submitted that the applicant's pending appeal is not a frivolous one and should be a basis for granting the application herein. Counsel cites as persuasive authority the case of ***Peter Mwanzia Kiilu v. Republic,*** Machakos H.Ct. Misc. Crim. Application No. 26 of 2002 in which ***Lady Justice Nambuye*** had held that, in such an application, *"the key consideration is whether the appellant has even one point to take up on appeal, in order to determine whether there is justification for putting the running of the sentence on hold."* In the case cited, the learned Judge's final assessment was as follows:

> ***"For now it is enough to say that the applicant has a point to take up on appeal and if upheld the conviction will be affected and so it is proper that he be admitted to bail pending appeal. This is so because if the appeal will succeed and find him when he shall have served a substantial part of the sentence he will be prejudiced, as there is no means for being compensated for the days spent in prison awaiting the hearing of the appeal***."

Ms. Nyarango noted that the applicant's appeal herein has eight grounds; and one of them relates to possible breach of the applicant's trial rights under s.72(3) of the *Constitution.* Another ground in the petition of appeal is that a plea of guilty had been recorded, whereas the plea had not been unequivocal. Before recording the plea of guilty, counsel urged, the trial Magistrate ought to have asked certain questions; and in this regard counsel relied on the Court of Appeal decision, ***Ndede v. Republic*** [1991] KLR 567 in which it had been thus held (p.570):

> ***"There is a long line of authority to the effect that the bar to an appeal against a conviction based on a guilty plea is not absolute. [In Adan v. Republic [1973] E.A. 445] the appeal…was allowed on the ground that his plea of guilty was equivocal."***

Learned State Counsel, ***Mrs. Kagiri*** opposed the appeal, on the basis, firstly, that overwhelming chances of success in the appeal had not been demonstrated, and secondly, that there were no exceptional circumstances justifying grant of bail pending appeal. From the record, counsel urged, the appellant had himself pleaded guilty after the charge had been read to him in a language that he understands.

Mrs. Kagiri doubted that the citation of s.72(3)(b) as the basis of an appeal carried much weight, since this was a new point entirely and had not been raised in earlier proceedings.

In considering an application such as the instant one, the most important consideration is whether the appeal itself is made *bona fide* and not frivolously; and a petition of appeal bears the mark of *bona fides* if it is well founded, and has good grounds which could lead to its success; but it is frivolous if it looks utterly hopeless, and not founded on objective criteria. What number of *positive traits* must an appeal have, to qualify as a *bona fide* appeal?

The authorities have taken differing positions in this matter: some say the appellant should demonstrate overwhelming chances of success; others would accept even just one indication of such success. Since one consideration alone could very well lead to the success of an appeal, it follows, I think, that the right test would be just, a *good chance of success*. This position seems to be supported by the persuasive authority which I have already cited: ***Peter Mwanzia Kiilu v. Republic***. So I will use such an apprehension to determine the instant matter.

I have read the proceedings of the Magistrate's Court, and I have not appreciated the basis of the claim that the applicant's plea of guilty was equivocal; it is also not obvious that the said plea of guilty was marred by some "mistake of fact"; it is not patent that the learned Magistrate omitted any procedural requirement, during plea-taking; it is not disclosed on the record that the applicant's senses were dulled during plea-taking, as alleged; the record does not create any impression that the applicant could not understand the nature of the proceedings; it is not obvious that the sentence awarded by the trial Magistrate was "disproportionate, harsh and excessive," in the light of the facts as read out and pleaded to by the applicant; there is nothing to show that the penalty meted out was *"highly prejudicial to the [applicant] and occasioned a failure of justice."*

When she appeared before this Court to argue the application, learned counsel raised a *new ground of appeal,* that the applicant had been brought to Court belatedly, contrary to s.72(3)(b) of the Constitution. The sanctity of constitutional provisions, and the gravity of claims properly attached to the Constitution, require that they be *formally and specifically raised, bona fide,* and they may not be cast aloft in casual mode – lest they fail to depict felt grievances. The question was not raised earlier, and did not even feature in the application papers.

From the whole scenario I have been unable to perceive good chances in the grounds of appeal – even

allowing that their merits can only come out at the hearing of the appeal itself.

In these circumstances, I have found no basis for allowing the applicant's application, which I hereby dismiss.

Orders accordingly.

DATED and DELIVERED at Nairobi this 25th day of February, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Applicant: Ms. Nyarango

For the Respondent: Ms. Gateru