



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Misc Crim Appli 782 of 2007

KEVIN WAFULA OKUNGU.....APPELLANT/APPLICANT

V E R S U S

REPUBLICRESPONDENT

R U L I N G

The applicant Kevin Wafula Okungu has moved this court by way of Chamber Summons dated 5/11/07, with the provisions of Section 3 (3) and Section 357 (1) of Criminal Procedure Code seeking that the applicant herein be granted bail pending appeal. It is supported by an affidavit sworn by his counsel Mr. Kinyanjui who states that the Applicant was convicted and sentenced to 10 years (Ten) imprisonment in Criminal case No. 376 of 2007. He has appealed against the conviction and sentence. It is his contention that the appeal has overwhelming chances of success. Further that the applicant is unlikely to abscond or jump bail if granted as he was even out on bail in the lower court.

The Applicant promises to abide by all restrictive terms and conditions which the court may impose. The application is opposed by the State represented by Miss Gateri. Mr. Kaburu argues on behalf of the Applicant that-

(1) *The overwhelming chances of the appeal*

succeeding are demonstrated in that vital known and named witness who were not called, and the only reason one can infer is because they would have given adverse testimony to the prosecution case.

(2) *It was not established whether accused is the*

one who inflicted the injuries, since there were even pre-existing injuries on the same limb.

(3) *The long period (17 days) taken before*

complainant sought treatment. This should have been treated as a crime of passion since the parties lived together as man and wife. That the investigation was not given due consideration when passing sentence, which is excessive.

(4) *There is also the fear that applicant will suffer*

irreparable loss if the application is not granted as he will then end up serving sentence over a period of time pending appeal, given the workload.

In response to these Miss Gateri says the appeal does not have any overwhelming chances of success as there is very strong evidence on record to support the conviction. Secondly that there is no requirement as to the number of witnesses one would call and those who were called, adduced sufficient evidence to support the charge. I think with regard to the evidence led and the issues raised, learned counsel has faulted various sections of the trial magistrate's judgment in which he reached certain conclusion that were unsupported by the evidence. The applicant has demonstrated that he has an arguable appeal. However that alone cannot be a reason to grant bail pending appeal – one also needs to consider whether there are exceptional or unusual circumstances so as to justify depriving the applicant of his liberty. (*See Dominic Karanja –Vs- Republic 1936 K L R 612*). And it is here that I must consider that the applicant has been sentenced to a ten year imprisonment term, he has only served seven months out of that term – if granted bail, then the temptation to abscond in the event of the appeal not succeeding is very real and probable. It is because of this second limb that I must reject the application and make orders as follows

(a) *The application seeking the applicant's release on bond pending appeal is rejected as the likelihood to abscond is real, given the long sentence he is serving.*

(b) *The application is dismissed.*

Dated and delivered at Nairobi this 13th day of February, 2008.

H. A. OMONDI

JUDGE