



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MERU

Criminal Appeal 16 of 2007

REPUBLICAPPELLANT

VERSUS

NAHASHON MURUNGI M'ITAYARESPONDENT

R U L I N G

The applicant was initially tried and acquitted by the court below for the offence of assault causing grievous harm contrary to Section 234 of the Penal Code.

The State was dissatisfied with the acquittal and filed an appeal challenging the same. The appeal was allowed and the applicant found guilty, convicted and sentenced to four (4) years imprisonment.

The applicant being aggrieved has filed a notice of appeal against the decision of this court.

In the meantime he seeks to be admitted to bail pending the hearing and determination of the appeal.

In the motion the applicant relies on the grounds that unless the application is granted he stands to serve before his appeal is heard thereby rendering the appeal nugatory. It is also averred that the appeal has overwhelming chances of success. That the applicant is sickly.

Counsel for the respondent opposed the application arguing that there is no likelihood of the applicant serving the term before the appeal is heard. That the appeal does not stand any chance in the Court of Appeal.

I have considered these arguments and the single authority cited, **Joseph Kaibunga V R**, Criminal Appeal No. MERU 16 of 2006.

Section 357 of the Criminal Procedure Code, under which this application is made gives this court jurisdiction to grant bail to the applicant pending the hearing and determination of his appeal.

It is now settled on the authority of **Dominic Karanja V R** (1986) KLR 612 that an application for bail pending appeal will be granted where it can be demonstrated that the appeal has overwhelming chances of success; where there are exceptional or unusual circumstances, and the likelihood of the applicant serving the entire or substantial part of the sentence.

Where the application is brought before the court whose decision is the subject of appeal, it is fallacious to expect that court to hold that the appeal has overwhelming chances of success.

Be that as it may, it is my opinion that the appeal does not have any chances of success.

It is important that the applicant proves that his appeal has overwhelming chances of success because having been convicted by a court of competent jurisdiction, the applicant loses the presumption of his innocence.

The applicant herein has failed to demonstrate the chances of success his appeal stands. The applicant has deposed that he suffers ill-health and has annexed treatment notes. In **Dominic Karanja** case, (supra) it was held that ill-health per se does not constitute an exception a circumstance where there are medical facilities for prisoners.

The treatment notes do not indicate how serious the applicant's condition is or how that condition is affected by his incarceration.

Finally a sentence of 4 years is not likely to be served or substantial part of it before the appeal is heard.

I find no merit in the application which is hereby dismissed.

Dated and delivered at Meru this 1st.day of February..2008.

W. Ouko

JUDGE