



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(Coram: Ojwang, J.)

MISC. CRIMINAL APPLICATION NO.592 OF 2007

SAMUEL KUIRA MWANGI.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

The applicant herein, who is the appellant in respect of Criminal Case No. 2322 of 2006 (**Republic v. Samuel Kuira Mwangi**) at Kibera Law Courts, came before this Court by Chamber Summons dated 22nd August, 2007. The grounds for the application were stated, in summary, as follows:

- (i) the applicant was convicted on 7th August, 2007 and sentenced on 10th August, 2007;
- (ii) currently the applicant is serving a prison term at Nairobi Industrial Area prison;
- (iii) the applicant had filed a petition of appeal on 21st August, 2007;
- (iv) the prosecution's evidence had carried many contradictions, and proof-beyond-reasonable-doubt had not been achieved, even though the applicant had been sentenced to a jail term;
- (v) the applicant, though a first-time offender, had been sentenced to a three-year jail term, the whole of which he could have served by the time the appeal is heard, and in the meantime the applicant's family wherefor he is the sole bread-winner, would be at risk of disintegrating;
- (vi) the grounds set out in the petition of appeal show overwhelming chances of the appeal succeeding.

The applicant was seeking admission to bail pending the hearing and determination of his appeal. He asked that the bail sum Kshs.40,000/= which had secured his liberty at the trial stage, be assigned to the terms of a new bond arrangement to secure his liberty during the pendency of the appeal. The applicant swore a detailed affidavit giving the evidentiary basis to support his prayers.

Learned Counsel **Mr. Kimeria** for the applicant, urged that this Court do consider the fact that the applicant was a young man of 21 years of age, recently married, and had just paid bride-wealth some two weeks prior to his conviction; he was a first-time offender; he was a man of fixed abode, and owner

of a shop where he sells goods on retail and wholesale; he was the bread-winner for his family; he had care-responsibility for his parents; during the trial stage, he had not failed to attend Court, at any time; he had been on bond during trial, throughout. Counsel urged that significance be attached to the fact that the trial Court had not proceeded straight to sentence the applicant, but had sought a probation officer's report; and, unfortunately, the learned Magistrate who passed the sentence did so before receiving the probation officer's report which had been called for by a different Magistrate.

Counsel urged that the appeal stood good chances of succeeding, as the testimonies given for the prosecution had been marked by a number of contradictions. The charge brought against the applicant had been that of causing grievous harm – but this incident took place in the applicant's own shop, and the good cause.

Learned counsel also stated that the appeal would raise constitutional issues touching on the applicant's trial-rights, as he had been arrested on 26th April, 2006 but only brought before the Court on 28th April, 2006 when the offence charged was bailable one and he should, ordinarily, have been brought before the Court within 24 hours of arrest (see *Albanus Mwasia Mutua v. Republic*, Criminal Appeal No. 120 of 2004; *Anne Njogu & Others v. Republic* High Court Misc. Cr. Appl. No. 551 of 2007).

Counsel noted that the applicant had been sent to jail on 10th August, 2007 and had remained there since then. He urged that this was a worthy applicant, and prayed for leniency in this matter. Counsel offered as an officer of this Court to ensure that the applicant would attend all proceedings during the hearing of the pending appeal.

Learned State Counsel *Mr. Mukura* did not contest the instant application, as in his opinion, the pending appeal stands good chances of succeeding. He noted that it had emerged from the testimonies of the prosecution witnesses, that the complainant had been injured while the applicant was acting in self-defence; and in those circumstances, the burden of proof had improperly been shifted onto the defence. Counsel urged that the trial Magistrate, in this regard, had reversed the recognized forensic roles in a criminal trial. The fact that the trial Magistrate sentenced the applicant before receiving the probation officer's report, counsel urged, was an improper exercise of discretion.

This ruling provides context and reasoning behind *orders* which I made on 19th September, 2007, and the same are now restated here, and they form an integral part of the ruling herein:

“I have heard the submissions of counsel, and I have become convinced that the prayer for bail pending appeal must be allowed. A reasoned ruling is to be given later; but now I will make orders as follows:

(i) I hereby allow the prayer for bail pending appeal, for the applicant.

(ii) The applicant's bail money still lodged with the Court in the sum of Kshs. 40,000/= shall continue to be held as the basis for this order granting bail.

(iii) On that basis, the applicant shall be released forthwith, and he shall enjoy the bail terms during the pendency of his appeal”.

It is so ordered.

DATED and DELIVERED at Nairobi this 3rd day of March, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Applicant: Mr. Kimeria

For the Respondent: Mr. Mukura