



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
Criminal Appeal 141 of 2006

DOUGLAS MUGAMBI MUTUA.....APPEALANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an application for bail pending appeal)

RULING OF THE COURT

1. This is an application for bail pending appeal. The same has been brought pursuant to sections 123,351 of the Criminal procedure Code (CPC).
2. The application is premised on five grounds on the face therefore. The applicant contends that he convicted in the absence of any single witness; that the evidence against the applicant was contradictory; that the learned trial magistrate ignored that applicants defense of alibi and that the applicants appeal has high chances of success. The applicant also contends that the learned trial magistrate arred in law and it fact in not granting him the option of a fine. The application is also predicated on the sworn affidavit of the applicant dated 31/ 10/ 2006.
3. The applicant was charged before the Tigania Resident Magistrate in Criminal Case Number 354 of 2005 with one count of assault causing actual bodily harm contrary to section 251 of the penal Code. He was tried, found guilty, convicted and sentenced to serve twelve (12) months imprisonment without the option of a fine. Before sentence, the applicant asked the court for leniency. The applicant has been in prison custody since 27/ 9/ 2006
4. During the hearing of the application on the 28/ 11/ 2006, Mr. Omayo appearing for the applicant contended that the appeal has high chances of success.
5. The application was opposed by Mr. Oluoch, learned counsel for the respondent. It was contended on behalf of the respondent that the applicants appeal; has no high chances of success and that there were no exceptional circumstances pleaded by the applicant that could sway the courts exercise of its discretion in his favour. It was further contended on behalf of the respondent that the offence took place in broad daylight and the complainant gave the name of the applicant to the police as the one who had assaulted him
6. On whether or nor failure to produce exhibits was fatal to the prosecutions case, Mr. Oluoch contended that the exhibit relevant to the complainants injuries to wit the p3 from was produced and that there was no need to produce other exhibits. Mr. Oluoch urged the court to apply the only known test in applications of this nature and that is whether the appeal has such overwhelming chances of success that to continue to hold the applicant behind bars would be a miscarriage of justice.

7. In the case of Dominic Karanja –Vs- Republic (1986) KLR 612, at page 613, the court of Appeal set out the test to be applied in considering applications of this nature when it expressed itself as follows:-

“The most important issue here is if the appeal has such overwhelming chances of success that there is no justification for depriving the applicant his liberty. The minor relevant considerations would be whether there are exceptional or unusual

circumstances. The previous good character of the applicant and hardship, if any, facing the wife and children of the applicant are exceptional or unusual factors:

See Somo Versus Republic (1972) E.A.476. A solemn assertion by an applicant that he will not abscond if he is released is not sufficient ground even with support of sureties, for releasing a convicted person on bail pending appeal.”

8. I hasten to add here that the applicant has not placed before me the Petition of Appeal to enable me appreciate what chances the applicants intended appeal has at succeeding. All that I have before me are the affidavits and the submissions made to me by both counsels.

9. For the reason that I have not seen and read the grounds of appeal, I would not exercise my discretion in favour of the applicant. The applicant has also not pleaded any special or exceptional circumstances that would tilt the scales of this court's discretion in his favour.

10. In the circumstances, I decline to grant bail to the applicant pending appeal. I direct that the appeal, if any should be fixed for hearing on a priority basis so that the likelihood of the applicant serving his full sentence of twelve (12) months' imprisonment before the hearing of the appeal is minimised.

11. Orders accordingly.

Dated and delivered at Meru this 16th day of May 2008.

RUTH N. SITATI

JUDGE