



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Criminal Misc. Application 229 of 2008**

**AUGUSTINE JOHN MACHARIA.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(From the original conviction and sentence in Criminal Case No. 1585 of 2005 of the Chief*

*Magistrate's Court at Kibera by*

*Mr Maundu – SRM)*

**R U L I N G**

This is a Chamber Summons application dated 23<sup>rd</sup> April 2008 made under Section 357 of the Criminal Procedure Code. It seeks for the applicant's release on bond pending hearing and final determination of Nairobi High Court Criminal Appeal 122 of 2008.

In the alternative and without prejudice to the above prayer, the applicants prays for an order of stay of the execution of the sentence imposed, pending hearing and determination of the appeal.

A final alternative prayer to the two above and still on a without prejudice basis seems that the Appeal herein be heard and determined as soon as is reasonably practicable.

The application is premised on grounds that considering the evidence adduced and the circumstances of the case in the trial court, the conviction therein, is manifestly unsafe.

*That the appeal has overwhelming chances of success.*

*That the appellant was sentenced to five(5) years imprisonment and unless the application is granted and or the appeal heard speedily, the appellant may serve a substantial portion of the sentence imposed and will suffer irreparable loss and damage.*

*It is also stated that applicant has acute Bronchitis and is hypertensive and is currently under strong and continuous medication, such that further incarceration will be detrimental to his health.*

The appellant was charged with the offence of robbery contrary to section 296(1) Penal Code and on 3<sup>rd</sup> April, 2008, he was found guilty of offence and sentenced to five years imprisonment.

The learned State Counsel, Mr Makura did not oppose the application saying the appeal had overwhelming chances of success as there was no proper identification of the applicant, and the evidence

which was adduced was largely circumstantial and did not meet the required standards. The learned State Counsel further submitted that the learned trial magistrate shifted the burden of proof onto the applicant.

The particulars of the charge was that on 25<sup>th</sup> day of February, 2005 along Bunyala Road, Nairobi jointly with others not before court, while on board motor vehicle registration No. KAS 607D, make Toyota Corolla white in colour, robbed Abdul Karim Muahia of Kshs 26,200/- and a mobile phone made Ericksson GA 628 valued at Kshs 6,000/- all valued at Kshs 32,200/-

The affidavit in support of this application is sworn by the applicant's Counsel Mr. C.O. Kanyangi and re-states the grounds for this application.

In considering such an application, the guiding principle should be the interest of justice as a primary consideration – I think this was the approach in the decision in the case of:-

Jivray Shah versus 1986 (KLR) 605 at page 606 – 607.

*“.....that the principal consideration is if there exists exceptional or unusual circumstances upon which this court can fairly conclude that it is in the interest of justice to grant bail. If it appears prima facie from the totaling of the circumstances that the appeal is likely to be successful on account of some substantial point of law..... and that the sentence or a substantial part of it will have been served by the time the appeal is heard, conditions for granting bail will exist..... the proper approach is the consideration of the particular circumstances and the weight and relevance of the points to be argued.”*

One of the issues raised in the present case by respondent is the mode of application of the circumstantial evidence which the learned State Counsel concedes, raises a very arguable ground and the question of who bears the burden of proof which is a principle of law. I have perused the trial court's record and do find that the applicant has raised an arguable appeal which stands chances of success.

Second is the question of appellant being likely to be prejudiced by serving a substantial part of his sentence by the time the appeal is heard. Indeed this was one of the issues concerned by Trevelyan J in the decision of Somo versus Republic 1972 EA 476 which stated in part:-

*“There is little, if any, point in granting the application if the appeal is not thought to have an overwhelming chance of success, at least to the extent that the sentence will be interfered with so that the applicant will be granted his liberty by the appeal court.....”*

The appellant was sentenced on 3<sup>rd</sup> April, 2008 but the appeal has not been given a date yet. The period of the jail sentence is not an issue in itself – at least not from Mr. Kanyangi's affidavit (since memo of appearance is not attached), save that there are special circumstances which are affected by the jail term, namely applicant's health. To this extent his medical report from Kenyatta National Hospital dated 28<sup>th</sup> March, 2008 has been annexed as COK 3 and signed by Dr. P.N. Otieno. That medical report confirms that the applicant was diagnosed of Bronchitis and was advised to continue medication and I think those are the special circumstances arising in this instance and which record has not been contested by the learned State Counsel, although this alone would not be a reason for granting of the orders sought.

My finding is that the applicant has demonstrated that he has an arguable appeal with probability of success.

I therefore allow the application and order that:-

(1) Applicant be released on bail pending hearing and determination of Criminal Appeal 122 of 2008 upon executing bond Kshs 100,000/- with one Kenyan surety of like amount.

Delivered and dated this 14<sup>th</sup> May, 2008 at Nairobi.

**H.A. OMONDI**

**JUDGE.**

**14<sup>TH</sup> MAY, 2008**