



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

Criminal Appeal 146 of 2007

SUSAN MWIKIUNA.....APPLICANT/APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

R U L I N G

The Applicant was convicted of the offence of grievous harm contrary to section 234 of the Penal Code and was on her plea of guilty sentenced to five (5) years imprisonment with a right of Appeal within 14 days by the learned Senior Resident Magistrate at Tigania.

By a Notice of Motion dated 3rd October 2007, filed under a Certificate of Urgency pursuant to Section 357 of the Criminal Procedure Code, the Applicant/Appellant seeks an order to be released on bail

pending the hearing and determination of Appeal No. 146 of 2007. The application is grounded upon the Affidavit of the Applicant, Susan Mwikiuna, sworn and filed with the Application on 16.04.2007. The Applicant sets out eleven (11) grounds in the Affidavit, the principal ones being grounds (3) (4) & (7) respectively, " that I did not understand the charge and the same was not explained to me, that the sentence of five (5) years was excessive, that the appeal has high chances of success, and grounds 5, 8, & 9 (inclusive) which concern the Applicant's family, her children wholly depend on her, they are suffering as they lack her care and there is nobody to look after them and her husband is a habitual drunkard and cannot be able to take care of the children.

These averments were reiterated during the hearing of the Application by the learned Counsel, Mr. Ondieki who took great exception to the learned trial Magistrate's seemingly out of the bolt finding that assault cases were rampant in the area, a generalization that was uncalled for in Counsel's view, because as rightly put by said Counsel, each case must be considered on its own merits, and not on the ground that such cases were common in the area. Counsel's submission that the Applicant was **single** was contrary to paragraph 9 of the Applicant's supporting Affidavit where the Applicant avers that "**my husband is a habitual drunkard and cannot be able to take care of the children.**"

In response to the application Mr. Oluoch, Senior Deputy Chief State Counsel in opposition to the

application argued that:-

1. **“the Appeal is against sentence by the Applicant’s own Supporting Affidavit. Under Section 234 of the Penal Code under which the Applicant was charged the Applicant was upon conviction liable to life imprisonment, the sentence of five years was therefore not manifestly excessive.**
2. **under the provisions of Section 348 of the Criminal Procedure Code no appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence. Learned Senior Deputy Chief State Counsel argued that the applicant having been convicted on her own plea of guilty, an appeal could only be on the question of sentence as provided in the said section 348 of the Criminal Procedure Code. The state would also argue later that the appeal does not lie.**
3. **There are no special or exceptional circumstances for exercising the court’s discretion in favour of the Applicant. There are no errors or defects on the face of the record, the facts as narrated by the prosecution disclosed the offence with which the appellant/applicant was charged.**
4. **The fact that the Applicant has two minor children do not constitute exceptional circumstances. Counsel relied on the case of DOMINIC KARANJA VS REPUBLIC [1986] KLR 612 and urged that the Application for bail pending appeal be dismissed.**

Having set forth the Applicant’s and the State’s rival arguments the real issue in this application is whether there are exceptional circumstances which, under Section 348 of the Criminal Procedure Code, (Cap 75, Laws of Kenya) would lead to the Applicant’s being granted bail pending appeal, and may be later, making a successful appeal on the sole ground of sentence. I say later, because discussing the legality of sentence at this stage may be prejudicial to the Applicant’s Appeal to be argued and answered when the Appeal is heard.

The case of **Dominic Karanja vs Republic** (supra) discussed the consideration with regard to which an application for bail pending appeal may be granted. The strong Court of Nyarangi, Platt and Gachui J.A. held that the most important aspect in such consideration is that if an appeal had such overwhelming chances of success there was no justification for depriving an applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances.

For instance, the court held that the previous good character of the applicant and the hardships, if any, facing his family were not exceptional or unusual circumstances or factors. Similarly ill-health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners, nor would a solemn assertion by an applicant that he will not abscond if released even if it is supported by sureties be sufficient ground for releasing a convicted person on bail pending appeal.

The situation here is unlike that in the above captioned case of **Dominic Karanja vs Republic** where Dominic Karanja had been tried convicted and sentenced. In this case, the Applicant had pleaded guilty to the charge of grievous harm. The record of the learned trial Magistrate clearly shows that when the charge was read over and explained to the Appellant, her answer was **“It is true. I caused grievous harm to Salome Mwakiuma”** (i.e. the complainant). A plea of guilty was entered. On 15th August 2007 when the facts were read and interpreted to the Applicant, the Applicant answered **“the facts are correct.”** Whether or not the facts as opposed to the charge were explained to the Applicant is not for this court to say. It is left to the court hearing the Applicant’s appeal to determine. I would only say that it is highly improbable that the accused failed to understand the gory details of the grievous harm and then go on to admit, **“the facts are correct”**.

Without dampening the Appellant’s effort to appeal I would for myself say that if the Applicant’s chances of success in the appeal are as high as the Applicant’s counsel urges, then I would find no reason for keeping the Applicant in prison. However in light of the clear provisions of Section 348 of the Criminal Procedure Code cited above that an appeal upon a plea of guilty is only maintainable upon the legality of a sentence and in light again of the clear provisions of Section 234 of the Penal Code (supra)

that a person guilty of grievous harm is liable to life imprisonment and in light of the sentence of five years which the Applicant received, I am not prepared to say that the Applicant's appeal has overwhelming chances of success.

The Applicant's application dated 3rd October 2007 and filed on 16th November 2007 is therefore dismissed.

Dated and delivered at Meru this 20th day of June 2008

M.J. Anyara Emukule

Judge.