REPUBLIC OF KENYA

THE HIGH COURT OF KENYA

AT KAKAMEGA

Criminal Appeal 4 of 2008

SAMMY LIBECHI ……………………….....……………….. APPLICANT

V E R S U S

REPUBLIC …………………………………………… RESPONDENT

R U L I N G

The application before me is for bail pending appeal. The applicant, **SAMMY LIBECHI**, was convicted for the offence of causing grievous harm contrary to ***section 234*** of the Penal Code. He was then sentenced to five (5) years imprisonment.

The said sentence was handed down on 13th February, 2008.

Shortly thereafter, on 21st February, 2008, the applicant moved this court by a Notice of Motion, which was expressed as having been brought pursuant to the provisions of ***section 357*** of the Criminal Procedure Code. The said application was supported by the affidavit Wilfrida A. Osodo, advocate.

When prosecuting the application, Mrs. W. A. Osodo, advocate submitted that the applicant's appeal had overwhelming chances of success. And in an effort to demonstrate that the appeal was more probably than not going to succeed, the applicant drew the court's attention to the fact that he had listed a total of 10 grounds of appeal, in his Petition of Appeal. He then pointed out that the "*major ground*" of appeal was the fact that the learned trial magistrate had simply dismissed the evidence tendered by the applicant and his witness.

Mrs. Osodo said that the applicant had given a sworn statement explaining the circumstances of his arrest, and that the said evidence was corroborated by his witnesses who said that the applicant was a victim of mob justice. The said mob justice is said to have been meted out on the applicant following a theft which had occurred at the home of the applicant.

The applicant did invite this court to take into account the contents of the P3 form which the prosecution had relied on to prove their case. In particular, I was asked to take note of the fact that in the said P3 Form, it was recorded that the complainant had been attacked by people who were well known to him.

That being the position, the applicant submitted that it was therefore surprising that he was the only person who had been charged with the offence.

To his mind, the P3 Form confirmed that the complainant had been a victim of mob justice. Therefore, the applicant submitted that there was reasonable doubt whether the complainant was attacked by the applicant or by a mob. The benefit of that alleged doubt should go to the applicant, so he said in his submissions.

In support of his application the applicant placed reliance upon the decision of the Hon. Amin J. in **ABDI Vs. REPUBLIC [1991] KLR 171.** Apart from the fact that the applicant in that case was granted bail as his appeal had high chances of success, the applicant also submitted that this court ought to consider his application favourably because he was a first-offender. It was his contention that the fact of being a first-offender was one of the relevant factors to be considered, as was done in the case of **CHIMAMBHAI V. REPUBLIC (NO.2) [1971] EA 343.**

Finally, the applicant informed the court that prior to being charged he had been a person of sound character.

In answer to the application, the learned State Counsel, Mr. Karuri, submitted that bail pending appeal should only be granted in exceptional circumstances. And, in his view, this was not such a case, as the offence was committed in broad daylight, when the applicant attacked the complainant with a panga.

The State said that the applicant cut the complainant on his left arm, cutting him seriously. He then cut the complainant's small finger on the left hand. Next, the applicant is said to have cut the complainant on the head, above the left ear.

The evidence of PW1 was said to have been corroborated by PW2, as well as by the P3 form, which confirmed the injuries sustained by the complainant.

As regards the applicant's defence, the State submitted that the same was not plausible as the Investigating Officer (PW4) had verified that the alleged house breaking and theft from the applicant's house did not take place.

In any event, submitted the State, the fact that in the P3 Form it was mentioned that the complainant was attacked by people well-known to him, instead of by the applicant, should be understood within the context in which it was made. The explanation offered for it was that as at the time the complainant reported to the police he was bleeding profusely and was in great pain.

Ultimately, the State submitted that the prosecution had proved the case against the applicant beyond any reasonable doubt.

When the applicant was called upon to reply to the submissions made by the State, he said that the attempt to explain the complainant's report was speculative, as the P3 form speaks for itself.

In determining this application I do remind myself that this is not the appeal. Therefore, I must, at this stage, refrain from making substantive findings which would end up tying-up the hands of the judge who will hear the substantive appeal.

However, I am fully alive to the fact that should I be satisfied that the appeal had an overwhelming chance of success, there would be no good reason to keep the applicant behind bars pending the hearing and determination of his appeal.

In the case of **CHIMAMBHAI Vs REPUBLIC (NO.2) [1971] E.A. 343,** at page 345, the Hon. Harris J. expressed himself thus;

"***The principal danger against which the court must guard in the granting of bail pending appeal is, of course, that the appellant may in the meantime either abscond or commit other offences ….***

In regard to the possibility of absconding a material consideration is the length of the term of

imprisonment against which the applicant is appealing, for clearly the longer the term the more likely is he to be tempted to abscond and possibly leave the country."

Of course, as the applicant submitted, if a person is a first-offender, and if during his trial he was out on bail, those are matters to be taken into account. But as Harris J. said in the **CHIMAMBHAI** case (above-mentioned), the courts need to weigh cases more on the basis of the length of the sentence than the fact that the applicant was either a first-offender or that he was out on bail during trial. His reasoning, which I concur with, is that even if a person had been out on bail during trial, if upon conviction he was sentenced to imprisonment for an appreciable duration, he may still be more tempted to abscond if he was granted bail pending appeal, than another person who was sentenced to imprisonment for a very short stint.

In this case, the applicant believes that his strongest point on appeal is the fact that the trial court dismissed his evidence. I therefore perused the record of the proceedings and the judgment. In my considered view, the trial court cannot be said to have simply dismissed the applicant's defence. The learned trial magistrate gave consideration to the line of defence, as espoused by both the applicant and DW2; he did so in almost two hand-written pages of his judgment. I say no more, for now, save to say that although DW2's evidence did support the evidence of the applicant, the trial court found both the applicant and his witness to have been anything but witnesses of truth.

Whether or not the trial court was correct to have arrived at that conclusion is a matter which must be left for determination after the substantive appeal is canvassed.

But then there is the issue as to the information contained in the P3 form, to the effect that the complainant was attacked by people who were well known to him.

The incident occurred at about 11.30 a.m. It was therefore in broad daylight as the learned State Counsel pointed out. That would imply that the complainant clearly saw his attacker or attackers.

Would the fact that the P3 indicated that the complainant was attacked by "*peopl*e" rather than "*a person*" imply that he was attacked by a mob, as suggested by the applicant? "Chambers' Concise Dictionary" defines the word mob as follows;

"***1. A large disorderly crowd. 2.*** **colloquially*****, any group of people. 3. (the mob)*** **colloquially*****, ordinary people; the masses. 4. (the mob), an organized gang of criminals, especially the MAFIA"***

As the complainant is reported to have told the police that the people who assaulted him were well known to him, that would imply that they could not be (even if they were more than one person), a mob.

In the result, I am not satisfied that the applicant has demonstrated that his appeal has overwhelming chances of success.

The applicant has also failed to demonstrate that his is a rare or exceptional case. That is the test set out in the authority cited by the applicant in **ABDI Vs REPUBLIC [1991] KLR 171** where at page 172, the Hon. Amin J. said,

"***the court is aware of the fact that an application for bail pending appeal is to be granted in rare and exceptional circumstances. Habib Kara Vesta & Another Vs. Republic [1934] EACA 197."***

Accordingly, and in judicially exercising my discretion in this matter, and having given due consideration to the facts and submissions canvassed before me, I find the applicant unworthy of the relief sought by him. His application for bail pending appeal is therefore dismissed.

Dated, Signed and Delivered at Kakamega, this 4th day of June, 2008

FRED A. OCHIENG

J U D G E