**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**Criminal Appeal 86 of 2008**

**PATRICK KIENGO GAKUMBI……APPELLANT**

**V E R S U S**

**REPUBLIC……..……..……..RESPONDENT**

**R U L I N G**

The Appellant/Applicant by his application brought by way of Chamber Summons dated and filed on 17.6.2008 seeks one single prayer, that he be granted bail and be released on bond pending the hearing and determination of his Petition of Appeal also dated and filed on 17.06.2008.

To support his Appeal, the Appellant/Applicant has not sworn an Affidavit himself but rather his Advocate Desderio Nyaga Nyamu has done so on his behalf. There is no explanation why, the Applicant himself did not swear the Affidavit. The twelve paragraph supporting Affidavit was paraphrased into four grounds upon which the motion is based. These are:

(1) The Appellant was aggrieved by the decision and judgment of the Senior Principal Magistrate and has appealed against both the conviction and sentence;

(2) The said appeal has strong grounds and has high chances of success,

(3) The appellant is already in prison as a consequence of the conviction and may so continue serving the sentence unless he is granted bail by this court,

(4) The natural and circumstances hereof are such that the Appellant may serve the whole sentence before his appeal is concluded thus rendering the same nugatory unless he is granted bail,

In his submissions to the court, Desderio Nyaga Nyamu contended that the Applicant should be granted bail because his appeal has overwhelming chances of success because of several inconsistencies in the evidence of the prosecution witness and therefore the prosecution had not discharged its duty of proving its case beyond reasonable doubt.

To prove his contention, Counsel cited inconsistencies in the evidence of the prosecution witnesses. For example counsel submitted P.W.1 (Henry Miriti) testified that there was no hooting, and that the motor vehicle being driven by the Applicant was moving at high speed, was overtaking and in the process of avoiding a huge pot hole on the road veered to the right side of the road, hit the deceased about 2 ½ meters off the tarmac. On the other hand P.W.2 (Francis Mawira Karani) who was a passenger sitting behind the driver, (the Applicant) testified that he heard hooting and when looking behind saw the

deceased 2 metres away. Counsel also found inconsistency in the evidence of P.W.4 a Police Officer who testified that the accused was overtaking another motor vehicle. Counsel also found fault with the use of the word "may" in the judgment by the learned trial magistrate which word he submitted should not appear in a criminal ruling or judgment. Counsel submitted that it is the duty of the trial court to evaluate all the evidence, and should not rely on the evidence of P.W.2 alone; that there was for instance no evidence of either overtaking or a pot hole.

For all those contradictions or inconsistencies the trial court should have given the benefit of doubt to the accused and either acquitted him or given him a lighter sentence. The Applicant's appeal had therefore overwhelming or strong chances of success.

Mr. Solomon Kimathi learned State Counsel did not share the views of his colleague. In Kimathi's submission the application lacked merit, and that the appeal had no chance of success, the prosecution had proved its case to the required standard in criminal matters, beyond reasonable doubt. The Applicant had been found guilty as charged, convicted and sentenced and was serving a lawful sentence, and that a few inconsistencies could be ignored, as they did not shake the prosecution's case.

For instance, the perception of speed as seen by a passenger is not the same as that of a by-stander by the road. So, P.W.1, a by-stander by the road saw the motor vehicle being driven by the accused was moving very fast, while P.W.2 who had been engaged in conversation with a fellow passenger thought the vehicle was not moving at high speed. Mr. Kimathi submitted that the evidence of P.W.2 could be ignored. The trial magistrate's conclusion that P.W.2 "May" not have seen or observed it was therefore reasonable, that the vehicle under the control of the Appellant while overtaking, another motor vehicle, veered off to the right side of the road, and hit a pedestrian causing her fatal injuries. The case for the prosecution was thus fully established to sustain the conviction and sentence.

Those in substance were the respective submissions by counsel for the Applicant and the learned State Counsel. There is a danger in an application for grant of bail pending appeal to engage in evaluating the evidence adduced at the trial of the Applicant. The evaluation of the evidence must be left to the appellate court whose mind must not be clouded at this stage by the court considering an application for bail pending appeal. If the court cannot evaluate the evidence, in depth then what consideration will it take into account in considering an application for grant of bail pending appeal?

The starting point is, I think, section 357 of the Criminal Procedure Code (Cap 75, Laws of Kenya) and which says:-

337(1) After the entering of an Appeal by a person entitled to appeal, the High Court, or the subordinate Court which convicted or sentenced that person, may order that he be released on bail with or without sureties or, if that person is not released on bail, shall at his request order that the execution of the sentence or order appealed against shall be suspended pending the hearing of the appeal:

Provided……"

**.**The said section clearly confers upon the court the discretion to release an appellant on bail, pending appeal, with or without sureties. Unfortunately that section does not give any guidelines by or under which such discretion may be exercised. In the case of ADEMBA VS REPUBLIC [1983] KLR 442 the Court of Appeal held-

(a) Bail pending appeal may only be granted if there are exceptional or unusual circumstances,

(b) The likelihood of success in the Appeal is a factor in granting bail pending appeal.

Taking the evidence as outlined by both the Applicant's counsel and the State Counsel, I cannot say that there are exceptional or unusual circumstances in the evidence under which the court could say the Applicant ought to be granted bail. As an accused person the fact that he did not abscond while put on bail is a factor in the Applicant's favour but bail pending trial is a different circumstance from bail

pending appeal. In bail pending appeal the applicant has already been convicted and sentenced. He is serving a lawful sentence.

On my peripheral consideration of the evidence I cannot share the optimistic submission of learned counsel for the Applicant that he has a high chance of success, and even if he were to serve the entire sentence of three years before the appeal, he would be serving a lawful sentence. Were his appeal to be successful whose chances, I doubt, on the evidence, the Applicant has a remedy in damages for malicious prosecution and subsequent imprisonment.

For those reasons I decline to grant the application and dismiss without costs to the Applicant's Chamber Summons dated and filed on 17.6.2008. There shall be an order accordingly.

Dated delivered and signed at Meru this 25th day of July 2008.

**M. J. Anyara Emukule**

**Judge.**