



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Appeal 848 of 2007**

**HARRY NJUGUNA NJOROGE.....APPELLANT**

**V E R S U S**

**REPUBLIC .....RESPONDENT**

**R U L I N G**

The Chamber Summons application is dated 4/12/07 filed under Section 357 of the Criminal Procedure Code. The application seeks that the applicant herein, Harry Njuguna Njoroje, be released and admitted to surety bond or cash bond pending the hearing and determination of the Appeal herein.

It is premised on grounds that:-

- (a) The applicant will suffer prejudice and loss if the present application is not allowed.**
- (b) The applicant is ready and willing to abide by any terms and conditions that the court may impose as a pre-condition to being granted the orders sought.**
- (c) It is only fair and just that the order sought be granted.**
- (d) The applicant has a good appeal with high chances of success.**
- (e) The applicant has already preferred an appeal Criminal Appeal 749 of 2007 after the judgment.**
- (f) The applicant is presently very sick due to the incarceration and requires constant medication which he may not get while in custody.**

The applicant was charged with the offence of causing death by dangerous driving contrary to Section 46 of the Traffic Act. Cap 403 (**Laws of Kenya**). The matter was heard by Mr. Maundu Senior Resident Magistrate who convicted him and sentenced him to a term of three (3) years imprisonment on 14<sup>th</sup> November, 2007. Mr. Kaburu who appears for the applicant argues that the appeal has high chances of success as the charge sheet was defective and the evidence of P.W.1 & P.W.2 cannot be believed and they must have been witness for hire. I think that for me to delve deeper into the issues raised in the appeal would be pre-empting what is already pending save to say he must demonstrate that he has overwhelming chances of success .

What he alleges that applicant was charged for the offence of careless driving and convicted on a charge of dangerous driving is incorrect, the charge sheet clearly shows applicant was charged with the offence of causing death by dangerous driving. As to whether P.W.1 & P.W.2 were witnesses for hire

whose evidence should not be believed cannot be decided ex parte the appeal – so the applicant has not adequately demonstrated the overwhelming chances of success being alluded to. Are there exceptional circumstances to warrant his release pending appeal? Mr. Kaburu submits that the applicant is a sickly man although no medical evidence has been availed. He explains that the Superintendent-General at the Prison said he would come at a later date to adduce that evidence – so pray do we wait for that event before making a finding on this assertion? As matters stand, there is nothing to confirm his health status ***BUT*** even if it is true that applicant is unwell, is there anything to suggest that he has such an exceptional life threatening condition that being in custody would be fatal? To this, the state counsel Miss Gateri has pointed out that the State has systems to ensure that persons in custody are accorded treatment – I can't fault that argument and so this limb fails. What about the apprehension that in the event of the appeal succeeding, Applicant will have spent a substantial period in custody and suffered harm, if the application is not granted. As earlier observed applicant was sentenced to serve three years imprisonment. Mr. Kaburu points out that he will have served a substantial part of his term and this will be the kind of loss which cannot be compensated. Applicant was sentenced on 14<sup>th</sup> November, 2007 – so far he has served just a little over two and half months. I think appeals with short sentences can be listed for hearing on a priority basis to mitigate that loss feared, so that applicant will not have served a substantial part of his sentence – it is a curable situation and therefore does not warrant release of applicant on bond pending appeal. Certainly applicant was out on bond during the hearing of the case in the main trial and he never absconded – but the prevailing circumstances were different – he didn't have his treasured liberty restricted – now the scenario is different and he can't use the past to argue for the present and future. The upshot is that there is no basis whatsoever to release the applicant on bond pending appeal as

- (1) ***He has not demonstrated that the appeal has high chances of success.***
- (2) ***There are no exceptional circumstances to warrant his release.***
- (3) ***The appeal to be heard on a priority basis as to avoid compromising applicant's liberty unordinarily.***

Subsequently the application is dismissed.

Written, signed and delivered this 13<sup>th</sup> day of February, 2007.

H.A. Omondi

Judge