



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**(CORAM: OJWANG, J.)**

**MISC. CRIMINAL APPLICATION NO. 388 OF 2007**

**BETWEEN**

**PETER KIHARA KAMAU..... APPELLANT**

**-AND-**

**REPUBLIC.....RESPONDENT**

**RULING**

This application relates to a pending appeal from the Judgement of the Senior Resident Magistrate at the Kibera Law Courts given on 10<sup>th</sup> April, 2007. The application, by way of Chamber Summons dated 29<sup>th</sup> May, 2007 and filed on 30<sup>th</sup> May, 2007 has one substantive prayer and was brought under certificate of urgency. The prayer is that the applicant be admitted to *bail*, pending the hearing and determination of his appeal.

General grounds are stated in support of the application, as follows:

- (a) that, the applicant's appeal has high chances of success and his medical condition may not permit his availability by the time the appeal is heard and determined;
- (b) that, the applicant and his family stand to suffer irreparably if this application is not disposed of urgently, as he is the sole bread-winner in a family of three, residing in Nairobi;
- (c) that, the applicant is willing to provide such security for his attendance in Court as may be required.

**Mr. Kelvin Mogeni**, the applicant's advocate, swore an affidavit in support of the application in which he thus depones. After judgement in Traffic Case No. 2397 of 2007 was delivered by the Senior Resident Magistrate on 10<sup>th</sup> April, 2007, certified copies of the proceedings were received by the applicant on 24<sup>th</sup> April, 2007. At this point the deponent avers: "I now apply for an order that the applicant be allowed to file the appeal out of time, and be admitted to bail pending the hearing and final determination of the appeal." The first leg of that prayer, however, is not in the application now before the Court; only the second leg – on bail pending appeal – is in the Chamber Summons of 29<sup>th</sup> May, 2007. But I have noted that leave to appeal out of time had indeed been granted in Misc. Criminal Application No. 312 of 2007.

Since judgement was delivered, it is deponed, the applicant has been held in prison custody. The deponent believes, from the content of the petition of appeal filed on 28<sup>th</sup> May, 2007 that the appeal has “very high chances of succeeding.”

The deponent avers that he has reliable information that the applicant “has been suffering from ailments related to his HIV status and [has] fallen ill in prison custody, is dejected and depressed.”

The deponent further avers that the applicant is the sole bread-winner in his family of three which resides in Nairobi, and he is ready and willing to adhere to any conditions such as this Court may impose to secure his attendance in Court, to ensure his release on bond pending the hearing and determination of the appeal.

It is deponed that during trial in the Magistrate’s Court, the appellant had consistently complied with bail terms.

This application was canvassed for the applicant and for the State Law Office, respectively by **Ms. Masake** and **Ms. Gakobo**.

**Ms. Masake** urged that the applicant’s appeal had a high chance of success, firstly on account of the circumstances of trial in the trial Court (which, however, she did not dwell on), and secondly, because the applicant who was HIV-positive, had already missed some medication schedules, on account of being held in prison. It was urged that the applicant’s condition continued to deteriorate, and considerable harm was being occasioned to his wife and three children in respect of whom he was the sole bread-winner.

**Ms. Masake** submitted that this was the very first time the applicant “[had] ever committed [an offence]”; it was urged that it was clear from the record that the applicant had not contravened the bail terms that applied to him as he underwent trial; and from that representation counsel further urged: “His [the applicant’s] conduct shows him to be a responsible man, ready to meet any conditions this Court may impose.”

Learned counsel **Ms. Gakobo** contested the application: on the grounds that the applicant had not demonstrated how the appeal could be said to hold overwhelming chances of success. Counsel contended that the evidence on record against the applicant, was overwhelming, and it was more likely than not, that his conviction would be upheld by the appellate Court.

On the factor of the applicant’s illness, in this application, **Ms. Gakobo** urged that illness was not the main factor to sustain an application for bail pending appeal; indeed, it should have been shown that the prison authorities would not allow the applicant to get medication as necessary – for illness to come up in aid of the application.

Learned counsel noted that the sentence of imprisonment imposed against the applicant was three years’ imprisonment; and there was “no likelihood he would have served a substantial portion of [that term] by the time the appeal is heard, so as to render the appeal nugatory.” She urged that the appeal had no merit, and that it be dismissed.

As already noted in this ruling, learned counsel for the applicant founded his client’s case, above all, on the applicant’s state of health. The effect is that she did not effectively canvass the assertion that the applicant’s appeal is one with *high chances of success*. I have looked at the petition of appeal, and at the proceedings of the trial Court which are attached. I could not immediately form the impression that the prosecution, and the trial, and the conviction entered against the applicant, were *so misplaced*, that an appeal such as that lodged by the applicant, *must* of necessity succeed. This point could have been canvassed further by counsel, but she contented herself by affirming that it was inappropriate to delve into the merits of her appeal. While I agree that this is not the forum for arguing the appeal, the condition for winning bail pending appeal, that high chances in the prospective appeal must be shown, would dictate, I think, as a *matter of law*, that the applicant is to lead the Court through the basic landmarks of the intended appeal. The *core features* of the appeal documents must be pointed out, to enable the Court to see that, indeed, there is a business-like appeal in the offing which would jolly well succeed, given its

apparent merits. Unless the Court is satisfied in that regard, then there is no legal foundation, independent of mere compassion, upon which a prayer such as the one now before this Court could be granted.

Furthermore, even were it possible for the Court to exercise a generous discretion based on compassion, that will be unsuitable in this instance. There was no answer to the point of merit (with respect) raised by learned counsel **Ms. Gakobo**, that it had not been shown that the prison authorities holding the applicant, are reluctant to have him take his medication on a regular basis, according to prescription.

I must, in these circumstances, conclude that no fitting case has been placed before this Court, for the grant of bail pending the hearing and disposal of the applicant's appeal.

I must, therefore, dismiss the applicant's application by Chamber Summons dated 29<sup>th</sup> May, 2007.

***Orders accordingly.***

**DATED and DELIVERED at Nairobi this 30<sup>th</sup> day of July, 2007.**

**J.B. OJWANG**

**JUDGE**

**Coram: Ojwang, J.**

**Court Clerk: G. Ndung'u**

**For the Appellant/Applicant: Ms. Masake**

**For the Respondent: Ms. Gakobo**