



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

Misc Crim Appli 300 of 2007

MAURICE OKELLO KABURU

***alias* SAMUEL OBIERO OMBEWA.....APPLICANT**

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

The applicant has come to Court by way of Chamber Summons, dated 20th April, 2007 and filed on 26th April, 2007. The application is brought under s.357 of the Criminal Procedure Code (Cap.75, Laws of Kenya

applicant's prayer is that he be released on bail pending the hearing and determination of High Court Criminal Appeal No. 67 of 2007, which he has lodged.

The grounds in support of the application are, firstly, that the appeal lodged is meritorious and has high chances of success; secondly, that it is likely the appeal will not be heard and determined soon and thus, the applicant will have served a substantial portion of the sentence by the time the appeal is concluded; and thirdly, that it be taken in favour of the applicant, that he will turn up for hearing faithfully during appeal as he had done during trial.

In the supporting affidavit the applicant avers that he had been sentenced to serve consecutive jail terms amounting to about three years, in Criminal Case No. 3076 of 2003, and he is currently held at the Nairobi Remand Prison. He depones that he has already lodged a petition of appeal, and he has received advice from his advocate that the appeal has high chances of success.

The applicant submitted before this Court that he had been convicted on the basis of inadequate evidence of identification; and that the proceedings in which he had been convicted were marked with material inconsistencies and contradictions. He contends that the learned Magistrate had erred, in convicting him. He pleads that he is a family man, with two children in school, and he is the sole breadwinner in the family. He states that he has been in prison since January, 2007, and in the meantime his children have not attended school.

Learned State Counsel **Ms. Gakobo** opposed the application, and urged that the applicant had not demonstrated that his appeal has overwhelming chances of success. She submitted that a reading of the proceedings of the trial Court shows sufficient evidence to sustain a conviction.

To the applicant's claim that he had been identified by only two witnesses, learned counsel submitted that the evidence of PW4 at the trial, was credible evidence of identification. PW4 had testified that he was familiar with the applicant, who had appeared before him on two earlier occasions – so that PW4's evidence was indeed that of recognition. And the applicant had appeared before PW8 at the time of opening the bank account which was the basis of the trial and of convictions on charges of stealing, and uttering false documents.

Ms. Gakobo submitted that there had been no material contradiction in the testimonies of witnesses, and so the convictions were unlikely to be disturbed on appeal.

Learned counsel urged that this Court be not moved by the applicant's pleas regarding his family-type hardships while serving in jail. Such hardships, counsel urged, "are exceptional circumstances and, on their own, they cannot warrant release on bond pending appeal." She submitted that the recognised standard for the grant of bond pending appeal, was the existence of overwhelming chances of success; and the same had not been shown on the instant application.

Ms. Gakobo noted that the sentence to which the applicant was now subject, was a two-year-eight-month jail term; and there was no likelihood that a substantial portion thereof would have been served by the time of conclusion of the appeal. Consequently, learned counsel urged, there was no risk of the appeal if it were to succeed, ending up being nugatory. She urged that the application be dismissed.

The applicant's submissions were quite consistent with the prayers as set out in the application; they amounted to contentions of a kind, that ideally ought to come only during the hearing of the appeal itself. That being the position, I must hold that no radically-significant element has been laid before this Court which would dispose it towards the inference that the appeal as filed, indeed, carries overwhelming chances of success. What I perceive is an appeal set to be fairly evenly-contested, and an appeal the outcome of which could go either way.

Such a position does not *prima facie* justify the grant of bail pending the hearing of an appeal, even if it is granted that special circumstances in each application of this kind would merit attention. No such special circumstances were raised in this case.

Therefore I hereby dismiss the application by Chamber Summons, dated 20th April, 2007.

Orders accordingly.

DATED and DELIVERED at Nairobi this 9th day of July, 2007.

J.B. OJWANG

JUDGE

Coram: Ojwang, J

Court Clerk: Tabitha Wanjiku

For the Respondent: Ms. Gakobo

Applicant in person