

REPUBLIC OF KENYA

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

Misc Crim Appli 229 of 2007

DENNIS EUNGU EUNGUAPPLICANT

VERUS

REPUBLIC.....RESPONDENT

RULING

Before me is an application by way of Chamber Summons filed by the applicant DENNIS EUNGU EUNGU. It seeks for an order that the applicant be granted bond/bail pending the hearing of his appeal. The appellant has actually filed Criminal Appeal No. 22 of 2007 against the decision in Kibera Chief Magistrate’s Criminal Case No. 7251 of 2005. The application is supported by an affidavit of the applicant. It is deponed in the affidavit that the applicant was sentenced to serve 10 years imprisonment. It is also deponed that the applicant had filed an appeal which had overwhelming chances of success.

At the hearing of the application, the applicant submitted that the prosecution evidence was full of contradictions. He also submitted that his identification was not positive. He submitted further that there was no evidence that the hymen of the complainant was torn. In his view, his appeal had overwhelming chances of success.

The learned State Counsel, Mrs. Kagiri, opposed the application. Counsel submitted that the applicant had not demonstrated overwhelming chances of success in the appeal. He had also not demonstrated exceptional circumstances. Counsel submitted that the issues raised by the applicant in the application were issues to be argued and considered in the appeal.

I have considered the application, the submission on both sides and have also perused the proceedings and judgment. This is an application for bail pending appeal. The main consideration to be taken by a court in such an application is whether the appeal has overwhelming probability of success. Another consideration is the existence of unusual or exceptional circumstances. In SOMO –vs- REPUBLIC [1972] EA 476, Traveyan J. held –

“(i)

(ii) that the applicant is of good character, that the appeal has been admitted to hearing, that the offence did not involve personal violence are not exceptional or unusual circumstances

(iii) the most important ground is that the appeal has an overwhelming chance of being successful, in that case there is no justification for depriving the applicant his freedom”

The reasoning in the above case has been followed consistently in subsequent court decisions. Suffice here to say that the Court of Appeal cited the above case with approval in the case of **JIVRAJ SHAH – vs- REPUBLIC Criminal Appeal No. 18 of 1986.**

The burden is on the applicant to demonstrate to the court that the appeal has overwhelming chances of success. The burden is also on him to demonstrate the unusual or exceptional circumstances. Having perused the record and judgment of the subordinate court, the applicant’s petition of appeal, the application herein and the submissions in court, I find that the applicant has not demonstrated that his appeal has overwhelming chances of success. He has also not demonstrated any exceptional or unusual circumstances. I agree however, that the applicant has an arguable appeal. The application for bail

pending appeal therefore fails.

For the above reasons I find no merits in the application and dismiss the same.

Dated and delivered at Nairobi this 31st day of October 2007

George Dulu

Judge

In the presence of –

Applicant in person

Mrs. Kagiri for respondent - absent

Eric - court clerk