



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA**

AT NAIROBI

MILIMANI LAW COURTS

Misc. Criminal Case 378 of 2007

SAMUEL MAKAU KYENI.....APPLICANT

AND

REPUBLICRESPONDENT

R U L I N G

Before me is an application brought by way of Chamber Summons dated 29th May 2007. It is purported to be brought under section 357(1) of the Criminal Procedure Code (Cap. 75 of the Laws of Kenya). It was filed by M/s Mbiyu Kamau & Company advocates on behalf of the applicant SAMUEL MAKAU KYENI. The substantive orders sought in the application are that ?

1. An order be issued for stay of execution of the sentence imposed against the applicant by the learned trial magistrate in Chief Magistrates Court Thika, Criminal Case Number 7557 of 2004.
2. The applicant be granted bail pending the hearing and determination of criminal appeal number 321 of 2007 filed in this court by the applicant on 24th May 2007.

The application has grounds on the face of the Chamber Summons and is supported by the affidavit of the applicant sworn on 29th May 2007. The grounds of the application are firstly, that the appeal had high chances of success; secondly, that the sentence was excessive and not based on any law; thirdly, that the applicant was not likely to abscond and that the applicant's past conduct while facing the subordinate court trial was in favour of him being granted bail; and lastly, that the applicant would be prejudiced if part or the whole of the sentence was executed while the appeal filed by the applicant was pending hearing and determination.

At the hearing of the application, Mr. Mbiyu, learned counsel for the applicant, made submissions in supporting the application, while Ms. Gateru the learned State Counsel made submissions in opposition to the application. While counsel for the applicant submitted that the appeal had overwhelming chances of success, Ms. Gateru submitted that the appeal did not have overwhelming chances of success. Counsel for the applicant submitted that the applicant was convicted of a non-existent offence, as the Sexual Offence Act No. 3 of 2006 came into operation on 21.6.2006 after the applicant was convicted and sentenced.

This is an application for bail pending hearing and determination of appeal. Several court cases have

considered the subject. It is generally agreed in the court case decisions that the main consideration in such an application is whether the appeal has overwhelming chances of success. This position was clearly stated in the case of **SOMO vs REPUBLIC [1972] EA 476**, in which Trevelyin J held, inter alia, that ?

“(i) -----

(ii) that the appellant 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 of his freedom.”

Other than the high probability of success, if there exists exceptional or unusual circumstances, then an application for bail pending appeal may be successful. However, each case will depend on its own facts. In the case of **AMRITLAL JIVRAJ SHAH –VS- REPUBLIC – Nbi Criminal Appeal No. 18 of 1986**, Nyarangi, Gachuhi and Apaloo JJA, cited with approval the case of **SOMO –VS- REPUBLIC (supra)**, and stated ?

“If it appears prima facie from the totality of the circumstances that an appeal is likely of the appeal is likely to succeed on accounting some substantial point of law to be urged, and that the sentence or a substantial part of it, will have been served by the time the appeal is heard, conditions for granting bail will exist. The decision of Somo –vs- Republic [1972] EA 476 which was referred to by this court with approval in Criminal Application Nai 14 of 1986, DANIEL DOMINIC KARANJA –VS- REPUBLIC where the main criteria was stated to be the existence of overwhelming chances of success does not differ from a set of circumstances which discharge substantial merits in the appeal which could result in the appeal being allowed. The proper approach is the consideration of the particular circumstances and weight and relevance of the points to be argued.”

The main thrust of the argument of the applicant’s counsel is that the applicant was convicted of a none existent offence. That legal point, in my view, is an arguable point. Indeed, there might have been amendments to the law in the year 2003, however the offence of defilement was in existence in the Penal Code (Cap. 63) before that. The sentence imposed is the sentence applicable after the 2003 amendment. Again, that is an arguable point, but does not establish high probability of success in the appeal. I have also perused the petition of appeal and I do not see anything that convinces me that the appeal, which is arguable, has overwhelming chances of success. The burden was on the applicant to demonstrate that his appeal has overwhelming chances of success. It was also on the applicant to demonstrate unusual or exceptional circumstances. He has failed to do so. I will therefore dismiss the application.

For the above reasons, I dismiss the application, and decline to grant the orders sought.

Dated and delivered at Nairobi this 22nd October, 2007.

GEORGE DULU

JUDGE

In the presence of

Mr. Mbiyu for the applicant

Ms. Gateru for the State - absent

Eric – court clerk

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