



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Misc Criminal Appli 319 of 2007**

**JOHN MUCHINA KIMEMIA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

Before me is a Notice of Motion dated 7<sup>th</sup> May 2007 filed by M/s Naikuni, Ngaah & Company advocates on behalf of the applicant JOHN MUCHINA KIMEMIA. The application is purported to have been filed under section 350(1) (2) and section 357(1) (4) of the Criminal Procedure Code (Cap. 75). The substantive orders sought in the application are that –

Ø The applicant/appellant be granted bail pending the hearing of his appeal Criminal appeal No.726 of 2006.

Ø If the court is unable to grant bail pending appeal to have the criminal Appeal No. 726 of 2006 be heard as a matter of urgency.

The application has grounds on the face of the Notice of

Motion. It is also supported by the affidavit of the applicant JOHN MUCHINA KIMEMIA sworn on 7<sup>th</sup> May 2007. The grounds of the application are firstly, that the applicant is a law abiding citizen and pleaded not guilty; secondly that the applicant has already filed an appeal against conviction and sentenced in Gatundu Criminal Case No. 1478 of 2004; thirdly, that if the applicant is released on bail pending appeal he will cooperate with and appear in court; fourthly, that the applicant is a young man and a professional Public Health businessman and sole breadwinner of his family and school going children; fifthly that the appeal filed raises weighty issues of law and facts and stands overwhelming chances of success; lastly, that the interests of justice (require) that the applicant/appellant is granted bail pending appeal.

At the hearing of the application, Mr. Naikuni, learned counsel for the applicant submitted that the judgment passed by the trial court was arbitrary, wrongful and unreasonable. The sentence was also quite heavy and severe. Counsel submitted that the appeal had an overwhelming likelihood of success, as it raised weighty issues of law and fact. Counsel contended that if the applicant was to wait for the appeal to be heard, he would have suffered in confinement for no apparent reason. Counsel also argued that the applicant was a young health professional of good character and record, a family man and breadwinner. Counsel argued that the magistrate contravened section 7(b) of the Criminal Procedure Code (Cap. 75), as he exceeded his powers by pronouncing a life sentence. Counsel also argued that the magistrate took over proceedings from a previous magistrate but did not warn the applicant as required under section 200 of the Criminal Procedure Code (Cap. 75). Counsel further contended that the magistrate did not comply with the provisions of section 211 of the Criminal Procedure Code before the appellant was put on his

defence. Counsel further submitted that the magistrate did not consider the alibi defence of the appellant.

Counsel sought to rely on the case of **PETER KAMAU MWANGI –vs- REPUBLIC**, Nai HC Misc. Cr. Appl. 723 of 2004 the case of **MOTICHAND –vs- REPUBLIC** (1972) EA 359 and the case of **MERALI –vs- REPUBLIC (1972) EA 47**. Counsel asked the court to allow the application and release the applicant on bail pending appeal.

Mrs. Kagiri, the learned State Counsel, opposed the application. Counsel argued that the appeal did not have overwhelming chances of success nor were there exceptional circumstances. Counsel contended that there was direct as well as circumstantial evidence in the case. There was nothing to show that the magistrate relied on hearsay evidence. Counsel further argued that section 200 of the Criminal Procedure Code (Cap. 75) was complied with. On the jurisdiction of the court, counsel argued that the court had jurisdiction to hear and determine the case as provided for in the schedule to the Criminal Procedure Code (Cap. 75). Counsel emphasized that there were no unusual or exceptional circumstances in the case. Counsel sought to rely on the case of **BARNARDS MUTUA MWANGANGI –vs- REPUBLIC** Nai H.C. Misc. Cr. Appl. No. 135 of 2007 and the case of **JIVRAJ –vs- REPUBLIC (1986) KLR 605**. Counsel also argued that since the applicant was sentenced to serve life imprisonment, his appeal would not be rendered nugatory if he was not released on bail pending appeal, as he had not served even one year in prison. Counsel urged me to dismiss the appeal.

In response, Mr. Naikuni, reiterated that the appeal had overwhelming chances of success, as the evidence relied upon was purely hearsay evidence. Counsel argued that the State Counsel had not addressed the issue of jurisdiction under section 7(1) (b) of the Criminal Procedure Code. Counsel also submitted that the fact that the applicant had served a short part of his sentence was not a good ground for denying him bail pending appeal.

I have considered the application and the submission of counsel for the parties. This is an application for bail pending appeal. The main consideration in such an application is whether the appeal has overwhelming chances of success, and in that event, there will be no justification for holding applicant in custody. The other consideration is whether there are exceptional or unusual circumstances. Several court cases have dealt with the subject before. Suffice it if I cite the case of **JIVRAJ SHAH –vs- REPUBLIC (1986) KLR 605**, in which Nyarangi, Gachuhi & Apaloo JJA, stated, inter alia –

- 1. The principal consideration in an application for bail pending appeal is, the existence of exceptional or unusual circumstances upon which the court of Appeal can fairly conclude that it is in the interests of justice to grant bail.**
  
- 2. If it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of some substantial point of law to be urged and that the sentence or substantial part of it will have been served by the time the appeal I heard, conditions for granting bail will exist.**
  
- 3. The main criteria is that there is no difference between overwhelming chances of success and a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed and the proper approach is the consideration of the particular circumstances and weight and relevance of the points to be argued.**
  
4. ....
  
5. ....
  
6. ....

I have considered the facts and circumstances of this case. I have perused the proceedings and the judgment. I have no doubt that the applicant has an arguable appeal. The sentence imposed of life imprisonment appears to be the maximum sentence for the offence of grievous harm. However, in my view, the fact that a sentence per se appears to be harsh is not an exceptional or unusual circumstance, especially where the sentence is a sentence of imprisonment. There could be some legal arguments on the compliance by the subordinate court with the provisions of section 200 and 211 of the Criminal Procedure Code (Cap. 75). As indicated by counsel for the applicant. However, on the face of it, there does not appear to be outright disregard for the procedural requirements of a criminal trial by the subordinate court. Weigh the facts before me, I have no doubt that the appeal is an arguable appeal. However, I am not convinced that the appeal has overwhelming chances of success. The burden was on the applicant to demonstrate the overwhelming chances of success of the appeal. The applicant has not done so. I will therefore not allow the application on that account.

The fact that the applicant is of good character, that he is a family man, that he is the sole breadwinner, in my view, are not unusual or exceptional circumstances. Therefore, in my view, the applicant has also failed to demonstrate unusual or exceptional circumstances.

However, looking at the facts and circumstances of this case, I am of the view that the appeal merits being given a priority hearing date. I will therefore issue an order for the early hearing of the appeal.

Consequently and for the above reasons I order as follows –

1. I dismiss the applicant for bail pending the hearing and determination of appeal.
2. I order that the appeal of the applicant, that is, Criminal Appeal No. 726 of 2006 be fixed for hearing by the registry on priority basis, if it has been admitted to hearing.

It is so ordered.

Dated and delivered at Nairobi this 15<sup>th</sup> day of October 2007.

**George Dulu**

**Judge**

**In the presence –**

Mr. Naikuni for applicant - absent

Mrs. Kagiri for the State - absent

Eric - court clerk