



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Misc Crim Appli 243 OF 2007**

**SAMUEL MATHENGE WACHIRA.....APPLICANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**RULING**

Before me is a Chamber Summons dated 30<sup>th</sup> March 2007 filed by M/S Gicheha Kamau & Company advocates on behalf of the applicant SAMUEL MATHENGE WACHIRA. The application was filed under section 357 of the Criminal Procedure Code (Cap.75) and seeks for the following orders, that –

1. The applicant be admitted to bail/bond pending the hearing of Criminal Appeal No. 166 of 2007.
2. In the alternative if the applicant is not admitted to bail his appeal be heard instantly.
3. Such other or further orders as the honouralbe court may deem fit to grant.

The application has grounds on the face of the Chamber Summons. The grounds are firstly, that the applicant's appeal has overwhelming chances of success. Secondly, that unless the applicant is admitted to bail/bond pending appeal he stands to suffer irreparable loss and damages. Thirdly, that the trial magistrate erred in law and fact in convicting the applicant which error was apparent on record. Fourthly, that the applicant is ready and willing to abide by terms of bail/bond granted by the Honourable court. The application is also supported by the affidavit of PETER GICHEHA KAMAU advocate, sworn on 30/3/2007.

At the hearing of the application Mr. Kamau, learned counsel for the applicant, submitted that the appeal of the applicant, which had already been filed and numbered 166 of 2007, had overwhelming chances of success. Counsel also submitted that if the applicant was not admitted to bail pending appeal, he would have served a substantial part of his sentence by the time his appeal will be heard and determined. Counsel submitted that he applicant was on bail during trial before the subordinate court, and was willing to comply with bail terms imposed and attend court.

Counsel argued that the overwhelming chances of success of the appeal was based on the fact that the evidence against the applicant was by a single witness, and left a lot to be desired. The trial court did not warn itself before convicting. Also, there were other crucial witnesses who were not called by the

prosecution to testify. The single identifying witness was also drunk. In addition, magistrate did not indicate the reason why she disbelieved the defence, which amounted to shifting the burden of proof to the applicant.

The learned State Counsel, Ms. Gateru, opposed the application. Counsel argued that there was no likelihood that the appeal would be rendered nugatory if the applicant was not released on bail pending appeal. The applicant was imprisoned for 5 years just in 2007, which was this same year. In counsel's view, appeals for short sentences were normally fixed for hearing by the courts on priority basis. Counsel also submitted that the applicant had not demonstrated overwhelming chances of success of his appeal. The applicant had also not demonstrated exceptional circumstances.

The consideration to be taken by a court in an application for bail pending appeal are well settled. The main consideration is whether the appeal has overwhelming chances of success. Other considerations are whether there are unusual or exceptional circumstances – see SOMO –vs- REPUBLIC [1972] EA 476.

At the stage of an application for bail pending appeal, the court is not required to go into the merits of the appeal, as that is for the appellate court. The court has to determine whether the appeal has overwhelming circumstances of success, as in that event there will be no justification for the applicant to continue being detained in custody. The court has also to look into whether there are exceptional or unusual circumstances that would justify the releasing the applicant on bail pending appeal. The burden is on the applicant to demonstrate that the appeal has overwhelming chances of success. The burden is also on the applicant to demonstrate the exceptional or exceptional circumstances.

I have perused the record of proceedings, the petition of appeal and the application herein. I have also considered the submissions of learned counsel on both sides. The grounds of appeal are on identification by a single witness, and failure to call a crucial witness. I do not see anything that convinces me that the appeal has overwhelming chances of success. No doubt, the appeal is an arguable appeal. However, in my view the applicant has not demonstrated that the appeal has overwhelming chances of success. The appellant has also not demonstrated any exceptional or unusual circumstances. The sentence is imprisonment for 5 years from 2<sup>nd</sup> February 2007. The fact that the appellant is of good conduct and that he was on bail/bond during the trial before the subordinate court is not an exceptional circumstance. I find no merits in the application for bail pending appeal, and have to dismiss the same. I will however the same. I will however order that the appeal be heard on priority basis.

Consequently, I dismiss the application and decline to grant the applicant bail/bond pending appeal. I however order that the registry do fix the appeal, when admitted, for hearing on priority basis.

It is so ordered.

Dated and delivered at Nairobi this 1<sup>st</sup> October 2007.

**George Dulu**

**Judge**

**In the presence –**

Applicant

Mr. Mbugua for applicant

Ms. Gateru

Eric - court clerk