

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA

Criminal Appeal 94 of 2007

ANASETI AMAI OPUTO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Arising from Original BGM CM CR.NO.875 OF 2007)

RULING

The applicant has moved this court, through Onyando & Co. Advocates for an order that he be admitted to bail pending appeal. The application is premised on section 356 (1) (or 356 d) and section 357 of the Criminal Procedure Code. At this point, I should point out that as rightly submitted by counsel for the state, section 356 (1) is inapplicable in this matter as the same relates to applications for bail made before the convicting court and not before the appellate court. Had the application been premised on that provision alone, it would have been struck out. The applicant is nonetheless covered by section 357 of the Criminal Procedure Code. The main ground raised by the applicant is that he has an arguable appeal with overwhelming chances of success. Counsel has argued that the trial was irregular in that after the charge was amended, PW1 who had already testified was not recalled to testify. I have perused the proceedings before the trial court. I have noted that PW1 – the Doctor told the court that the degree of injury was found to be ‘*maim*’. In medical jargon, ‘*maim*’ is more aggravated in degree than grievous bodily harm or assault causing actual bodily harm. This would mean therefore that it was because of the Doctor’s evidence that the charge was amended. The fresh charge was already supported by the Doctor’s evidence which was already on record. Although ideally the court should ask the accused person if he desires to recall a witness who has testified before the amendment of the charge, in this case, failure to recall PW1 did not occasion any prejudice to the accused person. It cannot therefore be said that on that ground only, the appeal has high chances of succeeding. As I have said, I have gone through the entire record of the trial court and I do not see any glaring irregularities or illegalities that would compel me in the absence of any other unusual circumstances to allow this application.

As rightly noted by the learned state counsel, the applicant has not set out any unusual or exceptional circumstances that would call for his release on bail pending appeal. I have noted that the offence involves personal violence and the complainant was actually badly injured. In such circumstances, and in absence of any unusual or exceptional circumstances, the court will normally be disinclined to grant bail pending appeal. My finding is that there are no ‘overwhelming’ chances of the appeal succeeding in this case. The applicant has just started serving a 3 year jail term. I am certain that if he files and pursues his appeal diligently, the same will be heard and determined expeditiously. For these reasons, my finding is that this application must fail. The same is therefore dismissed.

W. KARANJA

JUDGE

DELIVERED, Dated and Signed at Bungoma this 6th day of Nov., 2007 in

presence of Mr. Onyando and Mr. Ndege for the state.