



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

**Criminal Appeal 71 of 2006**

**ANGELINE OFUSI MALOBA.....APPELLANT**

**VERSU**

**REPUBLIC.....RESPONDENT**

**RULING**

The Appellant was convicted by the Kitale Senior Principal Magistrate on 27<sup>th</sup> June 2006 of the offence of being in possession of cannabis sativa (Bhang) contrary to section 3(1) read together with section 3(2) of the Narcotic Drugs and Psychotropic Substances Contral Act, Act No. 4 of 1994. She was sentenced to 3 years imprisonment.

The Appellant/Applicant lodged this appeal on 11<sup>th</sup> July,2006 against both conviction and sentence. She has now filed this application for bail pending appeal under the provisions of sections 356 and 357 of the Criminal Procedure Code, Chapter 75 Laws of Kenya. Her counsel, Mr. Nyamberega urged the court to release the appellant on bail inter alia, the following grounds:-

- a) The Appellant will suffer if she is not released on bail as she would have served a substantial part of her sentence by the time the Appeal is heard.
- b) The appeal has overwhelming chances of success.
- c) Appellant has 3 children aged between 1 – 9 years. They are minors and need her care.
- d) The Appellant had been on a bond of Shs.60,000/= before conviction and she did not abscond.

The Respondent, through Ms. Oundo opposed the application submitting that:-

- a) The Applicant must prove exceptional circumstances.
- b) She must prove that the appeal has a high chance of success.
- c) No sufficient evidence has been placed before the court that the children have nobody else to look after them and that the appellant is a sole bread winner.
- d) The Affidavit is in support is sworn by her counsel.

I have considered the application and submissions by Counsel. In the case of **RAGHBIR SINGH LAMBA –V- R**, (1958) E.A. 337 at P. 338, spry, Ag. J., held:-

**“.....where a person is awaiting trial, the onus of proving guilt is on the prosecution and consequently the onus is on the prosecution of showing cause why bail should not be allowed. On the other hand, when a person has been convicted, the onus is on the him to show cause why the conviction should be set aside and similarly the onus is on him to show cause why as a convicted person he should be released on bail. If that is so, it follows that the reasons must be exceptional, otherwise bail would be granted in the majority of cases, which would clearly offend against this principle.”**

In this case before me, with due respect,

Counsel for the Appellant merely states that his client’s case has overwhelming chances of success. However, he did not give any reasons or arguments to support this submission. He did not take the court though the Judgment of the trial court which is on record to demonstrate, the faults, errors and/or omissions if any, by the court in reaching its judgment leading to conviction. It is for the Appellant to assess the chances of success and demonstrate or show it to the court.

Be that as it may, this court was still obliged to examine the record and if on the face of it became evident that the case had overwhelming chances of success to it would have to grant the application. I have examined the record to the extent and standard this court is required and I find no basis to conclude that the appeal has overwhelming chances of success.

Besides the issue of an overwhelming chances of success, the appellant is required to prove the existence of exceptional circumstances for this court to consider granting bail. The Affidavit in support of the Application is sworn by her counsel. There is no explanation why the Appellant or a close family did not swear the affidavit. However all the same, it is bereft of any facts that could disclose exceptional circumstances. The fact that the appellant has three children is not an exceptional circumstances particularly as no mention is made of the father of the children and why he cannot look after them. There is no claim that the Appellant is a single parent or a widow.

This application has been made weak and unsustainable due to the fact that the affidavit is sworn by counsel and one who has no knowledge of his client’s family situation. Even for the little information or facts within his knowledge, he does not disclose or explain his sources.

In all, I do hereby find that there is no overwhelming chance of the appeal being successful and there are no exceptional circumstances to justify the grant of bail.

The Application is hereby refused.

Dated and Delivered at Eldoret this 3<sup>rd</sup> day of August,2006

**M.K. IBRAHIM**

**JUDGE**

**3/08/2006**

Coram – Ibrahim ‘J’

C/C - Chelang’a

Mr. Nyamberega for the Applicant

Ms. Oundo for the State.

Ruling read in their presence.

**M.K. IBRAHIM**

**JUDGE**