



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

**Criminal Appeal 72 of 2006**

**ALICE NANG'ONY.....APPELLANT**

**VS**

**REPUBLIC.....DEFENDANT**

**RULING**

By an application by way of Chamber summons, pursuant to the provisions of section 356 of the Criminal Procedure Code, the applicant seeks orders:

a) *That this honourable court be pleased to admit the appellant /applicant to bail, pending the hearing and determination of the appeal filed herein.*

The application is based on the grounds that:

- i) *The applicant's appeal is not frivolous but one with high chances of success.*
- ii) *If successful, the appeal shall be rendered nugatory as the applicant shall have served her sentence substantially.*
- iii) *A special circumstance upon which this honourable court can exercise its discretion on favour of the applicant exists.*

The application is predicated upon the affidavit of Ocharo Kebira Advocate sworn on 18<sup>th</sup> day of November 2006.

For the applicant, it was argued that appellant was convicted of the offence causing grievous harm contrary to section 234 of the Penal code (see annexure "OK".)

The appellant was sentenced to serve 5 months imprisonment (see annexure OK 2")

That the appellant has an arguable appeal in that evidence of PW1 does not bring out the nature of the injuries that the complainant suffered. The case was not therefore proved beyond reasonable doubt.

Last but not least, there was contradiction between the evidence of PW1 ( Peter K. Masai) and PW2 ( Agnes Naliaka) to the extent that PW1's testimony is to the effect that the injuries were caused by a jembe besides a coffee stick which was also used. Yet the complainant's testimony does not bring out what other item was used beside the jembe.

For the state, it was argued that the application is brought under section 356 of the Criminal Procedure Code. That under that section, it is the convicting court that has jurisdiction to grant bail as opposed to the High court. That the application should have been brought under section 357 (1) of the Criminal procedure Code. The citing of the wrong provision of the law is therefore fatal to the application.

Last but not least, that the appeal has no overwhelming chances of success as the contractions are minor. That the petition of appeal requires brief statement of facts or law.

Section 356 of the Criminal Procedure Code provides:

***“(1) The High Court, or the subordinate court which has convicted or sentenced a person, may grant bail or may stay execution on a sentence or order pending the entering of an appeal, on such terms as to security for the payment of money or the performance or non- performance of any act or the suffering of any punishment ordered by or in the sentence or order as may seem reasonable to the high court or the subordinate court.***

***(2) If the person in whose favour bail or stay of execution is granted under this section is ultimately liable to a sentence of imprisonment, the time during which the person has been released on bail, or during which the execution was stayed, shall be excluded in computing the term of his sentence, unless the High Court, or failing that court the subordinate court which convicted and sentenced the person, otherwise orders.”***

In my judgment, it is the convicting court that would grant but under section 356 of the Criminal procedure Code not the High court.

As the application is brought under the wrong provision of the law, I hold that the jurisdiction of the High Court has not been invoked. Accordingly, I have no jurisdiction to grant bail under section 356 of the Criminal Procedure code.

In the result, I dismiss the application dated 18<sup>th</sup> October 2006 for bail pending appeal.

**DATED and DELIVERED at Bungoma this 22<sup>nd</sup> day of December 2006.**

**N.R.O. OMBIJA**

**JUDGE**

Mr. Makali for Ocharo.