REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
MISC. CRIMINAL APPLICATION NO. 647 OF 2004

KENNETH KIMANI KAMUNYU……..APPLICANT

VERSUS

REPUBLIC ……....RESPONDENT

R U L I N G

The Applicant, **KENNETH KIMANI KAMUNYU,** was convicted for **GRIEVOUS HARM** contrary to Section 234 of the Penal Code, and then sentenced to 5 years imprisonment.

Following his sentencing, on 27th October 2004, the Applicant lodged Criminal Appeal No. 538 of 2004, in which he is challenging both his conviction and sentence. At the same time the Appeal was being filed, the Applicant also filed this Application for bail pending Appeal. This Ruling is in relation to that application for bail.

At the hearing of the Application, the Applicant was represented by Mr. Mbogua advocate, whilst the Respondent was represented by learned stated counsel, Mr. Makura.

According to the Applicant, his Appeal has a high chance of success. He also said that if he is not granted bail, he will have served a substantial part of the sentence before his Appeal is heard and determined. For those reasons, which were presented in an economic manner, by his counsel, the Applicant asks that he be admitted to bail; and he says that he is willing to comply with any conditions that this court may impose.

It was pointed out to the court that during his trial, the Applicant was out on bond, and that he did not ever fail to attend court. Finally, the Applicant, who is a Kenyan, said that he is desirous of prosecuting his Appeal expeditiously, and also that he has absolutely no intention of absconding.

In his response, Mr. Makura, learned state counsel put up a spirited opposition. He started by saying that even if the Applicant were to serve a large part of his sentence, that would not, by itself be an unusual circumstance, as upon the Applicant's conviction, he is deemed to have been properly convicted. There is no doubt that that is the correct position in law, as was expounded upon by Tanui, J. is **MUNDIA vs. REPUBLIC [1986] KLR 623 at 625,** whereat he said;

> **"The chances of appeal succeeding is a factor for consideration in arriving at a decision in an application such as this one. However, one would not lose sight of the fact that there is a presumption that once a person has been convicted he was properly convicted."**

Once that presumption comes into play, it means that the Applicant herein must be deemed to have been properly convicted by the trial court. It would therefore, follow that even if he were to serve the whole of the sentence meted out to him, or a greater part thereof, the law would presume that such conviction and sentence were in order, until and unless an appellate court were to hold otherwise.

In this case, the Applicant was sentenced to five years imprisonment, on 27th October 2004. In the light of my experience with the hearing of Criminal Appeals by the High Court bench based at Nairobi, I dare say that it would be unlikely that the Applicant would serve a substantial part of his sentence before his Appeal was heard. But, as already pointed out above, were it to be probable that he could serve the bulk of his sentence before his appeal was heard, that alone would not be reason enough to admit the Applicant to bail.

In **MUNDIA** vs**. REPUBLIC** (Supra), the court held as follows, at page 626: -

> **"Bail pending entering appeal may also be granted where there is a risk that the sentence will have been served by the time when the appeal is heard but there must exist the major issue of overwhelming chances of appeal in the first place."**

Applying that fundamental principle to this case, the Respondent pointed out that whilst the Applicant had been sentenced to 5 years imprisonment, the maximum penalty for the offence of Grievous Harm is life imprisonment. Therefore, as far as the Respondent was concerned the sentence imposed on the Applicant was actually lenient. In my considered view that analysis by the Respondent cannot be faulted. That would imply that the appeal against sentence did not have a good chance.

However, I must also give consideration to the grounds of Appeal against the Applicant's conviction. However, I do appreciate that at this stage the Appeal has not come up for hearing before me. I must therefore, be careful so as not to play the role of the appellate court, prematurely. But, at the same time, there is only one way of ascertaining whether or not the Applicant's Appeal has overwhelming chances of success. In order to make the requisite assessment, I must make a preliminary examination of the evidence on record.

Having done so, I must say that it became clear to me perhaps why the Applicant's counsel did not delve into the details of the evidence adduced in court. Suffice it to say that the evidence of PW1 corroborated that of PW2 about the manner in which the Applicant assaulted the Complainant viciously. The degree of injury caused to the Complainant was assessed by PW3, Dr. Samson Gitonga. He said that the degree of injury was grievous harm.

I have also noted that the Applicant and his two witnesses both placed the Applicant at the scene. Although the Applicant and DW2 testified that the Complainant injured himself after falling over when running away from the Applicant, PW3 categorically denied that the injuries suffered by the Complainant could have been caused by a fall on stones.

In my preliminary assessment of the evidence on record, I do not think that the Applicant has good chances in his Appeal. In the case of **ADEMBA vs. REPUBLIC [1983] KLR 442**, the Court of Appeal's judgment was summarized thus by the learned publishers of the law report, in holding numbered 2:

> ***"The likelihood of success in the appeal is a factor to be taken into consideration in granting bail pending appeal. Even though the Appellant showed serious family and personal difficulties, in view of the unlikelihood of success in this Appeal, the Application could not succeed."***

Had I reached a different conclusion regarding the Applicant's chances of success on his Appeal, I would have held that there was no justification for depriving the Applicant of his liberty. But in the light of my finding, that the applicant's appeal does not appear to have overwhelming chances of success, this application is unsuccessful. It

is dismissed.

Dated at Nairobi this 26th day of January 2005.

F. A. OCHIENG'

JUDGE