



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**Criminal Appeal 70 of 2005**

**(Appeal against both conviction and sentence of the Senior Resident Magistrate's Court at Mumias in criminal case No. 1275 of 2004 (MS P. K. SULTAN, SRM))**

**DANIEL OTIENO.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

DANIEL OTIENO, the Appellant, was convicted by the Senior Resident Magistrate, at Mumias, Ms. P. K. Sultan on 3.6.2005 in Mumias SRMCR.Case No.1275 of 2004 of robbery under section 296(1) of the Penal Code, Cap 63, and sentenced to imprisonment for a period of four years.

On 27-6-2005, the Appellant made an application to this court under Section 357 of the Criminal Procedure Code, Cap 75 of the Laws of Kenya, seeking orders that he be admitted to bail pending the hearing and final disposal of the appeal.

On 14-1-2005, the Appellant, dissatisfied with the conviction and sentence, lodged an appeal seeking to have the conviction quashed and sentence set aside. In the Memorandum of Appeal dated 14.6.05, the Appellant proffered 8 grounds of appeal in which, in a nutshell, he attacked the conviction on the ground that there was no evidence to sustain it.

In his application for bail, the Applicant contended in the grounds for making the application that the appeal has high chances of success. The affidavit of Mr. Samba, learned counsel for the Applicant sworn on 23/06/05 stated that the appeal has high chances of success and that the applicant is sickly and emaciated as he has been in prison since he was arrested in 2004.

During the hearing of the application, Mr. Samba urged the court to grant the applicant bail pending appeal as there was no evidence of identification against the appellant without which the conviction could not stand.

Mrs. Kithaka, learned Provincial State Counsel, opposed the application and submitted that the appeal had no merit. She pointed out that the appellant did not show that the appeal had overwhelming chances of success although he stated this. Her position was that the appellant was properly convicted and that the state was contemplating applying for enhancement.

I have perused the proceedings and judgement of the lower court. I have also given due consideration to the submissions made by both Mr. Samba and Mrs. Kithaka.

The grant of bail pending appeal is predicated on the premise that it is unnecessary to keep an applicant in jail if his conviction will eventually be quashed and sentence set aside. An applicant must therefore demonstrate that the appeal has overwhelming chances of success.

Section 357 of the Criminal Procedure Code, Cap 75, confers on this court unlimited discretionary power to admit an applicant to bail where such applicant has lodged an appeal. The discretionary power of the court has to be exercised judicially that is to say on sound legal principles. Where an applicant has demonstrated that the appeal has overwhelming chances of success or the decision appealed from was plainly wrong in law or is not supportable in law the court will readily admit the applicant to bail pending appeal.

At this stage, it is undesirable for me to delve too much into the analysis of the evidence for the purpose of determining whether or not the appeal has overwhelming chances of success. I escew such exercise which is better left until the hearing of the appeal stage for the simple reason that such analysis may prejudice the appellant. The likelihood of the appeal succeeding or the fact that the appeal has overwhelming chances of success should not be a matter to be belaboured as seems to be the case here.

After a careful consideration, it is my view that the appeal does not show that its chances of success are of an overwhelming nature nor do I discern anything in the record of appeal that can be said to be plainly wrong in law either on conviction or sentence.

In the circumstances, I decline to admit the applicant to bail pending appeal and dismiss the application dated 27-6-2005.

***Dated at Kakamega this 29th September, 2005.***

***G. B. M. KARIUKI***

***JUDGE***