REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

Misc Crimi Appeal 370 of 2005

(From Original Conviction and Sentence in Criminal Case No. 2190 of 2000 of the Chief Magistrate's Court at Nairobi).

WYCLIFF OKELLO LUKWILI……..……..…….APPELLANT

VERSUS

REPUBLIC.……..……..…RESPONDENT

RULING

The Applicant ***WYCLIFF OKELLO LUKWIRI*** has made an Application to this Court seeking to be released on bond/bail pending the hearing and determination of the Appeal he has preferred. The Applicant was charged and convicted in the Chief Magistrate Court, Nairobi in Criminal Case number 2190 of 2000 for the offence of demanding money with menaces contrary to Section 302 of the Penal Code amongst other charges. Following his conviction, he was sentenced to serve 2 years imprisonment. He was aggrieved by the conviction and sentence and accordingly lodged an Appeal on the 6th November, 2003. It is pursuant to the said Appeal that the Applicant has brought this Application.

In support of the Application, the Applicant depones that his Appeal has probable chances of success. That the Appeal has since been listed for hearing six times and each time the State has sought and obtained adjournment for various reasons. The Applicant further depones that he was convicted on a defective charge sheet because at no time did he demand kshs.20,000/= from PW4, Ezekiel Komen. The Applicant further depones that the Learned trial Magistrate grossly erred in law in convicting the Appellant on uncorroborated evidence.

At the hearing of the Application, the Applicant was represented by Mr. Amambo Learned Counsel, whereas the State was represented by Ms. Nyamosi, Learned State Counsel. In his oral submissions in support of the Application, Mr. Anambo merely expounded on what the Applicant had deponed to in the Affidavit in support of the Application. He reiterated the fact that the Applicant may serve a substantial portion of the sentence before the Appeal is heard and determined. He also reiterated the fact that the Appeal had overwhelming chances of success.

He referred the Court to the various grounds of Appeal in the petition of Appeal to demonstrate that the Appeal indeed had overwhelming chances of success. The main ground being that the evidence adduced in support of the charge did not support the particulars of the charge. Counsel further submitted that the sentence imposed was harsh and excessive. The offence carries a maximum sentence of 3 years yet the Applicant was sentenced to 2 years. In support of his entire Application, Learned Counsel relied on the case of ***RONALD KIPLAGAT BII VS REPUBLIC, MISC. CR. APPL. NO. 1 OF 2005 (UNREPORTED).*** I have carefully read and considered the ruling in the said case.

Ms Nyamosi opposed the Application. She submitted that the Applicant had not demonstrated any unusual and or exceptional circumstances to warrant him being placed on bail pending Appeal. The Applicant had also not demonstrated that the Appeal had overwhelming chances of success. Learned State Counsel further submitted that the authority relied on by the Applicant was merely persuasive and not binding on this Court. In any event the said authority was distinguishable. The facts therein and in the instant case were totally different. Counsel further submitted that the evidence before the trial Magistrate in the instant case was overwhelming and the particulars of the charge were proved. That on the face of it the Learned Magistrate did not make any mistake.

In the premises, she urged the Court to dismiss the Application as it was lacking in merit. In a brief reply, Mr. Anambo submitted that although the authority he relied on was persuasive, however the Learned Judge therein held that the Appeal was arguable. According to Learned Counsel, this Appeal was arguable as well. I have carefully considered the Application, the Affidavit sworn in support thereof and the oral submissions tendered by Learned Counsel in support of and in opposition to the Application.

In my view the principles governing the granting of bail pending the hearing and determination of an Appeal are now well settled. The presumption is that the Applicant was properly convicted. Therefore for an Applicant to go past the presumption he must be able to demonstrate to the satisfaction of the Court that the Appeal filed has overwhelming chances of success. The Applicant further has to demonstrate to the Court that there are exceptional or unusual circumstances pertaining to his Appeal. See ***CHIMAMBHAI VS REPUBLIC (NO. 2) (1971) E.A. 343, SOMO VS REPUBLIC (1972) E. A. 476, MERALI VS REPUBLIC (1972) E. A. 47, ICHAGU VS REPUBLIC, MISC. CR. APPL. NO. 400 OF 1989 (unreported) and DOMINIC KARANJA VS REPUBLIC (1986) KLR 612.***

Has the Applicant satisfied any of the conditions laid out in the aforesaid authorities so as to enable this Court to grant him bail pending Appeal? In answering this question it is necessary for this Court to undertake a preliminary evaluation of the evidence on record of the trial Court.

From my own careful evaluation of the evidence tendered, coupled with the grounds of Appeal and the submissions of Counsel, and without pre-emptying the success or otherwise of the Appeal, I think that the Applicant has made out a case for granting of the prayer sought in the Application.

The Applicant's main ground of Appeal is that he evidence tendered in support of the charge did not support the particulars of the charge sheet. The Applicant maintains that the Complainant in the charge sheet was Ezekiel Komen who in his evidence denied having seen, met or even talked to the Applicant at any given time. The only person who talked and dealt with the Applicant on behalf of the Complainant and to whom probably the demand with menaces was directed at to was PW1 Ezekiel Cheptumo. A question then arises whether a person can be really convicted of the offence of demanding money with menaces when the menaces was not addressed to the Complainant personally but to another person purporting to act on his behalf and or agents.

There is considerable force in this ground of Appeal which the Court hearing the Appeal will have to resolve. On this ground alone, I am satisfied that he Appeal filed by the Applicant is arguable. It will not therefore be in the interest of justice to deny the Applicant bail while he awaits the hearing and determination of he Appeal.

Further in the case of Toroha vs republic, Cr. Appl. No. 5 of 1988 (unreported), it was held that:-

> ***"Exceptional circumstances are deemed to be shown if there is a risk that the sentence may be served or substantially served by the time the convict's Appeal is heard and determined…."***

In the instant case, the Applicant was sentenced to a term of two years on 30th October, 2003. It is most likely that by the time the Appeal comes up for hearing the Applicant could well have served the entire jail term or a substantial portion of it, thereby rendering the Appeal nurgatory. For that reason, I would still have granted the Application.

All in all, I allow the application. The Applicant shall be released on his own personal bond of Ksh100,000/= together with one surety of similar amount. Upon release the Applicant will attend mention of pending Appeal before the Deputy Registrar (Criminal Division) every after 45 days until the Appeal is heard and determined. The first of such mention shall be on 21st November, 2005. Orders accordingly.

Dated at Nairobi this 14th Day of September 2005.

M. S. A. MAKHANDIA

JUDGE