



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 122 of 2003**

**( From original conviction and sentence in Criminal Case No. 490 of 2002  
of the Senior Principal Magistrate's Court at Embu – J. KIARIE – P.M.)**

PERMINUS KARIUKI NJAGI.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

**RULING**

The applicant has moved this court under Section 357 of the Criminal Procedure Code Cap 75 seeking to be admitted to bail pending appeal. The applicant was tried and convicted by the Senior Resident Magistrate Embu on 30th October, 2003 of 6 counts of conspiracy to murder contrary to section 224 of the Penal code. He was sentenced to serve concurrent terms of 3 years imprisonment on each count.

He has filed an appeal, listing 10 grounds on his petition of appeal. The appellant maintains that his appeal raises triable issues and has overwhelming chances of success as the evidence adduced was insufficient to prove the charges and that the trial magistrate was biased and shifted the burden of proof to the Appellant.

The Appellant pleads that his appeal is likely to be rendered nugatory as he is likely to serve a substantial part of the sentence before his appeal is heard.

The application is opposed .Learned state counsel Mr Obuo has submitted that it offends the proviso to Section 357 (1) of the Criminal Procedure Code as the appellant had already unsuccessfully applied for bail pending appeal in the lower court and therefore ought to have appealed against the lower court's order and not made a fresh application. He urged the court to dismiss the application as being improperly before the court. He further submitted that the Appellant has not demonstrated that the application has overwhelming chances of success.

Upon considering the provisions of Section 356 & 357 of the Criminal Procedure Code ,I do concur with the defence counsel that their application is properly before the court as the proviso to Section 357 only forbids the bringing of a fresh application for bail pending appeal in the High Court where such an application has been made in the subordinate court after the filing of an appeal. In this case the application in the lower court was made before the filing of an appeal .The proviso to Section 357 of the Criminal Procedure Code did not therefore come into play.

The main consideration in considering an application for bail pending appeal is whether the appeal has overwhelming chances of success. ( *Dominic Karanja versus Republic { 1986} K.L.R. 622*).

Mr Njiru has maintained that their appeal has overwhelming chances of success. He has referred the court to his grounds of appeal. I have perused the judgment of the subordinate court vis a vis the grounds of appeal preferred by the Appellant. While it is true that the appeal raise a number issues, it cannot be said that the appeal prima facie overwhelming chances of success.

Without saying more I find that this is not a fit and proper case for bail pending appeal, and accordingly reject the application.

***Dated signed and Delivered at Nyeri this 17 th December, 2003.***

**H.M. OKWENGU**

**JUDGE**