**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 132 OF 2016**

**TIMOTHY MBUUGU MWENDA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

Before me is a Chamber Summons application dated 11th November, 2016 brought under Section 357 of the Criminal Procedure Code. The Applicant prays to be admitted to bail/bond pending the hearing and determination of the appeal. He was convicted for the offence of causing grievous harm contrary to Section 234 of the Penal Code. He was sentenced to serve 3 years imprisonment on 23rd September, 2016. The application is premised on the grounds that the appeal has high chances of success and that if the application is not allowed, the Appellant shall have served a substantial part of the jail term by the time the appeal is heard and determined. It is further supported by the Appellant's affidavit sworn on 11th November, 2016.

The application was canvassed by oral submissions. Learned counsel Mr. Makori for the Applicant submitted that the conviction of the Applicant was purely based on circumstantial evidence which was not only insufficient but contradictory. He pocked holes on the evidence of PW6, 7, 8 and 9 which he stated did not elucidate on who between the Applicant and the complainant started the scuffle. As such, it could not be proved that the Appellant was the aggressor. Accordingly, the Applicant ought to have been acquitted. His further submission was that if the application is not allowed, the Applicant shall have served a substantial part of the jail term by the time the appeal is heard and determined as the appeals take long to be heard.

Learned State Counsel M/s Kimiri for the Respondent on the other hand opposed the application. She submitted that the evidence on record was direct since the Applicant willfully shot the complainant with a gun in a bar. She submitted that the Applicant approached the complainant while they were drinking and grabbed his spectacles after which he warned him that he would kill somebody. When the complainant followed the Applicant to give him back his spectacles, the Applicant shot him twice thereby injuring him. There were eye witnesses which dispelled the Applicant's submissions that the evidence was circumstantial. Moreover, the medical evidence supported the fact that the injuries the complainant suffered were caused by a gunshot and that the shots were fired from the firearm recovered from the Applicant. Ms Kimiri also submitted that currently appeals are heard within a short time and all that the Appellant was required to do was to facilitate the admission of the appeal. There was therefore no chance that the Applicant would serve the jail term before the appeal was heard and determined.

I have considered the application and the respective submissions. *This court in determining the Application at hand is guided by the holding in* ***Trevelyan J. in Somo v. Republic[1972] E.A 476*** *that:*

> ***"There is little, if any, point in granting the application if the appeal is not thought to have an overwhelming chance of being successful, at least to the extent that the sentence will be interfered with so that the Applicant will be granted his liberty by the appeal court. I have used the word "overwhelming" deliberately and for what I believe to be good reason. It seems to me that when these applications are considered it must never be forgotten that the presumption is***

***that when the Applicant was convicted, he was properly convicted. That is why, where he is undergoing a custodial sentence, he must demonstrate, if he wishes to anticipate the result if his appeal and secure his liberty forthwith, that there are exceptional or unusual circumstances in the case. That is why when he relies on the ground that his appeal will prove successful, he must show that there is an overwhelming probability that it will succeed. That the appeal has not summarily been rejected, taken in isolation, is of no account in the view of what I have said. … Nor is the fact that the appeal is not frivolous of any consequence on its own in support of the application…***

***What of other grounds? I do not doubt that such matters as the Applicant's good character, delay in the hearing of his appeal and hardship are for weighing in the balance in favour of the grant of the application. But they can only avail the Applicant if, on the facts presented, unusual or exceptional circumstances are shown to exist."***

In addition, i have perused through the evidence of the prosecution witnesses. No doubt that both the Applicant and the complainant had quarreled before the Applicant shot the complainant. Whereas the question of who the aggressor was will be adequately addressed at the hearing of the appeal, there is sufficient evidence that the Applicant shot the complainant with his gun as a result of which he occasioned him grievous harm. Therefore, the fact of who caused the injury and the nature of the injury is not disputed. I would therefore be hesitant at this point to rule in favour of the Applicant. My view is that, prima facie, the appeal may not succeed. Furthermore, since the proceedings have been typed, the appeal can be heard within a very short time.

In the premises, the application hereby dismissed. I order that the Deputy Registrar calls for the original record from the Magistrate's court and cause the admission of the appeal from the date hereof. Thereafter, the appeal can be fixed for hearing on priority basis. It is so ordered.

**DATED** and **DELIVERED** this 5th day of **December, 2016.**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

*1. No appearance for the Applicant.*

*2. M/s Nyauncho for the Respondent.*