



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MISC.CRIMINAL APPLICATION NO. 335 OF 2015**

**CHARLES MURIUKI WAHOME.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

By Notice of Motion dated 16<sup>th</sup> September, 2015, the Applicant prays that he be admitted to bail pending the hearing and determination of **Criminal Appeal No. 140 of 2015**. In the alternative, the court is urged to stay and/or suspend the execution of sentence passed in **Kibera Chief Magistrate's Court Traffic Case No. 3977 of 2010**. The application is premised on the ground that the pending appeal has overwhelming chances of success and on the whole, the Applicant was not accorded a fair trial.

It is supported by the affidavit of Lawrence Oigoro Nyangito Advocates having the conduct of the application on behalf of the Applicant sworn on 16<sup>th</sup> September, 2015. He deponed that the Applicant was not accorded a fair trial because the trial court failed to comply with mandatory provisions of Criminal Procedure Code which rendered the entire proceedings a nullity. Further, that the trial court failed to properly evaluate the evidence on record, which if it had, would have arrived at a different verdict. Moreover, the Applicant who was sentenced to serve one year imprisonment is likely to have served the entire sentence by the time the appeal is heard and determined. It is also contended that the sentence was harsh and excessive in the circumstances. Finally, counsel deponed that since the imprisonment of the Applicant, the Applicant's wife fell seriously sick and her health state is wanting.

The Application was canvassed before me on 12<sup>th</sup> November, 2015. Learned counsel Mr. Nyangito for the Applicant in his oral submissions reiterated the averments contained in the supporting affidavit. In addition, he urged the court to note that the evidence of PW1 and 2 was contradictory. He submitted that PW1 and 2 were the key prosecution witnesses. Both were sisters and they testified that the Applicant was over speeding at the time of the accident. That testimony was in sharp contrast with the Applicant's defence that he hit a pothole after headlights from an oncoming motor vehicle beamed on him. As a result, he lost control and the vehicle landed on the side. He submitted that according to PW1 the child who died in the accident was being carried by one Wanjiru. PW2 on the other hand testified that the child was being carried by its mother. He urged the court to note that such evidence coming from persons who were in the same vehicle could not be considered as credible. He also urged the court to note that no independent witness testified, reasons wherefore the defence case ought to have been upheld. Counsel submitted that in addition, the Applicant's defence was that the two deceased persons died due to their carelessness and negligence. As for the child, the mother threw her out through the window while her mother popped her body out of the car as she threw the child through the window. Learned counsel also

submitted that **Section 211 of Criminal Procedure Code** was not complied with.

Finally, on exceptional circumstances prevailing, counsel submitted that the Applicant being a first offender was sentenced to an imprisonment term of one year which he is likely to have served by the time the appeal is heard and determined. The Applicant is also a man with a young family and its bread winner.

Learned state counsel Ms. Aluda did not oppose the application based on the ground that although PW1 and 2 testified that the Applicant was over speeding, the speed of the vehicle was not indicated. She noted that the Applicant may have exercised diligence as he had driven the vehicle from Nairobi to Nyahururu and the vehicle only got involved in the accident when it had returned to Nairobi and the passengers were going home at Ngong. Finally, she conceded that the Applicant is likely to have served the entire sentence by the time the appeal is heard and determined.

I have considered the respective submissions. It is trite that for an application for bail pending appeal to succeed, the court must consider two main factors, mainly whether the appeal has high chances of success and whether the Applicant has demonstrated any unusual or exceptional circumstances to warrant the granting of bail pending appeal.

In the present case, the record of proceedings produced before this court attached a copy of charge sheet comprising only count II in which the Applicant was charged with causing death by dangerous driving contrary to **Section 46 of the Traffic Act Cap 403 Laws of Kenya**. But from the judgment of the trial court, it is clear that the Applicant was charged with 3 counts. Although it may not be clear what offence comprised the third count, it is obvious that count I was of causing death by dangerous driving because two persons died in the accident. I have evaluated the evidence of the 8 prosecution witnesses who testified. It is trite to note that the accident was self involved. Although there was no independent witness, the evidence of PW3 who was a motor vehicle inspector pointed at human factors to have contributed to the accident. He noted that the vehicle had no pre-accident defects which would have contributed to the accident. This was in consonance with the evidence of the investigating officer PW1 who pointed at the Applicant having driven the vehicle in a negligent manner. It is my view that prima facie, based on the evidence on record the appeal may not succeed. But there was the issue of non compliance with Section 211 of the Criminal Procedure Code. Section 211 requires that after the court finds that an accused person has a case to answer, the court explains to him the various ways by which he shall tender his defence. Unfortunately in the present case, after the court delivered its ruling putting the Applicant on his defence, he was immediately called to give a sworn statement of defence without complying with Section 211. The failure to comply with this mandatory provision meant that the entire trial was vitiated. That to me comprises a very good ground for appeal.

In counts I and II, the Applicant was sentenced to 12 months imprisonment which would run concurrently. In Count III, he was sentenced to a fine of Kshs. 5,000/= in default to serve 2 months imprisonment. In determining whether the fact that an Applicant is likely to have served the sentence by the time the appeal is heard and determined as good ground for granting bail pending appeal, the court must be satisfied that on evaluation of the entire evidence, the appeal would succeed. See the case of **Jivraj Shah vs Republic [1996] KLR 606**, the Court of Appeal held *inter alia*;

1. ***The principle consideration in an application for bail pending appeal is the existence of exceptional or unusual circumstances upon which the court can fairly conclude that it is in the interests of justice to grant bail.***
2. ***If it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on an account of some substantial point of law to be argued and the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail exist.***

In the present case, having found that the appeal has good chances of success, it is the view of the court that the fact that the Applicant is likely to have served the entire sentence by the time the appeal is heard warrants the granting of bail pending appeal.

Regarding personal problems facing the Applicant, it was held in the case of **Dominic Karanja vs R [1996] KLR 612**, that:

***“The previous good character of the Applicant and the hardships, if any, facing his family were not exceptional and unusual factors...”***

In that respect, although the Applicant is a family man, cannot of itself, warrant the granting of the orders sought. There was also no evidence tendered before the court to demonstrate that the Applicant’s wife was ailing.

In the result, on the ground that the appeal is likely to succeed, I find this application meritorious. The same is allowed. The applicant shall execute a bond of Ksh. 100,000/ with one surety of a similar amount to be assessed by the Deputy Registrar of this court. In the alternative he shall pay a cash bail of Ksh.50,000/.

**DATED and DELIVERED** this 1<sup>st</sup> day of **December, 2015**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. *No appearance for the Applicant*
2. *No appearance for the Respondent.*