



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 81 OF 2013

DAVID KIAMATI JESSE.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTION

(Being an Appeal from the Conviction and Sentence by M. WACHIRA Chief Magistrate Embu in Criminal Case No. 1343 of 2009 on 11th December 2013)

RULING

The Appellant/Applicant has filed this Notice of Motion dated 19th December, 2013 under Section 357 of the Criminal procedure Code for bond pending appeal. It is supported by the grounds on the face of the application. These are:-

- i. ***The applicant is ailing in prison.***
- ii. ***The applicant's appeal has overwhelming chances of success.***
- iii. ***The case is based on a bailable offence.***
- iv. ***The applicant shall abide by whatever condition that shall be set by this Honourable Court.***

The said application was also supported by Mr. Momanyi's affidavit which just mentions grounds for the application. When the application came for hearing Mr. Momanyi submitted that the cause of death was chronic subdural which the Doctor explained. And that there was no evidence that the applicant at any time hit the deceased on the head. He finally submitted that the evidence on record did not support the conviction.

Mr. Miiri the learned State Counsel did not oppose the application. He submitted that after perusing the record he had concluded that the applicant had an arguable appeal.

It is true that the offence which the applicant was convicted of is a bailable one. However that is not one of the things considered when dealing with **an application for bond pending appeal**. It is always taken that before a conviction is overturned the appellant was properly convicted. That is why the Court has to peruse the record to satisfy itself of the correctness of the said record.

In this case the prosecution called a total of ten (10) witnesses. The eye witnesses tend to say that the deceased appeared to be in a combative mood that day and he was also drunk. He had a fight with the

applicant's co-accused and member of the public had to separate them. He even had a whip (EXB1) which they struggled over with the applicant's co-accused. He later appeared at the applicant's home while naked and started throwing stones at the applicant threatening to rape his wife.

The applicant is said to have removed a burning piece of wood and hit the deceased with it. PW3 (wife of deceased) said when the deceased came home he was naked and had had a burn on the back. The next day he told PW3 he had been burnt by the applicant. Dr. Maingi (PW10) identified “**extensive abrasion on the upper back**” as one of the injuries the deceased suffered. He however found the cause of death to be chronic subdural, which was an injury to the head compressing the brain. It would therefore be very important to connect this cause of death with the actions of the applicant on this day from what the witnesses have stated.

The learned trial Magistrate found the applicant's co-accused to have committed a lesser offence. This Court will have to consider all this when the appeal is finally set down for hearing. All I find for now is that the applicant has an arguable appeal. In spite of the long sentence of ten (10) years imprisonment, my view is that the applicant should only serve it after the Court has considered his appeal on merit.

I therefore allow the application. He will be released upon executing a bond of Shs.200,000/= with a surety in similar sum. Once a surety has been approved the applicant's appeal should continue being mentioned until it is heard and determined.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 10TH DAY OF MARCH 2014.

H.I. ONG'UDI

J U D G E

In the presence of:-

Ms. Ingahizu for State

Mr. Momanyi for Appellant/Applicant

Applicant/Appellant

Njue CC