**REPUBLIC OF KENYA**

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

**HCCRA NO. 227 OF 2013**

**KELVIN KIBET AYABEI ::::::::::::::::::::::::::::::::::::::::::::::: APPELLANT**

**=VERSUS=**

**REPUBLIC ::::::::::::;::::::::::::::::::::::::::::::::::::::::::::::: RESPONDENT**

**RULING**

This is an application for Bail pending appeal. The Applicant was charged with the offence of Robbery with violence contrary to Section 296 (2) of the Penal Code.

However, after a full trial, he was convicted for the offence of Assault causing grievous harm, contrary to Section 234 of the penal Code.

The Appellant has moved to the High Court to challenge both the conviction and sentence. He believes that his appeal has high chances of success.

Mr. Tarus, the learned advocate for the Appellant, pointed out that by the time his client was seeking Bail pending appeal, he had already served four-and-a-half (4½ ) months in jail.

I understand the Appellant to be alluding to the substantial length of time that he had spent in prison custody.

The Appellant also pointed out that the Complainant's evidence actually exonerated him from the actions giving rise to the offence in respect to which the Appellant was convicted.

**Mr. Mulati**, learned state counsel, submitted that the appeal had no reasonable chances of success.

Moreover, the Respondent had the intention of giving Notice to the Appellant, that the Respondent will be urging the appellate Court to enhance the sentence.

As far as the Respondent was concerned, the evidence led by the prosecution had proved that the Complainant was not just assaulted, but was also robbed. In those circumstances, the Respondent's view was that the evidence adduced before the trial court proved that the Appellant was guilty of Robbery with Violence. Therefore, the Respondent's view was that the Appellant should remain in prison whilst awaiting the hearing and determination of his appeal.

When a person who has been convicted asks the appellate court to grant him bail, the onus is upon him to demonstrate that his appeal had overwhelming chances of success.

At that stage, the appellate court is entitled to presume that the conviction and sentence were both lawful, unless the Appellant demonstrates otherwise. In effect, an application for bail after conviction, is not determinable on the basis of the provisions of Article 49 of the Constitution.

Following conviction, the Appellant cannot assert that he be presumed innocent. Thus whereas an accused person can invoke a legal right to bail, which can only be rejected if the prosecution demonstrates compelling reasons to warrant a rejection of the application for bail; a person who was already convicted assumes the onus of showing the court why he ought to be given bail whilst his appeal was pending.

The Applicant herein says that the evidence shows that it is not the Applicant who hit the Complainant.

The relevant provisions of the Judgment of the trial court reads as follows:

***" As per the prosecution's evidence, the accused had***

***held the Complainant and one boy who was with***

***him (the accused) had then hit him with a stone,***

***thereby injuring him".***

Later on, the learned trial magistrate held as follows:

***" " … the accused's friend, by the name Njuguna, had hit him on the head, and the accused had him (Complainant), to fall down and he had run away."***

Is that reason enough to exonerate the Appellant, as he has contended?

The trial court addressed that issue as follows:

***" Though the accused did not manage to hit the Complainant,***

***he had created an opportunity for Njuguna to hit him,***

***and thus I hereby make an inference that indeed, the accused***

***had assaulted the Complainant jointly with others that are***

***not in this case, thereby inflicting grievous injuries to him***."

In the light of the foregoing, it is evident that the trial court was well aware of the fact that the Appellant did not personally hit the Complainant.

Nonetheless, the trial court made a finding that the Appellant participated in the attack on the Complainant.

The Appellant does not appear, as of now, to be challenging his said participation in the incident.

He may or may not be deemed to have been an accomplice, when the Appellate court re-evaluates the evidence. But if he should be found to have been an accomplice, it would imply that he was as guilty of the assault as the person who literally hit the Complainant.

The point I am making is that the appeal does not appear to have as straightforward an answer as the Appellant believes it to have.

There is also the possibility that the appellate court could be persuaded to uphold the intended invitation from the Respondent, to find that the evidence on record proved the offence of Robbery with Violence. I cannot pre-judge either the appeal or the Notice. But I do find that the Applicant has neither proved that his appeal has overwhelming chances of success, nor that there are any unusual or exceptional circumstances to warrant the grant of Bail.

Therefore, the Application for Bail is rejected.

However, I do direct that the hearing and determination of the appeal be fast-tracked.

It is ordered.

**….....**

**FRED A. OCHIENG**

**JUDGE.**

**DATED, SIGNED AND DELIVERED AT ELDORET, ON BEHALF OF**

**HON. FRED A. OCHIENG, THIS 5TH DAY OF JUNE, 2014.**

**….....**

**G.W. NGENYE-MACHARIA**

**JUDGE**