



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Miscellaneous Criminal Application 95 of 2012

MICHEAL OGOTA OGOLA.....APPLICANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 327 of 2009 in the Chief Magistrate's Court at Makadara – T. Mwangi (SRM) on 26/1/2011)

RULING

- 1. Michael Ogota Ogola** the applicant herein, filed an application dated 21st February 2012 by way of Chamber Summons. In the said application the applicant seeks to be admitted to bail pending the hearing and determination of appeal **No. 28 of 2011** that he has already filed in the High Court.
- The application is based on grounds that his appeal has overwhelming chances of success and if the applicant is not admitted to bail pending the hearing thereof, that appeal will be rendered nugatory and he will suffer irreparable loss. Further, it is urged that he is ready to abide by any and all conditions that the court may deem fit to impose in granting bail.
- Mr. Kang'ahi learned counsel for the applicant, submitted that the applicant's filed appeal has overwhelming chances of success, because the identification of the appellant was wanting since the evidence of **PW1** and **PW2** was that no identification parade was conducted, and that no description of the appellant was given to lead to their arrest.
- Learned counsel urged that, whereas **PW1** testified that eight armed people attacked him, **PW2** who purportedly witnessed the whole incident, saw only 3 to 4 people attack **PW1**. Further that, if there were eight people, identification would have been difficult, and that in any case in the report to the police no such evidence of identification was tendered.
- Learned state counsel Mr. Mulati on the other hand, opposed the application on behalf of the respondent on grounds that the overwhelming chances of success of the appeal had not been demonstrated. He urged, however, that if the court was inclined to grant the application sought, that it should be with reasonable conditions, because the respondent intended to give notice to the appellant that they would be asking the court to enhance the sentence and impose the death penalty.

6. We note that the sentence handed to the applicants was eight years imprisonment. There is therefore no likelihood of serving all of, or a substantial part of the sentence before this appeal is heard. The appellants also lost the presumption of innocence conferred upon them by the constitution when they were convicted.

7. The principles to be considered in an application for bail or bond pending appeal are now settled. In the case of **Dominic Karanja v Republic [1986] KLR pg. 612**, the Court of Appeal held *inter alia* that:

1. The most important issue was that if the appeal had such overwhelming chances of success, there was no justification for depriving the applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances.

In the above case the Court of Appeal also stated that a solemn assertion by an applicant that he will not abscond if released, even if it is supported by sureties, is not sufficient ground for releasing a convicted person on bail pending appeal.

8. Upon considering the relevant material in this case, and without delving into the merit and demerit of the appeals concerned we find that it has not been demonstrated that the said appeals have overwhelming chances of being successful. The judgement of the lower court shows that the question of identification was considered by the learned trial magistrate and that the appellants were arrested upon identification by the complainant himself.

9. For those reasons and without appearing to determine the merits and demerits of the appeal, we dismiss the application sought.

SIGNED DATED and DELIVERED in open court this **2nd** day of **July 2012**.

F. A. OCHIENG
JUDGE

L. A. ACHODE
JUDGE