



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CRIMINAL APPEAL CASE NO. 238 OF 2010**

**MICHAEL MUHUHI MACHIRA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Appeal from the original conviction and sentence by J. Kiarie, Principal Magistrate, in the Chief Magistrate's Criminal Case No.602 of 2008 at Nyeri)*

**RULING**

**Michael Muhuhi Macharia**, the Appellant herein, has taken out the Motion dated 8<sup>th</sup> October 2010 pursuant to the provisions of *Section 357* of the Criminal Procedure Code in which he applied for the following orders:

***THAT the Honourable Court be pleased to grant the applicant bail/bond pending the hearing and determination of his appeal on such terms as the court may deem fit to grant.***

The Motion is supported by affidavit of Robinson Ndata Mugo. When the Motion came up for interpartes hearing, the State, through Miss Ngalyuka, resisted the Motion by making oral submissions.

The background leading to the filing of this Motion is short and straightforward. The Appellant was tried on a charge of preparation to commit a felony contrary to *Section 308 (2)* of the Penal Code. The particulars of the offence are that the Appellant with others not before Court were found with pangas on board a motor vehicle with intent to commit the felony of robbery. In the end the Appellant was convicted and sentenced to serve three (3) years in prison. The Appellant was aggrieved hence this appeal. He is now before this Court seeking to be released on bond pending appeal.

The Appellant has stated that his appeal has high chances of success. It is his submission that he may serve the entire or substantial part of the sentence by the time the appeal comes up for hearing if he is not released on bail. Miss Ngalyuka, learned Senior State Counsel, is of the view that the appeal has very slim chances of success hence there is no need to release the Appellant on bail. She also pointed out that the Appellant has not shown any exceptional circumstances to warrant his release on bond. The principles to be considered in such applications are well settled. In the case of **JIVRAJ SHAH =VS= REPUBLIC [1986] K.L.R. 605** the Court of Appeal restated those principles when it held as follows:

**1. “ The principal consideration in an application for bail pending appeal is, the existence of**

***exceptional or unusual circumstances upon which the Court of appeal 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 account of some substantial point of law to be urged and that the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail will exist.***

***3. The main criteria is that there is no difference between overwhelming chances of success and a set of circumstances and weight and relevant of the points to be argued.”***

The Appellant has argued that his appeal has overwhelming chances of success. He has said that he will argue on appeal to the effect that the trial magistrate shifted the burden of proof to the defence and that he relied on contradictory evidence to convict. In my view, those are serious grounds which may lead to the appellant being acquitted if the appeal succeeds. It therefore means that the Applicant satisfies some of the conditions which must be considered. It has also been argued that, by the time the appeal comes up for hearing the Appellant will have served the whole or a substantial part of the sentence if he is not released on bond. The Appellant was sentenced to serve three (3) years in prison on 23<sup>rd</sup> September 2010. He has so far served five (5) months leaving a balance of two (2) years seven (7) months. I agree with the Appellant that he will have served a substantial part of the sentence before the appeal is heard if he is not admitted to bail. This is a case fit to grant the Appellant bail. I hereby direct that the Appellant be admitted to bail pending appeal. He should be released upon signing a bond of Ksh.10,000 with two sureties of like sum.

***Dated and delivered at Nyeri this 4<sup>th</sup> day of March 2011.***

**J. K. SERGON  
JUDGE**

In open court in the presence of Mugo for Appellant and Makura holding brief for Ngalyuka for the State.