



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

MISC. CRIMINAL APPLICATION NO. 10 OF 2010

WILLIAM MWAI MACHARIA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

Pursuant to the provisions of *Section 357 (1)* of the Criminal Procedure Code, **William Mwai Macharia**, took out the Summons dated 6th September in which he applied for the following orders:

- 1. THAT this application be certified urgent and be heard soonest possible or as this Honourable Court may deem fit and just.***
- 2. THAT this Honourable Court be pleased to order stay of execution of the sentence imposed against the applicant by the Learned Trial magistrate in Karatina Law Courts in criminal case number 613 of 2008.***
- 3. THAT this Honourable court be pleased to grant bail to the applicant pending hearing and determination of the Criminal Appeal No. 127 of 2010.***

The Summons is supported by the affidavit of the Applicant. When the Summons came up for interpartes hearing, Miss Ngalyuka, learned Senior State Counsel, made oral submissions to oppose the application on behalf of the Republic.

I have considered the grounds set out on the face of the Summons and the facts deponed in the supporting affidavit plus the oral submissions presented for and against the application. The record shows that the Applicant was tried for the offence of attempted murder contrary to *Section 220(a)* of the Penal Code. He was however, convicted for the offence of grievous harm contrary to *Section 234* of the Penal Code and sentenced to serve 4 years imprisonment. Being dissatisfied, the Applicant filed this appeal. Pending appeal, the Applicant has now sought to be released on bail pending appeal. It is the submission of the Applicant that the appeal has high chances of success and that the Applicant would be prejudiced if sentence is not stayed pending appeal, because he will have served the entire or substantial part of the sentence when the appeal comes up for hearing. Miss Ngalyuka on her part, is of the view that

the Applicant has not shown the exceptional circumstances which manifest themselves in this case to enable this Court exercise its discretion in his favour. It is important at this juncture to set out in brief the principles to be taken into account in such an application. In the case of JIVRAJ SHAH =VS= REPUBLIC [1986] K.L.R. 605, the Court restated these 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.”***

Let me examine whether this application meets the aforesaid requirements. The main issue ably argued before this court is that the appeal has overwhelming chances of success and that unless the Appellant is admitted to bail he is likely to have served the whole sentence or a substantial part of it when the appeal comes up for hearing. I have looked at the grounds set out on the face of the Petition of appeal. One of the grounds to be argued on appeal is to the effect that the learned trial magistrate erred when he misapplied the provisions of *Section 179* of the Criminal Procedure Code. It is also alleged that the convicting magistrate unfairly rejected the Appellant’s defence. In my view the first ground appears to raise a serious point of law which may upset the trial court’s decision. I find the application to meet one of the requirements to be taken into account. The record shows that the Appellant has been serving the sentence of four (4) years since 24th May 2010. He has now served a total of nine (9) months leaving about three (3) years three (3) months. If one takes into account the remission to be given by the prison authorities, then the Appellant will have served a substantial part of the sentence by the time the appeal comes up for hearing. I am convinced this is a proper case to admit the Appellant to bail. I hereby direct that the Appellant be released upon signing a bond of Ksh.50,000/= with two sureties of like sum.

Dated and delivered at Nyeri this 4th day of March 2011.

**J. K. SERGON
JUDGE**

In open court in the presence of the Applicant and in the presence of Mr. Makura, Learned Senior State Counsel. No appearance of Nyakundi for the Applicant.

**J. K. SERGON
JUDGE**