

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL 73 OF 2008

ERASTUS CHEGE MAINA APPLICANT

VERSUS

REPUBLIC RESPONDENT

R U L I N G

This is an application under *section 357* of the Criminal Procedure Code. In the application, **Erastus Chege Maina**, hereinafter referred to as “*the applicant*” seeks that he be admitted to bail pending the hearing and final determination of his appeal.

Apparently, the applicant was on 18th March, 2008 arraigned before **Miss L.W. Gitari (SPM)** in the Chief Magistrate’s Court, Nyeri on one count of manslaughter contrary to *section 202 and 205* of the Penal Code. The particulars of the charge were that “**On the 5th day of March, 2008 at Gikondi Secondary School, in Nyeri District within Central Province, unlawfully killed Daniel Kanyua Karenye....**” The applicant pleaded guilty to the charge and a plea of guilty was entered. Thereafter facts were led by the prosecution. The applicant admitted the facts. Consequently he was convicted on his own plea of guilty. He was then allowed to mitigate whereupon he was sentenced to serve seven (7) years imprisonment.

Aggrieved by the sentence, the appellant lodged the instant appeal through **Mr. M.K. Kiminda, Esq, Advocate** which is limited to sentence only.

At the hearing of the application, **Mr Kiminda** submitted that though the applicant pleaded guilty to the charge and admitted the facts, there was a missing link between the act committed by the applicant and the cause of death of the deceased.

In response, **Mr. Makura**, learned state counsel submitted that the appeal had no overwhelming chances of success. The applicant pleaded guilty and facts led disclosed and supported the offence charged.

I have carefully considered the application, the supporting affidavit and rival oral submissions. In an application of this nature, the applicant must satisfy the court that the appeal as filed has overwhelming chances of success and also minor consideration as to whether there were exceptional and unusual circumstances. **See Dominic Karanja V Republic (1986) KLR 612.** In this case the applicant pleaded guilty to the charge. That plea was properly and carefully taken by the learned magistrate. The facts in my view and contrary to the submissions by **Kiminda** disclosed a charge of manslaughter. I was also surprised by the about turn made by **Mr. Kiminda**. His petition of appeal filed raises only two grounds of appeal and they are all sentence. The conviction is not challenged at. By making the submission that there was a missing link between the act committed by the applicant and the cause of death, **Mr. Kiminda**, was indirectly questioning the conviction. However, he has not amended his petition to capture that fact. In the circumstances I do not think that it will be right for me to consider issues that are not captured in the petition of appeal.

Sentence it has always been said, is a discretion exercised by the sentencing court. Unless the sentence imposed is illegal or manifestly harsh and excessive the appellate court will hardly interfere with exercise of such discretion. One cannot therefore say with fortitude that an appeal based solely on sentence which is not illegal as in this case has overwhelming chances of succeeding. I do not think that the applicant has demonstrated to my satisfaction that his appeal has overwhelming chances of success. Accordingly the application is denied.

Dated and delivered at Nyeri this 9th day of July, 2009.

M.S.A. MAKHANDIA

JUDGE