



REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CRIMINAL APPLICATION NO 189 OF 1993

DOMINIC MWALUGHA APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The applicant Dominic Mwalugha was charged with the offence of being in possession of cocaine contrary to rule 9 of the Dangerous Drugs Act 245 Laws of Kenya.

The record shows that the charge was read over and explained to the applicant in English which he said he understood whereupon he said "it is true". The facts were then stated by the court prosecutor and when the Court asked the applicant if the facts as read were correct he replied "The facts are correct". He was then convicted and after mitigation was sentenced to serve 18 months' imprisonment. In effect the applicant was convicted on his own plea of guilty.

The applicant has since filed an appeal (HC CRA No 503 of 1993) against both the said conviction and sentence and the Petition of Appeal is part of the record in the present application. This is an application for bail pending the hearing of the said appeal.

The basic issues raised in the said Petition of Appeal are that the plea of guilty as recorded by the learned trial magistrate was not unequivocal, that it was not established the applicant clearly understood the offence preferred against him, that the answer to the charge did not establish his guilt and finally that the sentence was harsh and excessive.

For the applicant to succeed in obtaining the order sought it must be shown that his appeal has overwhelming chances of being successful. That is the basic test (See – *Somo –vs- Republic* [1972] EA 476). From what I am able to discern from the record before me I have no doubt that the charge was read over and explained to the applicant by the Court in English which he said he understood. What is in doubt is whether he was asked to admit or deny each and every element of the same (emphasis mine).

The applicant was unrepresented. Rule 9 under which the applicant was charged falls under subsidiary legislation – not the Parent Act. The marginal note thereof read "condition of possession". The said rule does not create an offence or provide penalty. It would appear therefore that the charge was misplaced.

However, assuming that a proper charge was before the Court the prosecution had the duty, even in a plea of guilty, to prove that the applicant was guilty beyond any reasonable doubt. With profound respect, this appears not to have been the case. The subject matter alleged to have been cocaine found in the possession of the applicant was not proved as such. No government analyst's report was produced to the Court and put to the applicant.

The foregoing show that the applicant,s appeal has overwhelming chances of being successful. He should therefore not be denied his freedom at this stage. His application for bail pending the hearing of his appeal succeeds.

I order that he may be released in executing a bond of Kshs 10,000/- with one surety in the like sum. He must attend the hearing of the appeal.

Orders accordingly.

Dated and delivered at Mombasa this 23rd day of December, 1993

A.MBOGHOLI - MSAGHA

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JUDGE



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