



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT CHUKA**

**HCCRA NO. E009 OF 2021**

**TARIKI KIREMA .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**(Being an application for bail pending appeal in an intended appeal from a judgment by Hon.M. Sudi S.R.M on the 30<sup>th</sup>.06.2021 in C.M.C.C No. 1068 of 2014 at Chuka).**

**RULING**

**INTRODUCTION**

1. **Tariki Kirema** the appellant herein, was charged as follows:-

**Count I: Stealing by servant contrary to Section 281 of the Penal Code.**

On the diverse dates between 1<sup>st</sup>.02.2014 and 24<sup>th</sup>.07.2014 at Trans nation Sacco Limited in Chuka within Tharaka Nithi County, being an employee of the said bank as the Financial Accountant, jointly with others not before court, stole Kshs. 5,978,608.00, the property of the said trans nation Sacco Limited which came into your possession by virtue of your employment.

**Count II: Fraudulent false accounting contrary to section 330(b) of the Penal Code.**

**Particulars:** on the 1<sup>st</sup> day of February,2014, at Transnation Sacco Limited in Meru South District within Tharaka Nithi County, being a servant to Transnation Sacco Limited to wit Financial Accountant, with intent to defraud made a false entry in Account **No.5020xxxx** in the name of Nthia Mercy M. purporting to show that on the said day **Kshs. 654,151.30** had been credited to the said account.

**Count III: Fraudulent false accounting contrary to section 330(b) of the Penal Code.**

**Particulars:** On the 6<sup>th</sup>.05.2014, at Transnation Sacco Limited in Meru South District within Tharaka Nithi County, being a servant to Transnation Sacco Limited to wit Financial Accountant, with intent to defraud made a false entry in account **No.xxxx** in the name of Nthia Mercy M. purporting to show that on the said day **Kshs. 458,011.30** had been credited to the said account.

**Count IV: Fraudulent false accounting contrary to section 330(b) of the Penal Code.**

**Particulars:** On the 22<sup>nd</sup>.04.2014, at Transnation Sacco Limited in Meru South District within Tharaka Nithi County, being a servant to Transnation Sacco Limited to wit Financial Accountant, with intent to defraud made a false entry in Account No. 5040xxxx in the name of Mercy Faith Kawira, purporting to show that on the said day **Kshs. 54,895.65** and **Kshs. 27,950** had been credited to the said account.

**Count V:** Fraudulent false accounting contrary to section 330(b) of the Penal Code.

**Particulars:** On the 22<sup>nd</sup>.04.2014, at Transnation Sacco Limited in Meru South District within Tharaka Nithi County, being a servant to Transnation Sacco Limited to wit Financial Accountant, with intent to defraud made a false entry in Account No. B0xxxx in the name of Mercy Faith Kawira, purporting to show that on the said day **Kshs. 100,000.00** had been credited to the said account.

**Count VI: Fraudulent false accounting contrary to section 330(b) of the Penal Code.**

**Particulars:** On the 13<sup>th</sup>.05.2014, at Transnation Sacco Limited in Meru South District within Tharaka Nithi County, being a servant to Transnation Sacco Limited to wit Financial Accountant, with intent to defraud made a false entry in Account No.461585 in the name of Kennedy Kinyua Njeru purporting to show that on the said day Kshs. 144,300 had been credited to the said account.

2. He denied the charges and the case proceeded to full hearing after which he was found guilty, convicted and sentenced as hereunder:

**Count 1:** 4 years imprisonment;

**Count II:** 3 years imprisonment;

**Count III:** 2 years imprisonment;

**Count IV:** Fine of Kshs. 100,000.00 in default 1 year imprisonment; **Count V:** Fine of Kshs. 100,000.00 in default 1 year imprisonment;

**Count VI:** Fine of Kshs. 100,000.00 in default 1year imprisonment.

3. The appellant has moved this court vide a notice of motion dated 2<sup>nd</sup>.07.2021 filed under a certificate of urgency and seeks the following orders:- -

That he be released on bond and bail pending the hearing and determination of the appeal. It is based on the following grounds: \_

**i. THAT the appellant /applicant was convicted on the 30<sup>th</sup>.06.2021 on all the six counts and severely (sic) sentenced to 4 years on the 1<sup>st</sup> count of stealing by servant, 3 years on the 2<sup>nd</sup> count of fraudulent false accounting, 2 years on the 3<sup>rd</sup> count of fraudulent false accounting and fined Kshs. 100,000.00 or 1 year imprisonment, on each of the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> counts all of fraudulent false accounting. The sentences were ordered to run consecutively instead of concurrently as is the law and practice. To that extent, amongst other aspects, the appeal herein has overwhelming chances of success.**

**ii. THAT article 50(2) (p) of the constitution requires meting the least severe sentence, contrary to the severe and harsh sentences meted upon the appellant/applicant by the trial court.**

**iii. THAT the appellant/ Applicant conducted the primary case while out on a bond of Kshs. 3,000,000.00 with one surety of a like sum and never failed to honor the same throughout the trial.**

iv. **THAT the appellant/applicant undertakes to observe and comply with any reasonable conditions which this Honourable court may deem fit to impose in admitting him to bail/bond.**

v. **THAT the appellant/applicant has a fixed place of abode and is therefore, not a flight risk.**

vi. **THAT bail or bond is a constitutional right. If the appellant remains in detention and his appeal ultimately succeeds, the resulting injustice and prejudice shall be profound and irreversible.**

vii. **THAT the applicant is aged about 40 years and has a young family comprising of four schooling children which depends on him exclusively for all their needs because his spouse is jobless.**

4. Further, the appellant filed a petition of appeal dated 2<sup>nd</sup>.07.2021 having been aggrieved by the judgment, appealed against both conviction and sentence on grounds that the learned trial magistrate erred in both law and facts in:

i. **Convicting the appellant on the count of stealing by servant yet the prosecution did not adduce cogent evidence to prove that charge.**

ii. **Holding that the appellant plucked and stole cheque leaves in the course of carrying out his reconciliation duties, yet the appellant was not the custodian of cheques books and the custodian of the cheque books did not complain and prove the same.**

iii. **Disregarding the evidence adduced in favour of the appellant coupled with the written submissions filed by his counsel.**

iv. **Failing to find and hold that none of the charges leveled and preferred against the appellant was proved beyond a reasonable doubt, which is the standard of proof in criminal cases.**

v. **Meting excessive and harsh sentences against the appellant contrary to the law and practice.**

5. Reasons wherefore the appellant prayed that the appeal be allowed, his conviction be quashed, the sentences meted against him be set aside and be set free forthwith.

The court directed that the application be served on the respondent. Upon service the respondent opposed the application and filed a replying affidavit sworn by Erick Momanyi, advocate of the High Court of Kenya practicing in the office of the Director of Public Prosecution.

6. On the 19<sup>th</sup>.07.2021, the matter came up before the court for direction and the court directed that the application be disposed off by way of written submissions.

### **APPELLANT'S SUBMISSIONS**

7. The applicant submitted that it is only fair that he be allowed to follow up the appeal while on bond in that the sentence meted unto him was severe. Further that, he vows to abide by the conditions that shall be passed by this court and that he is a resident of Nkubu and therefore not a flight risk.

On whether the applicant is entitled to bond or bail the applicant has cited the case of **Chimambho –v- Republic (1971) EA 343** where it was stated that the law recognized to an extent that there is a possibility of the conviction being erroneous or the punishment excessive, a recognition which is implicit to the legislation creating the right of appeal in Criminal Cases. The applicant also relies on **Article 49 of the Constitution** and the provisions on bail pending appeal under **section 357 of the Criminal Procedure**

**Code** (Cap 75). It is further submitted that the applicant is entitled to bail as a fine would have been more appropriate. That the sentence was too harsh and that this court after considering the evidence will be inclined to change the sentence.

The applicant further submits that the appeal has high chances of success and if the applicant is not released on bail, he is likely to serve a substantial part of the sentence. The applicant relies on **Jivraj Shah –v- Republic (1986) KLR 605** which laid down the principles for granting bail pending appeal. He also relies on **Samuel Macharia- v- Republic C.A No.50/2013 Nyri and Pauline Ruguru Kithumbu –v- Republic C.A 13/2019 Embu** which I have considered.

### **RESPONDENT’S SUBMISSIONS**

8. The respondent opposed the application and reasoned that, the sentence that was meted out by the trial court was legal and proper. That the applicant has not challenged the legality of the sentence and that sentence is a preserve of the trial court. That the same can only be overturned if wrong principles were applied occasioning a miscarriage of justice. That generally, the applicant has not demonstrated that any wrong principles were applied. He has also relied on the case of **Jivraj Shah –v- Republic** (supra) and submits that the appellant has not demonstrated the principles for granting of bail pending appeal.

The complainant (victim) joined the proceedings and filed an affidavit sworn by Luucham Mugambi Nthigai. His contention is that the application is not merited as the trial magistrate correctly found that the applicant stole Kshs.5,978, 698.00 and correctly convicted and sentence the applicant. That the sentence was not severe in the circumstances. The victim has raised further grounds in the affidavit which I have considered. The victim in its submissions states that the applicant has not demonstrated to the court that there are any exceptional or unusual circumstances to warrant the court to release him on bond/bail pending appeal. He further submits that the applicant has emphasized so much on the severity of the sentence but has not discharged the burden to prove that he has an appeal that has overwhelming chances of success. That severity of the sentence cannot *per se* be a ground for granting bail pending appeal without demonstrating that the sentence was against the law.

The complainant urges the court to find that the applicant has not demonstrated and/or met the threshold required to enable him being released on bail pending appeal. He relies on the case of **Jivraj Shah –v- Republic** (supra) and urges the court to dismiss the application. He has also relied on **Daudi Obiero Nyakweba –v- Republic (2021) eKLR, David Kimani Kuria- v- Republic (2021) eKLR** ..

### **ANALYSIS AND DETERMINATION**

I have considered the application. I have also had a chance to consider the proceedings before the trial court as well as the judgment.

9. The issue which arises for determination is whether the application meets the threshold for the grant of bail/bond pending appeal.

10. The legal foundation for bail pending appeal is provided under **Section 357(1) of the Criminal Procedure Code** (CAP 75 of the Laws of Kenya) which provides as follows:

**“After the entering of an appeal by a person entitled to appeal, the High Court, or the subordinate court which convicted or sentenced that person, may order that he be released on bail with or without sureties, or, if that person is not released on bail, shall at his request order that the execution of the sentence or order appealed against shall be suspended pending the hearing of his appeal.”**

11. The principles for granting bond pending an appeal has been articulated by all the parties who have cited the case of **Jivraj Shah v Republic [1986] eKLR** which laid down the principles for granting bail pending appeal as follows;

“(1) The principal consideration in an application for bond pending appeal is the existence of exceptional or unusual circumstances...”

(2) If it appears prima facie from the totality of the circumstances that the appeal is likely to be successful...or that the sentence or substantial part of it will have been served by the time the appeal is heard and concluded.

(3) The main criteria is that there is no difference between overwhelming chances of success... and a set of circumstances which disclose substantial merit in the appeal.

12. I shall now consider whether this application has met the required threshold under these heads.

***i. Whether the appeal has overwhelming chances of success***

13. The rationale for considering the chances of success of the appeal was given by **Trevelyan J in Somo – v- Republic [1972] EA 476** which is a leading authority on the subject, the court considered the rational for determining whether the appeal has overwhelming chances of success. The court stated that: this is based on the presumption that when the applicant was convicted, he was properly convicted. That is why, where he is undergoing a custodial sentence, he must demonstrate if he wishes to secure his liberty, that there are exceptional and unusual circumstances.

14. The applicant states that appeal herein has a high probability of success since the trial court ordered that the sentence run consecutively and not concurrently. Further that, the case was not proved beyond reasonable doubt; that his defence was disregarded by the court and that the sentence meted out to him is unjustified. It is my view that whether or not the sentence is severe is a matter to be determined on appeal. This appeal is on conviction and the sentence. Overwhelming chances of success of the appeal must be with regard to evidence upon which the conviction was based on. This has not been demonstrated. With regard to the sentence it must be demonstrated that the sentence was unlawful.

15. The appellant has not demonstrated any point of law to show that the appeal has overwhelming chances of success. The applicant has the burden to prove that the appeal has high chances of success. This is critical as it forms the basis of his release because unlike bail pending trial bail pending appeal is not a constitutional right. There is a presumption that he was lawfully convicted unless the contrary is proved. The main consideration is that if it is likely for the appeal to succeed he will have served a substantial part of the sentence. I find that the appellant did not discharge this burden.

***ii. Whether there are exceptional circumstances to warrant exercise of Court’s discretion to grant bail pending appeal***

16. What constitute exceptional circumstances were dealt with in **R vs. Kanji [1946] 22 KLR**, where **De Lestang, Ag. J.** (as he then was) held that:

“...the mere fact of delay in hearing an appeal is not of itself an exceptional circumstance, but it may become an exceptional circumstance when coupled with other factors. The good character of the appellant may, for example, together with the delay in hearing the appeal constitute an exceptional circumstance.....

17. The applicant has submitted that he is 40 years and has a young family comprising of four schooling children who depend exclusively on him for all their needs since the wife is jobless.

18. In **Dominic Karanja v Republic [1986] KLR 612** it was held that the previous good character of the Applicant and the hardships if any facing his family were not exceptional or unusual circumstances.

19. The Applicant submitted that he was previously released on bond of Kshs. 3,000,000.00 with one surety of a similar amount during the trial and that he abided to the set bond terms. The Respondent submitted that the fact that Applicant was released on bond terms in the lower court does not form a valid

ground to support his present application for bail pending appeal as the circumstances have changed. I agree with the Respondent. Although the Applicant did not abscond during trial, there is a high motivation to abscond now that he has been convicted.

20. In **Peter Hinga Ngotho v Republic [2015] eKLR** it was held that the fact that the Applicant did not breach the bail conditions in the court below, is not an exceptional circumstance which can warrant a decision to admit an Applicant to bail pending appeal.

21. In my humble view, the applicant has not demonstrated any unusual or exceptional circumstances to warrant the grant of bond pending appeal.

**iii. Whether there is a high probability of the sentence being served before the appeal is heard**

22. In **Chimambhai v. Republic [1971] EA343**, Harris, J. granted the application because, an anticipated delay in the hearing of an appeal together with other factors considered to constitute a good ground for the granting of the application.

23. The Applicant argues that he is bound to suffer if he remains in detention and if his appeal ultimately succeeds will result in injustice and prejudice. He was sentenced to 9 years imprisonment for 4 counts and a fine of Kshs. 100,000.00 in default 1year imprisonment; fine of Kshs. 100,000.00 in default 1year imprisonment; fine of Kshs. 100,000.00 in default 1year imprisonment.

24. The appellant/applicant's appeal has been admitted to hearing showing thereby that it is not frivolous. In addition to that, currently law and practice favour quick determination of matters without unreasonable delay. The burden of proof was on the Applicant to demonstrate that he is likely to serve a substantial part of the sentence before the appeal is heard which in turn could be successful hence leading to prejudice. As matters stand the appeal is ready as the proceedings and the record of appeal are ready the file and can proceed to hearing any time.

25. I hold the view that it is not likely that the Applicant will serve a substantial period before the appeal is heard and determined.

**CONCLUSION**

26. In light of the foregoing I find no merit in this application. I reject the application and order that it be dismissed.

**Dated, signed and delivered at Chuka this 22<sup>nd</sup> day of October 2021.**

**L.W. GITARI**

**JUDGE**