



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC.CRIMINAL APPLICATION NO. 433 OF 2015

DAVID CHEBURET.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

David Cheburet was the second accused in **Milimani Criminal Case No. 1924 of 2010**. He was charged in the 3rd Count with falsification of register contrary to **Section 361 of the Penal Code**. It was alleged that on 15th November, 2009 at Kenya Revenue Authority, Namanga Customs Station, in Kajiado District of Rift Valley Province having the actual custody of Inward Private Motor Vehicle Register, knowingly, made a rotation entry number R/NMA/8953/11/09 to be made in the said Inward Private Motor Vehicle Register which in any material particular was to his knowledge false. He was found guilty and was sentenced to serve 3 years imprisonment. He was aggrieved by both the conviction and sentence and he preferred **Nairobi Criminal Appeal No. 193 of 2015**.

Pending the hearing of the appeal, he has moved this court with a Notice of Motion application dated 3rd December, 2015 in which he prays that he be admitted to bail pending the hearing and determination of the appeal. He contends that the appeal has overwhelming chances of success.

During the hearing of the application, learned counsel Mr. Chebii for the Applicant submitted that the Applicant's appeal had overwhelming chances of success. His contention was that although the Applicant made the entries in the motor vehicle register, he had not seen the motor vehicle physically because there was no requirement for him to view the vehicle before making the entries. In any case, the entry he made of the motor vehicle in question was a true reflection of the vehicle itself. Hence, he did not falsify the record of the vehicle. The Applicant therefore had no role in inspecting the vehicle before he made the entries. Counsel further submitted that the Applicant was a family man with school going children and his continued imprisonment was prejudicial to them. Furthermore, during the trial, he had been granted a bond of Kshs. 20,000/= and he never absconded the trial.

Learned counsel Ms. Wario for the Respondent opposed the application. She submitted that the appeal has no chances of succeeding as the prosecution had proved their case beyond all reasonable doubts. Again, the Applicant had not demonstrated any unusual or exceptional circumstances that would warrant the grant of bail pending appeal.

I have accordingly considered the application, the respective submissions and I take the following view of the application. The court of appeal laid down the principles to be considered in an application for bail

pending appeal in the case of **Jivraj Shah vs Republic [1986] eKLR** in which the court held that:

1. *The principle 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 which disclose substantial merit in the appeal which could result in the appeal being allowed and the proper approach is the consideration of the particular circumstances and weight and relevance of the points to be argued.”*

I have perused the Petition of Appeal by the Applicant dated 20th November, 2015. One of the grounds in the Petition is that it was not within his knowledge that the motor vehicle in issue was not within the customs premises at the time he entered the record. He has also contested the fact that he was convicted based on circumstantial evidence, that the vehicle had been detained by Anti-Terrorism Police Unit when in fact there was no evidence that he had knowledge of the same. Furthermore, he has advanced the ground that he did not falsify any Government official record as he entered in the register what was on the record concerning the subject motor vehicle. Those Grounds cannot be deemed as frivolous when compared with the evidence of PW4 who was a key prosecution witness against him. The witness did confirm that the Applicant entered on the register the record of the motor vehicle presented to him. That alone raises a triable issue. As such, I hold that, *prima facie*, the appeal has overwhelming chances of success. It would then be prejudicial to continue incarcerating the Applicant when the appeal is likely to succeed.

On existence of unusual or exceptional circumstances, the fact that the Applicant is a family man and has school going children does not constitute a factor that would necessitate his release on bail pending the hearing of the appeal.

In the premises, the application succeeds. The Applicant is hereby released on a bond of Kshs. 200,000/= with a surety of a similar amount to be assessed by the Deputy Registrar of this court. In the alternative, he shall deposit a cash bail of Kshs. 50,000/=. The appeal should be listed for hearing within the next 90 days. It is so ordered.

DATED and DELIVERED in Nairobi this **16th** day of March, **2016**

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Mr. Chebii for the Applicant.*
2. *Miss Atina Respondent.*