



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPLICATION NO.101 OF 2016

MUNGAI WACHANGA HINGA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The applicant herein was charged with 3 counts in the Chief Magistrate’s Court at Nairobi vide Cr. Case No. 59 of 2011. In count I and III, he was charged with stealing contrary to Section 275 of the Penal Code. The particulars of count I were that on unknown dates between the months of June and 2008, at unknown place within the Republic of Kenya jointly with others not before court stole one Development Bank of Kenya cheque leaf number 011710 valued at Kshs. 100/= the property of Muigai Commercial Agencies. In count II he was charged with forgery contrary to Section 349 of the Penal Code in that on or before the 20th day of June, 2008, at unknown place within the Republic of Kenya with intent to defraud, forged a certain Development of Kenya cheque No. 011710 for Kshs. 385,000/= purporting it to be a good and valid order of payment issued to Muigai Wachaga Hinga. The particulars of Count III were that on 20th June , 2008 at Commercial Bank of Africa International Life House Branch, in Nairobi within Nairobi area, with others not before court stole Kshs. 385,000/= the property of Muigai Commercial Agencies. The applicant was convicted in all the three counts and was sentenced to serve one year imprisonment In count I and two years imprisonment in count II and III respectively. He was dissatisfied with the conviction and sentence and preferred High Court Criminal Appeal No. 50 of 2016.

By a Notice of Motion application, dated 24th March, 2016, he asks the court to grant him bail pending hearing and determination of the appeal. It is his case that the appeal has overwhelming chances of success. That he is sickly and suffering in the prison, that he obeyed the terms of bond granted during trial, that he is likely to serve the term of imprisonment before the appeal is heard and determined and that it is necessary to grant him bail so as to decongest the prison.

In opposing the application, learned state counsel Ms. Wario submitted that the appeal has no chance of succeeding, that his sickness can be well catered for in the prison and that there does not exist any exceptional and unusual circumstances to warrant the granting of bail.

I have accordingly considered the respective submissions. The principles to be considered in an application for bail pending appeal were well enunciated 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 criterial 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.”*

In the respect of the current case, learned counsel for the Applicant Mr. Gachie submitted on success of the appeal that the learned trial magistrate convicted the Applicant purely on circumstantial evidence. She found in her judgment the evidence of only one witness (PW3) as credible in total disregard of the account of the events as narrated by the applicant in his defence. According to the counsel, there had been a conversation between PW3 and the Applicant in a secluded place. Each of the two gave an account of what transpired in their own versions. Unfortunately, the version of the Applicant was disregarded by the trial court in a statement of one line in the judgment. I have had a look at the proceedings alongside the judgment of the learned trial magistrate and I think that the issue raised by the learned counsel cannot be frivolous in any event. I am of the view that in the circumstances, the applicant has an arguable appeal and he therefore succeeds on the first ground on which the application is premised.

On the existence of exceptional and unusual circumstances, it was submitted that the applicant was ailing having sustained a gunshot wound and being hypertensive which conditions need proper and frequent attention. While I agree with the latter statement, it is important to bear in mind that an Appellant having been convicted, remains a guilty person unless the conviction is upset by an appellate court. The mere fact that the Applicant has a wound and is hypertensive would not in the circumstances constitute exceptional or unusual circumstance to warrant the granting of bail pending appeal; unless it can be shown that the illness cannot adequately be attended to in the prison. The Applicant's conditions, fortunately can be well checked while he is in prison.

On whether the applicant is likely to serve the term of imprisonment before the appeal is heard and determined, this can only be determined if, on evaluating the entire evidence the appeal is likely to succeed. In the instant case, the cumulative sentence being of two years, I concede is a short period within which the applicant may serve before the appeal is heard and determined. Having found that the same is likely to succeed, this ground on which the application is premised leans in his favour.

Finally, it was submitted that the application should be allowed so as to decongest the prison. Whereas I agree that our prisons need measures that would decongest them, I do not think ordinarily that would be a main ground on which an application for bail pending appeal would succeed on its own. This argument is laudable in cases of revision of sentences and for persons awaiting trial. My view is that it is a persuasive ground where the court finds that an applicant has an arguable appeal with a likelihood of success.

In the result, this application is allowed. The applicant is admitted to a bail of Kshs. 70,000/= or a bond of Kshs. 200,000/= with a surety of a similar amount to be assessed by the Deputy Registrar of this Court. It is so ordered.

DATED and DELIVERED this 29th day of April, 2016

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Wachira holding brief Gachie for the Applicant*
2. *M/s Atina holding brief for M/s Wario for the Respondent.*