



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL APPEAL NO.146 OF 2015**

**PATRICK SAIDI MUSYOKA.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**RULING**

By Notice of Motion dated 6<sup>th</sup> May, 2015 the applicant Patrick Saidi Musyoka seeks bail pending appeal herein. It is brought under Sections 347, 350, 356 and 357 of the Criminal Procedure Code, the Constitution of Kenya and all enabling provisions of the law. It is premised on grounds that the appeal has high chances of success, it is in the interest of justice and fundamental rights enshrined in the Bill of Rights in the Constitution for the applicant to be granted bail pending appeal, that the offences for which the applicant was charged are bailable and that he was granted bail by the trial court and did not abscond the trial.

The application is supported by the affidavit of the applicant sworn on 6<sup>th</sup> May, 2015. In brief he deposes that he complied with the terms and conditions of bail granted to him before the magistrate's court and that being the sole breadwinner of his family of a wife and eight children the court should be lenient to him in granting him the order sought.

The application was canvassed by way of filing written submissions. Those of the applicant were filed by M/S Wafula Simiyu & Company Advocates on 26<sup>th</sup> May, 2015. On the issue of success of the appeal, Counsel submitted that the prosecution did not demonstrate how the appellant knew that the subject money was debited from the complainant's account and credited into Gusii County Council account. As such, both *mens rea* and *actus reus* were not proved. It was submitted that the prosecution also failed to demonstrate how the applicant participated in the theft and conspiracy to defraud Kenya Roads Board in presenting a forged cheque on 28<sup>th</sup> February, 2008 for payment. It was further submitted that the prosecution did not prove the charge of conspiracy to defraud and fraudulent accounting on the part of the applicant. The Counsel submitted that no single prosecution witness placed the applicant at the scenes of the crimes both at the National Bank branches at Nairobi Upper hill and at the Kisii branch. That further, the trial court convicted the applicant majorly on the evidence of the investigating officer who testified as PW12. According to PW12, he narrowed down his investigations to the actual beneficiaries of the stolen money which was to the tune of Kshs.28,885,756/-. The applicant was neither a direct nor a proxy beneficiary of any of that amount or the amount that was recovered. This was vindicated by prosecution exhibits 34 and 35 which contained list of persons and companies that benefited from the stolen proceeds. The applicant was neither in that list nor linked to any of the companies in the list. Surprisingly too, as submitted no criminal proceedings were instituted against the names in the list of beneficiaries. As such, it was a miscarriage of justice to charge and convict the appellant.

It was further the submission of the applicant's counsel that the applicant was also charged because he was the custodian of the cheque books in questions. But that evidence was controverted by the evidence of PW6 Samuel Kiprotich Koech who admitted to have had the cheque book in question as at 25<sup>th</sup> February, 2008 which was the time of the theft and of cashing in the fraudulent cheque. This evidence was corroborated by that of PW10 Dr. Francis Nyanganya.

It was also submitted that the prosecution failed to produce the cash book in question but only tendered its extracts. This left a huge gap in the link between those extracts and their source.

Further, it is the applicant's argument that the mere fact of his posting of prosecution exhibits 22(a),(b), (c) and (d) which were bank reconciliations, would not have enabled him to detect those postings as fraudulent and therefore stop the theft. In respect thereof, the applicant was just but a victim of circumstances.

Again, according to the applicant the complainant was refunded all the lost money by the bank and it was therefore erroneous of the trial court to disregard this pertinent issue in founding a case against the applicant.

Finally, the applicant's counsel submitted that since the applicant did not abscond the trial and is the breadwinner of his family of eight children three of whom are in secondary school the court ought to be lenient and grant him bail pending appeal.

In response, Learned State Counsel Mr. George H. Mureithi in submissions filed on 4<sup>th</sup> June, 2015 urged the court to consider the following issues:-

1. **It is not clear who between the 4<sup>th</sup> accused person (now deceased) and the applicant who was in custody of the cheque book produced as exhibit 13, from which exhibit 14 (the questioned cheque) was plucked from.**
2. **From the appellant/applicant's sworn statement he was directed by the General Manager vide the letter dated 4<sup>th</sup> November, 2008, to assist the then accountant in doing reconciliations. This was seven months after the cheque in question had been cashed.**
3. **From the record the Investigating Officer (I.O) did not state whether the applicant had benefited from the fraud in order to prove theft of the money.**

I have accordingly considered the respective submissions and as is trite in an application for bail pending appeal the court is obligated to consider the following factors:-

- a. **Whether the appeal has high chances of success.**
- b. **Whether the applicant has demonstrated any unusual of exceptional circumstances to warrant the grant of bail pending appeal.**

See Ademba -Vs - Republic (1983) KLR, 442, MutuaVs Republic (1985) KLR, 497 and Jivraji Shah -Vs- Republic (1986) KLR 605.

The applicant herein was charged in Counts IV and V alongside five others with the offence of conspiracy to defraud contrary to Section 317 of the Penal Code and stealing contrary to Section 275 of the Penal Code respectively. In Count VIII he was charged together with another with the offence of fraudulent false accounting contrary to Section 330(c) of the Penal Code.

In Count IV he was sentenced to serve 18 months imprisonment, in Count No. V to 24 months imprisonment and in Count VIII to 36 months imprisonment. All sentences were to run concurrently.

The prosecution called a total of 12 witnesses whose evidence I have perused and considered. In view of the submissions made by the learned counsel for the applicant, it is my view that the appeal for the applicant has a high chance of success. I will however hesitate to wholly analyze the same in fear of

preempting the appeal herein. That said though, as was held in **Dominic Karanja –Vs- Republic (1986) KLR 612:-**

**“The previous good character of the applicant and the hardships, if any, facing his family were not exceptional and unusual factors.....”**

I do not think that the fact that the applicant did not abscond the trial court proceedings and that he is the breadwinner of his large family would be favourably considered in granting him the orders sought.

In the end, the application succeeds and the same is allowed. The applicant shall execute a bond of Kshs.1,000,000/- with one surety of a similar amount to be assessed by the Deputy Registrar of this court.

It is so ordered.

**DATED and DELIVERED** at Nairobi this 22<sup>nd</sup> June, 2015.

**G. W. NGENYE – MACHARIA**

**JUDGE**

**In the presence of:-**

1.....for the applicant.

2.....for the respondent.