



**REPUBLIC OF KENYA**

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

**HIGH COURT CRIMINAL APPEAL NO.268 OF 2015**

**CAROLYNE AKEYO OKWEMBA.....APPLICANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**RULING**

The instant Application dated 9<sup>th</sup> March, 2015, is brought pursuant to Section 356 of the Criminal Procedure Code, seeking bail, pending the Appeal HCCrA No. 120 of 2015, from conviction and sentence in the Judgment in Nairobi Chief Magistrate's Court Criminal Case No. 1898 of 2010 delivered on 10<sup>th</sup> June, 2015 by Honourable L. Mbugua CM, in which the Applicant was found guilty of 4(Four) counts of Stealing by Servant contrary to Section 281 of the Penal Code and sentenced to 2 years imprisonment on each count.

The grounds of the Application are that;

- a. **The Applicant was on 08.11.2010 charged with four counts of Stealing by Servant contrary to Section 281 of the Penal code.**
- b. **Throughout the period of her trial, the Applicant was admitted to bail pending trial whose conditions she fully complied with.**
- c. **On 10.06.2015, the Applicant was convicted on all four counts and sentenced to 2 years imprisonment on each count to run concurrently.**
- d. **On the same date, immediately after delivery and sentence, the Applicant applied for certified copies of the Judgment.**
- e. **The process of typing and certifying the Judgment took long and the Applicant only managed to get the certified copy of Judgment and proceedings on 10.07.2014.**
- f. **The failure to enter the Appeal herein within the prescribed period of 14 days was caused by inability of the Applicant to obtain a copy of the judgment appealed against and a copy of the record within a reasonable time of applying to the court thereof.**
- g. **The Applicant's Appeal has overwhelming chances of success as evidenced by the attached Petition of Appeal.**
- h. **The Applicant, upon conviction and sentence left behind a five year old son who has become psychologically traumatised at the abrupt absence of the mother from home.**
- i. **The applicant is currently pregnant and was so pregnant at the time of conviction and sentence. The said pregnancy had presented complications with what the doctors have diagnosed as;**
  - i. **Hypertension in pregnancy.**
  - ii. **She is a high risk mother.**
  - iii. **She lost her first baby due to the same problem.**

**iv. Her second born pregnancy was induced at 33 weeks.**

- j. The Doctors who have examined her have observed that the condition the Applicant is suffering from could be detrimental to her health and the baby if she is not monitored closely.**
- k. The Doctor who has examined the Applicant has recommended that she requires close monitoring by a gynaecologist till she delivers.**
- l. The foregoing diagnosis coupled with the Applicant's good behaviour throughout the time she was admitted to bail pending trial and the overwhelming chances of success of her Appeal renders her suitable for bail pending Appeal.**

The application is supported by the Affidavit of Alfrique Otieno Mwana, the Applicant's husband, which apart from reiterating the grounds of the application, has annexed to it a copy of the Petition of Appeal, medical records of the Applicant and proceedings of the Lower Court (portions thereof).

In arguing the application, Counsel for the Applicant contended that she was convicted merely because she did not explain clearly where she left the money in the Director's office and that witnesses conceded it was not unusual to leave the money in the office. This, it was argued, amounted to shifting the burden of proof to the accused. There being no direct evidence that she stole the money, the Court relied on circumstantial evidence whereas the loss could be explained to theft by other staff in the director's office. Further, the Applicant's absence from work could be explained by her having taken unpaid leave and she was in any case found at her rural home.

Counsel for the Applicant submitted that the Applicant is six months pregnant and she requires close supervision of her doctor as she suffers from hypertension duration pregnancy. He referred to two medical reports from Langata Women Prison Health Centre and Doctor David Kiragu, her gynaecologist.

In support of her application, the Applicant relied on the authorities, being;

- 1. Nyeri HCCr.A No. 50 of 2013 Samuel Macharia Njagi –v-Republic**
- 2. Nakuru HCCr.A No. 164 of 2013 Charles Owanga Aluoch –v-DPP**
- 3. Kisii HCCr A No. 56 & 57 of 2014 Denis Yobesh Ombogo & Another-v-R**

The Prosecution conceded partially to the application only on the ground of the Applicant's illness, seeking for stringent bail terms and generally disputed that the appeal had high chances of success.

I have accordingly considered the application and the arguments of both parties as well as the authorities provided by the Applicant. For an application of bond pending appeal to succeed, the applicant must demonstrate that the appeal has a high chance of succeeding and that there exists unusual and exceptional circumstances.

I have also looked at the Lower Court proceedings attached to the application. I have noted that for whatever reason, only a portion of the proceedings of the Lower Court have been attached. At page 12 of the bundle, the proceedings start on the 25<sup>th</sup> of January, 2013. On the next page (13), it appears that the first witness is PW8. Nowhere else are the initial portions of the proceedings are found in the bundle. It follows that the evidence of a whole 7 prosecution witnesses is missing from the bundle. Indeed, the testimony of the lead witnesses as well as of all of those who would be considered complainants in the Lower Court trial is not included in the bundle.

As a direct result of the missing portions of the proceedings, it becomes impossible to take any holistic look or make any objective conclusions regarding the issues raised in grounds 1, 2 and 5 of the Petition of Appeal which relate to the merit of the appeal.

Again, with regard to ground 3, it is my view that the links in the chain of evidence is incomplete. In the same vein, a decision regarding how appropriate it was to rely on the circumstantial evidence requires a look at the evidence in totality so as to see clearly the connection in the chain of evidence. Here again, the missing portion of the proceedings hampers a clear look at the chain of evidence.

It was held, inter alia, in the case of JIVRAJ SHAH -VS- REPUBLIC [1986] KLR at 605 by the Court of Appeal that;

**“2. If it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on an account of some substantial point of law to be urged and the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail will exist.”**

Again, in Abdi vs. Republic [1991] KLR at 171 the court held, inter alia;

**“2. To admit an applicant to bail is the decision of the court which must be judicially exercised keeping in sight all the facts relating to the application, all the matter material to the trial at the lower court, the grounds submitted in the petition and the chances of success and the nature of the trial. The time it would take for the appeal to be prosecuted and determined is by itself not a sufficient ground.”**

Regarding Ground 4, it has raised my concern regarding at what point this “*incumbency*” arose in the trial Magistrate’s mind, of apparent shift of the burden of proof upon the Applicant. Whatever the case, I arrive at the opinion that this is a viable appealable issue, but in my opinion not qualifying to have overwhelming chances of success.

It was deposed and then submitted that the Applicant is a person of good conduct who complied with the terms and conditions of her bail pending trial. The implication of this submission is that for this reason she is then suitable for bail pending appeal. It has also been deposed that she has a 5 year old child who has been psychologically traumatized by her abrupt absence. However, none of these reasons are criteria for the granting of bail pending appeal. I am so advised by the case Dominic Karanja v. Republic [1986] KLR 612 in which, inter alia, was held;

**“...b. The previous good character of the applicant and the hardships, if any, facing his family were not exceptional or unusual factors. Ill health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners.**

**c. A solemn assertion by an Applicant that he will not abscond if released, even if it is supported by sureties, is not sufficient ground for releasing a convicted person on bail pending appeal...”**

Finally, as regards the existence of other exceptional circumstances, I have looked at the two medical reports made by Doctor Ndeti of Langata Women Clinic and Doctor Kiragu, a Gynaecologist. Both are clear that she requires close and frequent specialised prenatal care. They attest that the condition she is suffering from could be detrimental to her health and that of the baby if she is not monitored closely. I have no reason to doubt the two reports. I am then minded about the health of both the mother and the unborn child. In the spirit of protecting the sanctity of life, I shall rule in favour of the Applicant. I am, in this respect guided by the case of Abdi vs. Republic [1991] KLR at 171 in which it was held inter alia,

**“ 1. An application for bail pending appeal is to be granted in rare and exceptional circumstances....”**

It is my view that this is one of those rare and exceptional circumstances in which bail pending appeal is warranted.

Also, in JIVRAJ SHAH -VS- REPUBLIC (Supra) the Court of Appeal held, inter alia;

- 1. “The principal 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....”**

In my view, justice will not be served by the continued detention of the Applicant to the detriment and risk of her life and that of the unborn baby.

In the upshot, the application succeeds. The Applicant shall execute a bond of Ksh. 2,000,000/ with one surety of a similar amount to be assessed by the Deputy Registrar of this court or pay cash a cash bail of Ksh, 1,000,000/.

**Dated and delivered** at Nairobi this 14<sup>th</sup> day of August, 2015.

**G. W. NGENYE – MACHARIA**

**JUDGE**

**In the presence of:-**

1. ....for the applicant
2. ....for the respondent.