



**REPUBLIC OF KENYA**

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

**MISC.CRIMINAL APPLICATION NO.217 OF 2015**

**LUCY NYAMBURA MARUBU.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The applicant herein prays that she be granted bail pending the hearing and determination of her appeal. She was charged and convicted of stealing by agent under **Section 283 of the Penal Code in Criminal Case No. 2329 of 2014**, in the Chief Magistrate's Court at Kiambu. The application is brought by way of Notice of Motion dated 19<sup>th</sup> June, 2015 under **Section 357 of the Criminal Procedure Code, Cap 75, Laws of Kenya**.

It is premised on grounds that;

1. The applicant's appeal has high chances of success
2. The applicant shall abide by any condition set once bail/bond is given.

The application is supported by an affidavit sworn by Ng'ang'a Kimani dated 19<sup>th</sup> June, 2015 wherein he reiterates that the appellant's appeal has overwhelming chances of success. He depones that there exists exceptional circumstances on the part of the applicant in that the applicant suffers from asthma and other related illnesses which illnesses are incompatible with the prison atmosphere. He depones that the applicant is likely to serve a substantial part of the sentence before her appeal is finally determined. He depones that no prejudice will be occasioned to the prosecution if the appeal is granted.

In his submissions, Mr. Ng'ang'a, appearing as counsel for the applicant, stated that the appeal ought to succeed. He submitted that the charge sheet was defective since the applicant was charged under Section 283 of the Penal Code which deals with stealing by agent. He submitted that the specific subsection ought to have been specified to avoid a miscarriage of justice. Learned counsel submitted that the conviction was majorly based on the evidence of PW3 who is an employee of the complainant's Bank. He submitted that the statement was never produced in accordance with Section 65 of the Evidence Act as it was computer generated.

The application was opposed by the prosecution. Mr. Mureithi appearing for Ms Ndombi submitted that the medical condition of the applicant is not a special condition and that she could be referred to the hospital from prison. On the issue of the charge sheet, Counsel submitted that the charge disclosed an offence known in law which is stealing by agent. He submitted that the issue of production of the statements was never raised at the hearing and that there was no objection to their production. He submitted that the withdrawals were from the same agency. He prayed that the application be dismissed.

First, on the issue that there exists exceptional circumstances, Learned counsel submitted that the applicant suffers from asthma. In this regard, I wish to refer to the case of **KARANJA vs. REPUBLIC 1986 KLR 612** and **MUTUA vs. REPUBLIC 1988 KLR 497**.

In **Karanja's case** the court of appeal sated that,

***"...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."***

A similar view was expressed in **Mutua's case** where the Court of Appeal stated thus:

***" It must be remembered that an applicant for bail has been convicted by a properly constituted court and is undergoing punishment because of that conviction which stands until it is set aside on appeal. It is not wise to set the applicant at liberty either from the point of view of his welfare or of the state unless there is a real reason why the court should do so"***

Therefore, the success of this application depends on whether there is a high likelihood that the applicant's appeal shall succeed. From the submissions by learned counsel for the applicant, he states that the charge sheet was defective by virtue of the fact that the specific sub-section of Section 283 under which the applicant was charged was not mentioned hence causing prejudice.

Section 283 comprises subsections which specify the offences charged under it.

In **SIGILANI -VS- REPUBLIC (2004) 2 KLR, 480**, it was held that:-

***"The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence."***

Section 134 of the Criminal Procedure Code provides for what the components/ingredients of a charge sheet constitutes as follows:-

***"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."***

In this respect the charge sheet should have specified the offence under the appropriate subsection so that from the outset the applicant was in a position to prepare for her defence. It is the view of this court that the failure to do so may have prejudiced her and could constitute a good ground for the appeal. As such, I think she has an arguable appeal with a likelihood of success, reasons wherefore this appeal may succeed.

In the end, I allow the appeal. I order that the applicant executes a bond of Ksh. 100,000/= with one surety of a similar amount or deposits of a cash bail of Ksh.50,000/=. The surety shall be assessed by the Deputy Registrar of this court.

**DATED and DELIVERED this 24<sup>th</sup> day of September, 2015.**

**G.W. NGENYE-MACHARIA**

**JUDGE**

In the presence of:

1. *Ng'ang'a for the applicant*
2. *M/s Nyaundo holding brief for Ms. Kimiri for the respondent.*