

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.363 OF 2015

PETER MUCHANE

WAINAINA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Peter Muchane Wainaina was convicted of the offences of forgery under **Section 349** and **attempted theft** under **Section 275** as read with **Section 389** of the **Penal Code**. The Applicant was sentenced to serve one (1) year imprisonment in respect of the 1st count and two (2) years imprisonment in respect of the 2nd Count. The sentences were ordered to run concurrently. The Applicant was aggrieved by his conviction and sentence. He has filed an appeal to this court. The appeal is yet to be heard and determined.

Pending the hearing of the appeal, the Applicant made an application pursuant to, among others, **Section 357** of the **Criminal Procedure Code** to be admitted to bail pending the hearing of the appeal. The Applicant contends that his appeal raise substantial grounds which upon evaluation by the court will show that the Applicant's appeal has overwhelming chances of success. The Applicant stated that there exist exceptional circumstances that should convince this court to release the Applicant on bail pending appeal. The Applicant states that he suffers from high blood pressure and is of old age. He states that his medical condition requires specialized treatment that is not available in prison. The Applicant was apprehensive that he was likely to serve a substantial part of the custodial sentence that was imposed on him. The Applicant stated that he was ready to abide by any terms that this court may impose in order to secure his release on bail pending appeal. The application is supported by the annexed affidavit of the Applicant. Although the Respondent did not file any papers in opposition to the application, nevertheless, during the hearing of the application, Ms. Atina for the Respondent made oral submission in opposition to the application.

During the hearing of the application, this court heard oral rival submission made by Mr. Jumba for the Applicant and Ms. Atina for the Respondent. This court has carefully considered the said submission. Mr. Jumba essentially reiterated the contents of the application and the supporting affidavit. Ms. Atina was of the view that the Applicant had not made a case for this court to grant him the prayers sought in the application.

The principles to be considered by this court in determining whether or not to release the Applicant on bail pending appeal is well settled. The same were set out by the Court of Appeal in **Jivraj Shah –vs- Republic [1986] KLR 605** at page 606:

“There is not a great deal of local authority on this matter and for our part such as we have seen and heard tends to support the view that the principal consideration is if there exist exceptional or unusual circumstances upon which this court can fairly conclude that it is in the interest of justice to grant bail. 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 in law to be urged, and that the sentence or a substantial part of it, will have been served by the

time the appeal is heard, conditions for granting bail will exist. The decision in Somo –vs- Republic [1972] E A 476 which was referred to by this court with approval in Criminal Application No.NAI 14 of 1986, Daniel Dominic Karanja –vs- Republic where the main criteria was stated to be the existence of overwhelming chances of success does not differ from a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed. The proper approach is the consideration of the particular circumstances and the weight and relevance of the points to be argued. It is almost self-defeating to attempt to define phrases or to establish formulae. There is a helpful passage in Archbold, Criminal Pleading Evidence and Practice, 41st Edition page 783, paragraph 7 – 86.”

In the present application, this court has perused the proceedings and the judgment of the trial court. The court has also seen the petition of appeal lodged by the Applicant. Whereas the Applicant is of the opinion that the appeal that he has lodged before this court has overwhelming chances of success, this court, prima facie, is of a contrary view. The evidence adduced by the prosecution witnesses cannot be dismissed as being flimsy or wishy-washy. The reasons given by the trial court in reaching the determination to convict the Applicant are within bounds of reasonableness. It is not clear to this court at this stage of the proceedings whether this court can assess that the appeal lodged by the Applicant has a reasonable or overwhelming chance of success.

As regard whether the Applicant has established exceptional circumstances, this court is not convinced that medical grounds suffice to constitute exceptional circumstances. In the present application, the Applicant stated that he suffers from hypertension. Hypertension is a condition that is controlled by use of drugs. Those drugs can be availed to the Applicant while he is in prison. This court does not agree with the contention by the Applicant that the prison authorities have no means or capacity of maintaining his medical condition.

The upshot of the above reasons is that the Applicant has failed to establish a case for this court to release him on bail pending appeal. The application lacks merit and is hereby dismissed. It is so ordered.

DATED AT NAIROBI THIS 29TH DAY OF OCTOBER 2015

L. KIMARU

JUDGE