



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISCELLANEOUS CRIMINAL APPLICATION NO. 347 OF 2013

MARY NJERI KAMAUAPPLICANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 1164 of 2012 in the Chief Magistrate's Court at Kiambu – Ms. L. D. Ogombe (RM) on 13th August 2013)

RULING

1. This is a Notice of Motion dated 24th day of October 2013, brought under **Section 357** of the **Criminal Procedure Code Cap 75 laws of Kenya**. The applicant seeks orders of court to admit her to bail/bond pending the hearing and determination of **Criminal Appeal No. 195 of 2013**. She relies on the grounds on the face of the application and the annexed affidavit of Peter Gicheha Kamau in support of the application.
2. The appeal stems from the conviction of the applicant in **Cm Cr. Case No. 1164 of 2012** in which she was convicted for the offence of preparing to commit a felony contrary to **Section 308(2)** of the **Penal Code** in **count I** and being in possession of an imitation firearm contrary to **Section 21(1)** as read with **Sections 34(1) of the Firearms Act, Cap 114** in the **count II**. She was sentenced to years imprisonment in each count.
3. Learned counsel Mr. Gicheha Kamau urged on behalf of the applicant, that there was enough evidence on record to create doubt as to the culpability of the applicant. Mr. Gicheha argued first, that the trial court shifted the burden of proof to the defence; second that the applicant was a passenger in the motor vehicle in which the toy pistol was found and there was no evidence to indicate that she was aware of its presence; third that the court failed to note that the police officers were in civilian clothes and in a motor vehicle bearing a civilian number plate, which evidence should have aided the defence case.
4. In response Miss Ndombi learned state counsel submitted that the applicant was properly convicted and sentenced according to the lower court record. The evidence of the police officers was credible and consistent since the appellant's car overtook the officer's vehicle and blocked it.
5. Second, she argued that the events leading to the shoot-out were disputed but in the judgement of the lower court, the learned trial magistrate stated that there were inconsistencies in the evidence tendered by the appellant and the people she was charged with. That the evidence from the

prosecution witnesses was truthful and credible. Third, that appellant's motor vehicle was behind the police car, it overtook them and blocked them prompting the officers to give chase.

6. A summary of the prosecution's case was that on 14th April 2013 the 1st accused hired motor vehicle KAE 953 L from John Njuguna (PW1). It was agreed that he was to return the motor vehicle by 9.00 p.m. when he failed to return the subject motor vehicle as agreed and did not answer his phone when **PW1** called him, **PW1** reported the matter at Githunguri Police Station.
7. It later transpired that the 1st accused had been arrested in the night driving **PW1**'s car. In that car were three other passengers including the applicant herein. At the time of arrest a toy pistol is said to have been recovered from the car.
8. The applicant denied the offence and stated that she was in the car together with her three companions headed towards Kirigiti when another motor vehicle came upon them and tried to stop them. They did not stop because the hour was later and they were suspicious of the occupants of the second motor vehicle she denied both counts.
9. The principles to be considered in an application for bail or bond pending appeal are now settled. In the case of **Dominic Karanja v Republic [1986] KLR pg. 612**, the Court of Appeal held *inter alia* that:
 1. **The most important issue was that if the appeal had such overwhelming chances of success, there was no justification for depriving the applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances.**
10. The Court has considered the grounds of appeal and the submissions of both parties on record having regard to the circumstances of this case. From the record it appears that in the analysis the learned trial magistrate shifted the burden of proof onto the defence. The conviction appears to be based entirely on the perceived gaps or inconsistencies in the defence case instead of the strength of the prosecution case.
11. For the foregoing reasons and without delving into the merits and demerits of this application, the court finds that the appeal has a *prima facie* chance of success, and that therefore this application has merit and I allow it.

SIGNED DATED and DELIVERED in open court this 27th day of March 2014.

L. A. ACHODE

JUDGE