REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC.APPLIC. NO.52 OF 2014

JOSEPH NGUNGURU WANJOHI…… …..…. APPLICANT

VERSUS

REPUBLIC…….....……RESPONDENT

(Being an appeal from the original conviction and sentence in Kibera Chief Magistrate's Court, Criminal Case No. 1301/2013 by Hon. Mr.D. Ochenja on 30th January 2014)

RULING

Joseph Ngunguru Wanjohi and Isaac Ogula Ngando were jointly charged in Kibera Chief Magistrate's Court Criminal Case No. 1301 of 2013 with the offence of conspiracy to commit a felony contrary to Section 393 of the Penal Code. He was convicted and sentenced to serve three (3) years imprisonment. Being aggrieved by the conviction and sentence passed the appellant has lodged an appeal against the conviction and sentence.

He seeks to be released on bail pending the hearing and determination of his appeal. His application is based on the grounds that the appeal is arguable and has high chances of success. It is supported by the affidavit sworn by his counsel on 10th February 2014.

The gist of the application is that the Honorable trial magistrate convicted him purely on suspicion as there was no direct or indirect evidence connecting him with the crime he was convicted of.

Mr. Makumi counsel for the applicant submitted that the appeal filed had an overwhelming chance of success. He argued that none of the prosecution witnesses gave any direct evidence connecting the applicant to the offence he was charged with and that the prosecution case was primarily based on circumstantial evidence.

Secondly, Counsel for the applicant submitted that the trial magistrate convicted him purely on suspicion. This suspicion relates to among other issues, the finding of 100 US dollars in the applicants house without reasonable explanation, when the complainant had been robbed of 4000 US dollars. The trial magistrate found the applicant culpable in the absence of any reasonable explanation of this finding and concluded that the said 100 US dollars was part and parcel of the stolen money. **Counsel further contended that the trial magistrate proceeded to convict the applicant on the money found at his place by the police when they conducted what he termed an illegal search without warrants. He also submitted that the conviction was based on prosecution evidence that was characterized by various contradictions and**

inconsistencies.

Ms. Ndombi, the learned State Counsel opposed the application. She submitted that the applicant was properly convicted and sentenced by the trial court. She urged that prosecution witnesses were credible and the circumstantial evidence sufficient. On the issue of search warrants, her position was that there were circumstances that required search warrants and those that did not as provided in the National Police Act specifically Section 60. I have looked at the said section and with respect see no application to the present case in that it relates to disorderly conduct in a police building.

She also urged that the applicant had not demonstrated any unusual circumstances to warrant grant of bail pending appeal.

The principles that guide the court in reaching a decision to release a convict on bail or reject the application of that nature were considered in the case of **Jivraj Shah versus Republic [1986] KLR 605.** The Court of Appeal stated thus;-

> **"1.** ***The principle 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 interest of justice to grant bail.***
>
> ***2. 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 of law to be urged and that the sentence or substantial part of it will have been served by the time the appeal is heard, conditions of granting bail will exist".***

I have carefully perused the lower court record and considered the submissions of counsel. My first observation relates to the framing of the charge. Whereas the applicant is charged with the offence of conspiracy to commit a felony, it would appear, the alleged felony was complete in that the particulars of the charge alluded to the offence of robbery.

Where an offence is complete, it no longer remains a conspiracy unless the two are charged separately. The charge therefore may be faulted for duplicity.

From the record it is true that the learned trial magistrate convicted the appellant on the basis of circumstantial evidence. Further there is a strong indication that suspicion as opposed to direct evidence underlined the said conviction.

While the inference of such finding would point to a highly probable connection, arriving at such a conclusion should ideally entail a more elaborate finding supported by concrete evidence that would leave one with no other hypothesis. In the interim however, it is trite law that suspicion however strong can never be the basis of a conviction. This was the holding in the case of **Joan Chebichi Sawe vs. Republic, Criminal Appeal No. 2 of 2002 where it was held: - "……..*Suspicion however strong cannot provide a basis for inferring guilt which must be proved by evidence…….*"**

I am persuaded that the applicant has demonstrated he has an arguable appeal with overwhelming chances of success. That being the case this application succeeds. He shall be released on executing a bond of Kshs. 100,000/-= with one surety of equal sum or by depositing cash bail of Kshs. 50,000/= pending the hearing of his appeal. He must attend the hearing of the appeal.

Orders accordingly.

DATED, SIGNED and DELIVERED at NAIROBI this19th day of March, 2014.

A.MBOGHOLI MSAGHA.

JUDGE