



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 12 OF 2014

JUDY WARUGURU KAGAI.....APPELLANT/APPLICANT

VERSUS

REPUBLIC.....PROSECUTION

(Being an Appeal from the Conviction and Sentence by T. MWANGI Principal Magistrate Wang'uru in Criminal Case No. 735 of 2011 on 7/3/2014)

R U L I N G

This is the Notice of Motion dated 3rd April 2014 brought under Section 123(3) of the Criminal Procedure Code and Article 51 of the Constitution seeking an order granting the Appellant/Applicant bail pending appeal. Its supported by the following grounds:-

- i. ***The appeal filed herein has high chances of success.***
- ii. ***She is already serving a jail term on the basis of the judgment written on 7/3/2014 by a Magistrate who on 31/1/2014 had been declared as unfit and/or not proper to continue serving as a Magistrate by the Judges and Magistrates vetting board.***
- iii. ***There are no chances or probabilities that she is likely to abscond when admitted to bail.***
- iv. ***Considering the judgment as whole and the clear admission by the Magistrate that there were legal issues as to who was the complainant – yet she concluded that was not fatal to the prosecution case, that comes out clearly that the Magistrate had other considerations other than the known standards of prove in Criminal Case – beyond any shadow of doubt.***

It is also supported by an affidavit sworn by the applicant/appellant. In it she reiterates that her appeal has high chances of success. The Respondent did not file any replying affidavit to the application.

1. In his submissions Mr. Ngige for the applicant mainly dwelt on one ground that there was a special circumstance in this matter on the basis of which the application for bail pending appeal should be allowed.
2. And the circumstance is that the judgment the subject of this appeal was written by a Judicial Officer who had been removed from office by the Judges and Magistrates Vetting Board. He referred the Court to the cases of:-

(I) JIVRAJ SHAH VS REPUBLIC [1986] KLR 605

(II) MUNDIA VS REPUBLIC [1986] KLR 623

Where the Court of Appeal outlined some principles for consideration in a matter of this nature.

3. Mr. Sitati the learned State Counsel in response opposed the application. He submitted that the evidence against the appellant was so overwhelming and that the appeal had no chances of success. He rebutted claims that the judgment had been written by the Magistrate Ms. T. Mwangi after she had left the Judiciary.
4. The Court of Appeal in the case of **JIVRAJ SHAH VS REPUBLIC** laid down some principles for consideration in an application of this nature.
5. These are;

i. 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.

ii. 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 will be heard, conditions for granting bail will exist.

iii. The main criteria is that there is no difference between overwhelming chances of success and a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed and the proper approach is the consideration of the particular circumstances and weight and relevance of the points to be argued.

6. The issue for determination is whether the Appellant/ Applicant has brought herself within the confines of these principles or any one of them.
7. The Appellant/Applicant was charged with the offence of stealing by servant. A total of five (5) witnesses were called on behalf of the Prosecution. The Appellant/Applicant gave a sworn defence denying the charge. The learned trial Magistrate reserved the Judgment for 9/1/2014. This Judgment was not delivered on 9/1/2014 and its not disputed that the said learned trial Magistrate ceased being a Magistrate on 30/1/2014. The matter was mentioned on 26/2/2014 when a date for Judgment was set for 7/3/2014. On 7/3/2014 a Judgment written by T. Mwangi was delivered by D. Nyaboke Resident Magistrate.
8. The certified copy of Judgment annexed to the application is signed by T. Mwangi and dated 7/3/2014. The learned State Counsel has told this Court that the Judgment was written earlier than 30/1/2014 and was left pending.
9. The issue raised by the Appellant/Applicant is serious and it may be the first issue the Court hearing this appeal will have to contend with even before going into the merits of the appeal itself. It must be determined whether what was read was a competent Judgment. It is not an issue that can just be wished away as the State would wish it to be.
10. My finding is that this issue is an exceptional circumstance in terms of the case of **JIVRAJ SHAH VS REPUBLIC**, because if its found to be meritorious it would obviously lead to the success of the appeal.
11. I am therefore satisfied that in the circumstances it is only fair that bail pending appeal be granted.
12. The application therefore succeeds. The Applicant may be released upon executing a bond of KShs.200,000/= with a surety in similar sum. The Deputy Registrar Kerugoya will assess the surety presented.

If released on bond the Applicant must attend Court for mentions until her appeal is heard and determined.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 25TH DAY OF APRIL, 2014.

H.I. ONG'UDI

J U D G E

In the presence of:-

Ms. Ingahizu for Sitati for State

Mr. Ngige for Wambugu for Appellant/Applicant

Appellant/Appellant

Kirong CC