REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISCELLANEUS CRIMINAL APPLICATION NO. 198 OF 2014

ABDIFATAH OMAR MOHAMED ….....APPLICANT

-VERSUS-

REPUBLIC .....RESPONDENT

(From original conviction and sentence in criminal case Number 473 OF 2014 in the Chief Magistrate's Court at Mililani – E. G. Nderitu (SPM.) on 01/4/2014)

R U L I N G

1. The applicant herein **Abdifatah Omar Mohamed**, has brought this Chamber Summons application dated 27th June 2014, under **Section 357** of the **Criminal Procedure Code CAP 75 Laws** of **Kenya**. He is seeking orders of court admitting him to bail pending the hearing and determination of **Criminal Appeal No. 75 of 2014**. His appeal stems from a conviction in **Criminal Case No. 473 of 2014**, by Mrs. E. G. Nderitu, Senior Principal Magistrate at Nairobi Chief Magistrate court Milimani law Courts, for the offence of being unlawfully present in Kenya contrary to **Section 53(1)**, as read with **Section 53 (2)** of the **Kenya Citizenship** and **Immigration Act No. 12 of 2011.** Following the said conviction he was sentenced to pay a fine of Kshs. 400,000 and in default serve 12 months imprisonment. He has filed the appeal primarily to contest the sentence imposed.

2. The gist of this application, as urged by learned Counsel Mr. Chacha Mwita on behalf of the applicant, is that the applicant who was given a severe sentence was deserving of and ought to be granted bail pending the hearing of his appeal. He argued that the sentence imposed on the applicant was harsh and excessive. That he had known relatives who were Kenyan Citizens and was therefore unlikely to jump bail. Besides, he also had a fixed place of abode from where he was apprehended at the time of his arrest. Mr. Chacha Mwita signified the applicant's willingness to comply with any conditions upon which the court would grant bail. He further urged that the applicant had an arguable appeal which was likely to succeed and that the sentence or a substantial part of it would have been served by the time the appeal is heard.

4. Mr. Chacha Mwita urged that the applicant was a first offender, had pleaded guilty to the charges when they were read to him, in effect saving the courts time and he sought to be returned to his native country. Counsel argued that the country was going through a unique situation it had not envisioned, and for which the applicant had not been linked to in any way and that therefore, the court ought to allow his application.

5. Mr. Kabaka, learned state counsel opposed the application. He argued that for such an application to succeed the applicant must prove that intended appeal had overwhelming chances of success, which he had not demonstrated. He pointed out that the applicant was not contesting his conviction but the sentence, which predominantly hinged on the court's discretion, the law and unique circumstances of the case. The sentence meted out he urged, was not excessive but was informed by the circumstances of the case, and was merited. He urged the court to dismiss the application for lacking in merit.

6. The principle consideration in an application for bail pending appeal as stated by the Court of

Appeal in the case of **Jivraj Shah vs. Republic [1986] LLR 605**, was, *inter alia*, that bail pending appeal would be considered where there were existing exceptional or unusual circumstances upon which the Court of Appeal could fairly conclude that it was in the interest of justice to grant bail. Secondly, that it may be granted where 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. In that instance conditions for granting bail will exist.

7. I have perused the lower court record including the judgment of the trial court, and also assessed the sentence imposed by the lower court. I have also looked at the petition of appeal and the grounds advanced therein to establish whether the appeal can be said to have overwhelming chances of success. The grounds of appeal do not in my view carry any substantial weight and in the premise do not portend any overwhelming chances of success.

8. The appellant did plead guilty and is not contesting the conviction from the submissions before me. On the sentence, **Section 53 (2)** of the **Kenya Citizenship** and **Immigration Act No. 12 of 2011** provides for the penalty for this offence as follows:

   "Any person convicted of an offence under this section shall be liable upon conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding three years or to both."

   Considering this section, the sentence imposed against the appellant was not excessive as it was not in any way in excess of the said provision of the law.

9. On this laid basis therefore, it cannot be said that prima facie the appeal has overwhelming chances of success. Although it is argued that there is a possibility that a large part of the sentence will have been served before the appeal is heard and determined, it is pertinent to note that the applicant is serving a lawful sentence imposed by a competent court since his conviction and the sentence has not been overturned on appeal yet.
10. For the foregoing reasons, I would find that the application is lacking in merit and decline to grant it. The application is dismissed.

SIGNED DATED and **DELIVERED** in open court this ***29th*** **day** of **September 2014.**

L. A. ACHODE

JUDGE