



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MURANG'A**  
**CRIMINAL APPEAL NO. 88 OF 2014**

**JOHN NGOTHO MAINA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

By a notice of motion dated 20<sup>th</sup> June, 2014, the applicant sought to be released on bond or cash bail pending the hearing and the determination of his appeal. The motion was supported by his counsel's affidavit sworn on 20<sup>th</sup> June, 2014.

The background of the applicant's application is that he was charged with and convicted of the offence of obtaining by false pretences contrary to **section 313** of the **Penal Code** in **Murang'a Principal Magistrates Court Criminal Case No. 88 of 2014**. He was sentenced to serve two years imprisonment.

In his submissions, counsel for the applicant told the court that the appeal which the appellant has lodged against the decision of the learned magistrate has got high chances of success. The reason for the counsel's belief that the appeal will succeed is that the money that the applicant is said to have obtained by false pretences was the proceeds from the sale of a motor vehicle which he had been authorised to sell by its owner. Indeed counsel submitted that the vehicle was sold for Kshs. 575,000/= and in his view, the appellant ought not to have been prosecuted because this was purely a civil dispute.

The state counsel appeared to agree with the counsel for the appellant and said that he was conceding to the application because the appellant had been authorised by the vehicle's owner to sell it on his behalf.

It is apparent from the record and it is not in dispute that the applicant received money from the complainant on the strength of a sale agreement in which the applicant was described as the owner of the vehicle in issue. It appears that real owner of the vehicle was not aware of this agreement and neither was complainant aware that the vehicle did not belong to the applicant. To compound this matter even further, the vehicle was not delivered to the buyer while the applicant retained the proceeds of its purported sale.

Without having to make any conclusions at this stage of the proceedings, I disagree with both the learned counsel for the state and the applicant's counsel that in these circumstances the appellant's appeal has overwhelming chances of success. The fact that any of the parties in the dispute out of which the charges against the appellant were founded could institute a civil suit to address their grievances should not be bar to criminal prosecution if a criminal offence known in law is disclosed. There is no law, as far as I know, that bars criminal prosecution of an individual simply because there exists a civil suit or there is a possibility of a civil suit emanating from the same set of facts on which the criminal prosecution is based. What matters is that the criminal process should not be used for purposes other than what it is designed

for and in any event, it should not be used to bring pressure to bear on any of the parties in the civil suit. In **Nairobi High Court Misc. App. Nos. 839 and 1088 of 1999, Vincent Kibiego Saina versus Attorney General Kuloba**, J( as he then was) said at pages 24 and 24 of the judgment:-

*“Let it be stressed here as it has been explained in earlier decisions on this land, that it has never been the policy or practice of the High Court of Kenya to suppress a criminal prosecution merely because the matter with which the prosecution is concerned is also a subject of civil litigation between the same parties or their privies. The High Court does not hold the view that no criminal prosecution should be instituted side by side with a civil suit based on the same or related facts; nor does it hold that a person should never be prosecuted in criminal proceedings when he has a civil suit by or against him which relates to matters in the criminal case.”*

And in **Kuria & Others versus Attorney General (2002) 2KLR 69** at page 80, it was held that:-

*“It is not enough to state that because there is in existence of a civil dispute or suit, the entire criminal proceedings commenced based on the same facts are an abuse of the court process. There is need to show the process of the court is being abused or misused. There is a need to indicate or show the basis upon which the rights of the applicant are being undermined by the criminal prosecution.”*

In view of this position of the law, the applicant’s counsel’s argument that the complainant’s complaint against the appellant could only have been resolved by way of a civil suit does not hold; neither is it a ground upon which one may argue that an appeal has overwhelming chances of success.

In the Court of Appeal decision of **Dominic Karanja versus Republic (1986) KLR at page 612**, it was held that where an appeal has overwhelming chances of success, there was no justification for depriving the applicant of his liberty.

Again in the Court of Appeal decision of **Jivraj Shah versus Republic (1986) KLR 605**, the court was also of the view that 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, then bail should be granted.

I am not convinced that the applicant’s appeal has such overwhelming chances of success that depriving him of his liberty pending the determination of his appeal is not justified; neither can it be said as was stated in **Jivraj Shah versus Republic (supra)** 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.

I am inclined to conclude that there isn’t any merit in the appellant’s motion dated 20<sup>th</sup> June, 2014. It is therefore dismissed.

**Dated, signed and delivered in open court this 17<sup>th</sup> October, 2014**

**Ngaah Jairus**

**JUDGE**