

REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Criminal Application 571 of 2012

JOEL BITIEKA MAGAREAPPLICANT

VERSUS

REPUBLICRESPONDENT

R U L I N G

1. Before me for hearing is the application by Mr. Joel Bitieka Magare dated 26th November 2012, seeking bail pending appeal. The application is supported by the affidavit of Peter Wanyama Ojiambo, the applicant's brother in-law.
2. Mr. Ochola, learned counsel for the applicant argued that the appeal has overwhelming chances of success, for reasons that the plea by the applicant was not unequivocal. That there is no evidence that the charge was read to the applicant in a language which he understood, although he responded in Kiswahili.
3. Mr. Ochola contended that since there was a Mr. Ngaira for the applicant on record, the charges should have been read in a language understood by both the applicant and his lawyer.
4. Additionally, it was argued that the facts were all lumped together for all the 2 counts, so that when the applicant said that the facts were true it is not clear which facts he was referring to as there were two separate counts.
5. Thirdly, Mr. Ochola contended that both the charges and the facts were lacking in material particulars. For instance it was urged that the name of the person who was killed in the accident was not given. There was no death certificate or a notification of death. In short there was nothing to prove that someone died.
6. Ms. Wang'ele, learned State Counsel responded that the applicant pleaded guilty to the charges. Under **Section 348** of the **Criminal Procedure Code**, an appeal from a conviction on a plea of guilty can only be on sentence.
7. Miss Wang'ele submitted that the applicant had an advocate, and if he did not understand the language used in court, the advocate would have raised the issue. She opined that it was an afterthought for the applicant to raise the issue of language at this stage. Further that the facts read out related to the two counts and did not need to be separated.
8. Miss Wang'ele also urged that whereas it was true that the name of the deceased was not provided, and that it should have been given, that issue should have been raised at the trial. She maintained that the sentence being served is legal, since it followed a conviction.
9. I have considered the submission before me and reassessed the proceedings which led to the applicant's conviction in the lower court, and without appearing to preempt the pending appeal. I am satisfied that this application meets the threshold set out by the Court of Appeal in the case of **Jivraj Shah vs. Republic [1986] LLR 605.**
10. It does appear prima facie from the totality of the circumstances of this case that the appeal is

likely to be successful on account of a substantial point of law to be urged under ground No. 6 of the memorandum of the intended appeal. Meanwhile the sentence or substantial part of it will have been served by the time the appeal is heard.

For the foregoing reasons I find that the application has merit and is granted.

The applicant is therefore released on a cash bail of Kshs.30,000/=.

SIGNED DATED and **DELIVERED** in open court this *25th* *day* of *April* **2013**.

L. A. ACHODE
JUDGE