



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**MISCELLANEOUS CRIMINAL APPLICATION NO. 164 OF 2013**

VIRGINIA WANJIKU KIMANI .....APPLICANT

VERSUS

REPUBLIC .....RESPONDENT

*(From original conviction and sentence in criminal case Number 1891 of 2008 in the Chief Magistrate's Court at Nairobi – Ms. F. Munyi (PM) on 5<sup>th</sup>/6/2013)*

**RULING**

1. This is a Chamber Summons dated 11<sup>th</sup> June 2013, brought under **Section 357(1)** of the **Criminal Procedure Code, Cap 75** laws of Kenya, **Articles 49(h)** and **50** of the **Constitution**. The applicant, **Virginia Wanjiku Kimani** seeks to be admitted to bail pending her appeal. The appeal stems from a conviction by Ms. F. Munyi, the Principal Magistrate Nairobi law court in **CM Cr. Case No. 1891 of 2008, Nairobi.**
2. In the said case the applicant was tried on three counts. He was convicted for the offence of making a document without authority contrary to **Section 357(a)** of the **Penal Code**, and sentenced to two years imprisonment in **count II** and to a fine of Kshs.50,000, in default to serve 1 year imprisonment in **count III**. She was acquitted in **count I**.
3. Mr. Kirugi the learned counsel for the applicant urged that the applicant was charged with uttering a false document, being a bank statement from Equity bank, and that the Asset Finance form was not what the applicant was specifically charged with. That in count three she was charged with attempting to fraudulently obtain a loan, not money, and that a loan is not something capable of being stolen.
4. Mr. Kadebe, the learned State Counsel, opposed the application stating that the evidence that was presented in relation to **counts II** and **III** was sufficient to sustain a conviction. That the learned trial magistrate gave an interpretation of the section that encompasses uttering a false document, and therefore the case was proved. Further that the form referred to was an Asset Finance form when the charge, referred to a bank statement, and that the supporting documents to the Asset Finance form included the bank statement.
5. The learned state counsel further averred that it was a dangerous approach to seek to separate

something called a “loan” from the money which the applicant was trying to obtain once the loan was advanced, and urged the court to deny the bail.

6. The principles to be considered in an application for bail or bond pending appeal are now settled. The most important issue is that if the appeal had such overwhelming chances of success, there is no justification for depriving the applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances. The previous good character of the applicant and the hardships, if any, facing his family are not considered exceptional or unusual factors, in this regard. (See the Court of Appeal decision in the case of **Dominic Karanja v Republic [1986] KLR pg. 612.**)
7. I have perused the evidence and judgment on record, as well as the submissions from the applicant and the respondent. Without delving into the merits and demerits of the appeal, I am not persuaded that the appellant has demonstrated that her appeal has overwhelming chances of success, as averred in her supporting affidavit.
8. Bail is indeed a constitutional right under **Article 49(1)(h)** of the **Constitution**, stated at paragraph 11 of the supporting affidavit. That Article however, applies to bail pending trial and provides as follows:

***“An arrested person has the right to be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons.”***

In the case before me, the appellant has already been convicted and has therefore lost the presumption of innocence that was available to him prior to the conviction. At the hearing of her appeal the burden will be upon her to convince the court that she was convicted wrongly. I must therefore balance between her right to bail as urged by the learned counsel on her behalf, and the lawful sentence that she is serving following a trial regularly conducted.

9. While I sympathise with the applicant for the deterioration of her health as alluded to in her affidavit, and submitted by Mr. Kirugi on her behalf that alone cannot be termed as exceptional or unusual circumstances upon which I can conclude that it is in the interest of justice to grant the bail sought, since she can access a medical facility while in prison.
10. For the foregoing reasons, I find that the application before me has no merit and decline to grant it. The application is dismissed.

**SIGNED DATED and DELIVERED** in open court this **28<sup>th</sup>** day of **August 2013**.

**L. A. ACHODE**

**JUDGE**