REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 43 OF 2011

TOBIAS MUSYOKI MUTUA.....APPELLANT

Versus

REPUBLIC….....RESPONDENT

R U L I N G

By a Chamber Summons dated 30th January, 2013 brought under section 357(1) of the CPC, and article 165(6) & 7 of the Constitution, the applicant seeks to be admitted to bail pending the hearing and final determination of his appeal against conviction and sentence in Nyeri Anti- corruption case number 7 of 2011.

The applicant was tried and convicted on 10th March, 2011 of three counts of the offence soliciting for a benefit and one count of receiving a benefit contrary to section 39(3)(a) as read together with section 48(1) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003. He was convicted of all the four counts and ordered to pay fines in respect of each conviction and in default serve respective sentences as detailed in the lower court's judgment.

He was dissatisfied with the conviction and sentence and filed in this court, a petition of appeal which he contends has an overwhelming chance of success.

It is therefore his argument that if not admitted to bail, he will at the time of final determination of the appeal have served either whole or substantial portion of the sentence.

In the draft petition of appeal the applicant faults the trial court's finding on some seven grounds the main ones being:

1. ***The learned Chief Magistrate erred in fact and in law in convicting the the appellant on insufficient, uncorroborated and contradictory evidence. Prejudice and a miscarriage was occassioned to the appellant.***
2.
3. ***The learned Chief Magistrate erred in fact and law by failing to appreciate that the appellants constitutional rights were breached in that he was not presented to Court within the precribed period and no plausible explanation was offered by the prosecution. A miscarriage of justice was occassioned to the appellant.***
4.
5. ***The learned Chief Magistrate erred in law and in fact in convicting the appellant on the basis of a transcript that was made from a taped conversation which tape was almost inaudible. Prejudice was occassioned to the appellant.***
6.

7. ***The learned Chief magistrate erred in law and in fact in writing and delivering a judgment contrary to section 169(1) of the CPC. A miscarriage of justice was occassioned to the appellant.***
8.
9. ***The learned Chief Magistrate erred in law and in f act in imposing a sentence that was extremely harsh and excessive. Prejudice was occassioned to the appellant***
10.
11.

At the hearing of the instant application Mr. Njuguna Kimani who appeared for the applicant informed the Court that a similar application had previously been filed by the applicant and heard by my brother Justice Sergon and a ruling thereon rendered dismissing that application. However counsel urged before me that although the learned Judge dismissed the application, his observation that the appeal herein raised serious points of law inspired the current application especially in the light of the decision in **Esther Theuri Waruiru & Another v. R Criminal Appeal Number 48 of 2008.** In this case the Court of Appeal quashed the conviction and sentence of the appellants for the reason that the Kenya Anti-Corruption Commission arrested and arraigned the appellants in court prior to seeking and getting the concurrence of the Attorney General as stipulated under section 35(1) of Anti-Corruption and Economic Crimes Act. Whereas this ground was never canvassed before Justice Sergon when the applicant first unsuccesfully sought bail, Mr. Njuguna seeks to confer benefit upon his client by this purely technical point.

Whereas I may not agree with the Court of Appeal's interpretation of section 35(1) of the Anti-Corruption and Economic Crimes Act, my hands are tied by the decision in **Esther Theuri Waruiru's case** due to the asymetrical nature of our judicial system.

To comment on the decision in **Esther Theuri Waruiru's case**, I would state that the Constitution enjoins us as judges in exercising our judicial authority to do so without undue regard to technicalities and in a way that protects the principles of the Constitution. Besides article 259 requires anyone interpreting the Constitution to do so in among other ways, that promotes development of the law and good governance. Criminal charges are in their nature very serious as they may mean loss of property or liberty upon conviction. To indict a person therefore must be the most severe of all steps that a society takes against one of their own hence caution must be exercised and the process considered only when inescaple. However our criminal justice system plays a critical role in creating order, rule of law and good governance in our midst. It would therefore be undesireable that a criminal charge backed by evidence meeting the required standard of proof should be allowed to collapse on a technicality especially where such technicality does not cause prejudice to the accused

The applicant had a go at a bail application which my brother Justice Sergon declined to grant on the basis that he saw no prima facie evidence that the appeal had an overwhelming chances of success. The learned Judge was also doubtful if the appeal would take long before it was heard then since the at time of filing the bail application the proceedings had already been typed, certified and supplied to the parties. This position has not significantly changed except that the applicant now seeks bail on the ground of a purely technical determination by the Court of Appeal and which ground was never contemplated when the appeal was filed.

As stated earlier in the ruling, the heirarchical nature of our judicial system ties my hands and leaves me with very little room for manouvre around the decision in **Esther Theuri Waruiru's case.** I have therefore to consider albeit reluctantly the point taken by counsel for the applicant and resolve it favour of his client and admit him to bail.

The applicant at the trial stage was admitted to bail in the sum of Kshs.50,000/- with a surety of a similar amount alternatively cash bail in the sum of Kshs. 20,000/- As stated elsewhere by this court, the applicant is no longer a free person but a convict. His conviction is prima facie valid until set aside. The bail terms therefore ought to be more stringent than at the trial stage to ensure his presence during the pendency and disposal of his appeal.

12.

13. The court in the circumstances admits the applicant to bail in the sum of Kshs. 100,000 with surety of similar amount to be executed before the Deputy Registrar of this court. The applicant is further directed to report to the said Registrar once every 30 days upon his release until the hearing and determination of this appeal or further orders of this court.

Dated and delivered at Nyeri this 13th day of August, 2013.

NELSON ABUODHA J.

JUDGE

Delivered in open Court in the presence of Wahome for the Appellant and Makunja for the Republic.

NELSON ABUODHA J.

JUDGE