

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISCELLANEOUS CRIMINAL APPLICATION NO. 305 OF 2013

WILSON SHIVACHI MMAITSIAPPLICANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 2 OF 2010 in the Chief Magistrate's Court at Nairobi – D. N. Mulekyo (Ag. C.M.) on 28/8/2013)

RULING

1. This application which has been brought by way of Notice of Motion dated 20th September 2013, mainly seeks that the court be pleased to admit the applicant to bail pending the hearing of his appeal, and, that there be an order for stay or suspension of execution of sentence in **Anti-Corruption Case No. 2/2010, Nairobi**, pending the hearing of the appeal.
2. Mr. Omino learned counsel for applicant, in rather melodramatic fashion also described, the applicant's health as being at a "cross roads" and that he was "facing fatal attack". The appellant's appeal was said to have very high chances of success because he acted under instructions and no mens rea had been proved on his part. That the applicant only carried out messengerial duties and was neither a signatory nor decision maker in the said process.
3. The learned state counsel Miss Maina opposed the application on grounds that the appeal was neither arguable nor did it have chances, of success as there was sufficient evidence on record to support the conviction and sentence. She averred that the prosecution had proved that government procedures and regulations on procurement, had been flouted by the applicant and others that no tender had been awarded to the directors of Vulcan Lab, and that the minutes stating otherwise had been said to be falsified.
4. I have read the proceedings and the judgment of the learned trial magistrate. The principles that guide the court in applications of this nature were canvassed in the case of **Dominic Karanja v Republic [1986] KLR pg. 612**, wherein the Court of Appeal held that:

"The most important issue was that if the appeal had such overwhelming chances of success, there was no justification for depriving the applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances".
5. A co-accused of the applicant did not deny that the sum cited was paid to him and the company, and that this was founded on a contract between him and the company on one hand and the public body (SEPU) on the other hand, which is alleged to have paid the said sum. There is evidence that some of the officers of the complainant public body may have acted unprocedurally in approving and making payment of the said sum. On the evidence presented, the applicant is not alleged to have participated in the deliberations that led to the approval and, or payment of the said sum, and

in the judgment of the learned trial magistrate, the contract leading to the said payment was not faulted.

6. Mr. Omino's contention that it was upto the prosecution to show the compelling reasons as to why bail should not be granted to the applicant, and that the respondent had failed to demonstrate that the appellant was a flight risk and further that, in fact, he is a family man and had not evaded his trial in the lower court is only applicable at the initial trial. In an application for bail pending appeal, the presumption for innocence no longer applies, and bail is not available as a matter of right. Hence the principles set out in **Dominic Karanja** (supra). In this case the applicant's health or family situation is also not the determinant issue, since the previous good character of the applicant and the hardships, if any, facing his family are not exceptional or unusual factors as indicated in the above case.
7. It does appear prima facie from the totality of the circumstances of this case that the appeal is likely to be successful, and that meanwhile the sentence or substantial part of it will have been served by the time the appeal is heard.

For the foregoing reasons and without appearing to pre-empt the intended appeal, I find that the application has merit and is granted.

SIGNED DATED and DELIVERED in open court this **30th** day of **October 2013**.

L. A. ACHODE

JUDGE