



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**MISCELLANEOUS CRIMINAL APPLICATION NO. 304 & 323 OF 2013**

**BENSON ANYONA OMBAKI .....1<sup>ST</sup> APPLICANT**

**PATRICK MWAVALA .....2<sup>ND</sup> APPLICANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**RULING**

1. The applicants herein brought two applications dated 20<sup>th</sup> September 2013 and 2<sup>nd</sup> October 2013 respectively. The applications which were brought by way of Notice of Motion were consolidated at the hearing and proceeded as **Misc. App 304 of 2013**. The application mainly seeks that the court be pleased to admit the two applicants to bail pending the hearing of their appeals, 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. The supporting affidavit in respect of the 1<sup>st</sup> applicant is dated 20<sup>th</sup> September 2013. In it, it is deponed that the cash bail of Kshs. 1 million deposited on behalf of the applicant in the lower court is still held by the court; that the applicant has already filed his petition of appeal which has high chances of success and that the applicant has fallen ill since being committed to prison and needs specialized treatment which is not available in prison.
3. The learned counsels Mr. Kirera and Mr. Gichaba filed written submissions on behalf of the 1<sup>st</sup> applicant which in sum, urged that the applicant was convicted for the count of making a fraudulent payment for goods not supplied contrary to **section 45(2) (a)(ii)** as read with **Section 48 of Anti-Corruption and Economic Crimes Act No. 3 of 2003**. That this was an alternative count to the main charge of conspiracy to commit an offence of corruption in count No. II in which the court acquitted the applicant.
4. They also argued that the said count was related to the charge of wilful failure to comply with the law relating to procurement, which he faced in count No. I and the alternative charge thereto of abuse of office, contrary to **Section 46** as read **Section 48** of the **Anti-Corruption and Economic Crimes Act No. 3 of 2013**.
5. They also contended that the payment that was made by the appellant as pointed out in the judgment and further in the sentence, was made pursuant to a valid contract which was not at all faulted by the court. That the transaction that led to the eventual payment of the money was

- clearly based on the said contract. That the court having found that the contract was validly entered into, cannot criminalise the transactions that followed there from, especially as relates to the alternative count in which the applicant was convicted.
6. They further argued that the prosecution had failed to prove where the conspiracy took place and relied on extraneous evidence, while ignoring relevant evidence from the Chairperson of the Board.
  7. For the 2<sup>nd</sup> applicant it was argued by learned counsel Mr. Mogire that he has a good appeal with overwhelming chances of success and is therefore entitled to be considered for bail pending appeal. Mr. Mogire submitted that the prosecution failed to prove its case beyond reasonable doubt and that therefore, the application should be favourably considered by the court.
  8. Mr. Mogire contended that the charge sheet was fatally defective as there was no clarity of particulars of the offence as required by the law. That the law requires the particulars to be concise, distinct and clear to enable the applicant understand what offence he is facing, in order to prepare his defence. That the particulars set out in the charge sheet were deficient and did not support the offences levelled against the applicant.
  9. Mr. Mogire also argued that there was no evidence showing what the 2<sup>nd</sup> applicant's position at SEPUS was nor where the alleged offence was committed. That this was crucial to the prosecution case as there was need to prove beyond reasonable doubt the nexus between the applicant and the organization.
  10. Mr. Mogire further urged that the evidence of the witnesses was contradictory and benefit of doubt arising therefrom should have been given to the applicant, who should have been acquitted of the offences. Lastly, Mr. Mogire submitted that it was not proved that the applicant derived any benefit of whatsoever nature from the transaction which led to his conviction.
  11. 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 submitted that the 2<sup>nd</sup> applicant was an employee of SEPU and even though he alleges that he worked as a support staff, in the report of the document examiner it was found that he was instrumental in the award of the tender, as his signature was in the documents that were used to award the tender. That both applicants knew very well that the Procurement Committee had not sat and were involved in raising the requisition.
  12. Miss Maina further submitted that the finance and general purposes committee had resolved to use the normal procurement methods or seek guidance from the Ministry and the said guidance was not sought. Further, that the minutes stating that Vulcan Lab should be given the award were falsified, as it was confirmed by **PW1, PW6 and PW7** that that was not what they had resolved in their meeting.
  13. 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 **Jivraj Shah vs. Republic [1986] LLR 605**, to which Mr. Gichaba directed me. In the said case the Court of Appeal held *inter alia* that:

***“1. The principle consideration in an application for bail pending appeal is, the existence of exceptional or unusual circumstances upon which the court of appeal can fairly conclude that it is in the interest of justice to grant bail.***

***2. 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, conditions of granting bail will exist.***

This type of application therefore, turns on the likely success of the pending appeal and on the likelihood of serving the sentence before the said appeal is heard.

14. A co-accused of the applicants in this case 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. In the judgment of the learned trial magistrate, the contract leading to the said payment was not faulted.
15. In this case the court has been urged to consider the applicants' ill-health adverted to by their respective counsels. The court was referred to the case of **Shah v Republic (1986) KLR 528 and Kagima v Republic Nrb Cr.181/2004** (unreported), in which the courts gave consideration to the applicants' health status. I note however, that the court did remark in the **Kagima** case, that "ill-health alone may not necessarily constitute exceptional circumstances."
16. The applicants' ill-health due to diabetes and high blood pressure may not constitute exceptional circumstances where there exist medical facilities for prisoners. See the Court of Appeal decision in **Dominic Karanja vs Republic [1986] K.L.R. 612.**
17. Without appearing to pre-empt the intended appeals, it does appear prima facie, from the totality of the circumstances of this case that the appeals are likely to be successful, and that meanwhile the sentence or substantial part thereof will have been served by the time the appeals are heard.

For the foregoing reasons I find that the application has merit and accordingly grants it.

**SIGNED DATED and DELIVERED** in open court this **19<sup>th</sup> day of December 2013.**

**L. A. ACHODE**

**JUDGE**