



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Criminal Appeal 545 of 2012

SHADRACK KIPKURUI KIPROTANUIAPPLICANT

VERSUS

REPUBLICRESPONDENT

RULING

1. The Applicant herein was charged as the 2nd accused person, with the offence of stealing contrary to **Section 275** of the **Penal Code**, with an alternative charge of handling stolen goods contrary to **Section 322 (2)** of the **Penal Code**, in **Kibera Law Courts Criminal Case No. 4141 of 2010.**
2. Upon the conclusion of the matter, the Applicant was acquitted on the main count but was convicted on the alternative charge and was sentenced to serve 16 months imprisonment.
3. Aggrieved by the conviction and sentence, the Applicant filed an appeal, **Criminal Appeal No. 273 of 2012**. He subsequently filed this Application by way of Chamber Summons dated 31st October 2012 under **Article 47** of the **Constitution** and **Section 357** of the **Criminal Procedure Code** seeking to be admitted to bail pending the hearing and determination of the appeal. While the Application is correctly brought before the Court under the Criminal Procedure Code, **Article 47** of the **Constitution** as cited, is not appropriate for this Application since the said provision deals with the right to administrative action.
4. The Application is premised on the ground that the appeal has high chances of success and that if the Applicant is not admitted to bail there is a possibility that he may serve a substantial part of the sentence before the appeal is heard and determined.
5. Mr. Mutai, learned Counsel for the Applicant urges in the written submissions, that the evidence on record shows that the keys and money which were the subject matter in the trial, were found in the possession of the 1st accused and not the Applicant herein. That fact was supported by the Complainant who stated that the money was found with the 1st accused who had kept it in her handkerchief. He further urged that the trial Magistrate in her judgment acknowledged that the money recovered was found with the 1st accused but nonetheless convicted the applicant for handling the said money.
6. The Applicant therefore submits that he was convicted for the offence of handling something which he neither handled nor was in possession, custody or control of and further, the Applicant as the husband of the 1st accused, ordinarily lived with her in the same house and should not be held criminally liable for the criminal acts of his wife.
7. The learned Counsel also submitted that if the prayers sought are not granted, the Applicant shall

have served a substantial part of the sentence before the appeal is heard and determined. He urged the Court to consider further that the Applicant had been on bail during the trial in the Magistrate's Court.

8. Miss Venda, learned State Counsel for the Respondent did not oppose the Application on the same grounds that were raised by the Applicant; that the complainant stated that he did not know why the Applicant was arrested since he was not one of the employees. Secondly, that the property which the Applicant was said to have handled was found with the 1st accused and not the Applicant.

9. The principles upon which the Court would grant bail pending appeal were re stated in **Jivraj Shah vs. Republic Criminal Application No. NAI 18 of 1986, [1986] KLR 605**, in which the Court of Appeal held that,

“The principal 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 interests of justice to grant bail

If 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 for granting bail will exist.”

10. I also note that the sentence meted out was 16 months of imprisonment. While the time it would take for the appeal to be determined is not of itself a ground for granting bail, I find that in this case, there is likelihood that a substantial part of the sentence may be served during the pendency of the appeal, and therefore render the appeal nugatory.

11. Having considered the record before me and the submissions of the parties, the circumstances of this case and without going into the substance of the appeal, I am persuaded that the Applicant has demonstrated that this Application merits the grant of bail as prayed.

12. This Application is therefore allowed, and it is ordered that the Applicant be and is hereby released on a bond of Kshs. 100,000 with one surety of similar amount, or alternatively on a cash bail of Ksh. 50,000/=.

SIGNED DATED and DELIVERED in open court this 27th day of **February 2012**

L. A. ACHODE
JUDGE