REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

REVISION CASE 262 OF 2011

GEORGE TITI KANDU.....APPELLANT

VERSUS

REPUBLIC .....…….....…….....RESPONDENT

R U L I N G

This is an application for bail pending appeal. The applicant, **GEORGE TITI KADU**, was convicted for the offence of Obtaining money by false pretences contrary to **section 313 of the Penal Code.** He was then sentenced to 18 months imprisonment. The said conviction and sentence were handed down on 3rd October 2011.

Shortly thereafter, on 17th October 2011, the applicant lodged an application for bail pending appeal.

When canvassing that application, the applicant submitted that his appeal had overwhelming chances of success. That submission was based on the applicant's contention that the evidence adduced by the prosecution did not support the charge.

In particular, the applicant said that whereas the charge sheet indicated that he had received Kshs.1,000,000/- from the complainant, Caroline Ndida Mutoko, the evidence showed that he did not receive any funds.

He had also submitted that the prosecution failed to prove the nexus between the complainant and the Royal Danish Embassy, who had allegedly entrusted the funds to the complainant, for use in the purchase and supply of water tanks to schools.

If any money was received, the same may have been paid to Otung Limited, which the applicant said, was completely distinct from him, as an individual.

The applicant also faulted the trial court for allowing the charge sheet to be amended twice, without due regard to his rights. On one occasion, the court is said to have permitted an amendment on the basis of the wrong provisions of the law **(i.e. section 215 of the Criminal Procedure Code)**; and on the second

occasion the amendment is said to have been effected casually, in the absence of the applicant's advocate.

In both instances, the learned trial magistrate is said to have failed to inform the applicant of his right to demand, if he so wished, the recall of witnesses who had already testified.

The other issue that was canvassed by the applicant was that the matters in issue were basically contractual. The contract was said to be between Otung Limited and DANIDA/MDG.

The applicant says that he was only an agent of Otung Limited, whilst the complainant was the agent of DANIDA/MDG.

Thereafter, the complainant terminated the contract, and the applicant believes that he is actually entitled to compensation for the breach of contract.

After the contract was terminated, the applicant believes that it was not reasonable to expect him to nonetheless proceed to perform the said contract.

In any event, the arrest and prosecution of the applicant is said to have taken place before the due date for the delivery of the tanks, so submitted the applicant.

Furthermore, as the complainant and the applicant were negotiating the refund of the money received by Otung Limited, the applicant describes his arrest as unnecessary and ill-motivated.

In any event, the applicant said, there was no evidence that there was any false pretence. The applicant was in the business of supplying water tanks: that he says, is not false pretence.

The trial court is faulted for concluding that the applicant had no capacity to deliver the water tanks, yet no such evidence was provided to the court.

The failure to refund money after the complainant terminated the contract, is said, by the applicant, to be anything but false pretence.

All those submissions were duly considered by my learned brother, Mbogholi Msagha J., who then gave a reasoned ruling on 20th December 2011. In the said ruling, the learned judge held as follows;

"The ingredients of the offence were, with respect, disclosed in the evidence adduced, and more specifically in the evidence of the complainant. The conduct of the applicant was incriminating and when asked to refund the money for the water tanks not supplied, he declined to do so. Had he done so he would have mitigated his position to erase the issue of false pretence. Even if it were to be argued that this was a civil matter, the conduct of the applicant crossed the line and introduced a criminal element in the transaction".

Less than 2 months after that ruling was delivered, the applicant brought another application for bail pending appeal. It is that second application that is for determination before me.

The reason why I deemed it necessary to set out the gist of the submissions which were made in the first application, is that Mr. Fred Namisi, the learned advocate for the applicant, said to this court, that he wished me to re-evaluate the said submissions.

He also pointed out that subsequent to the court's earlier decision, the applicant's health condition had become worse.

Medical records were made available to this court, to demonstrate that the applicant suffers from severe hypertension, dental carries and renal disease.

Both the Nairobi remand and Allocation hospital, as well as the Kenyatta National Hospital have

indicated that their facilities were constrained. The two medical facilities have suggested that the applicant should seek treatment at a private hospital.

The respondent submitted that the medical condition of the applicant cannot be reason enough to entitle the applicant to bail.

In the light of the findings by Msagha J., it would be most inappropriate for me to give a different assessment of the applicant's chances of success, in his pending appeal. If I were to differ with my learned brother, that may be construed as either an act of sitting on an appeal on his decision, or, at the very least, a revision or review of the said decision.

Both Msagha J. and I are Judges of the High Court. We therefore are courts of concurrent jurisdiction. I cannot therefore sit on an appeal over the decision of my learned brother, nor is there any reason, in law, to justify any attempt to have me revise or review the decision of the learned Judge.

In my considered view, the issues raised by the applicant are weighty and arguable. They are most certainly not frivolous.

At the same time, the applicant's health appears to be undergoing serious challenges. He is in need of medical treatment which is not currently available either at the Nairobi Remand and Allocation hospital or at the Kenyatta National Hospital. That implies that unless the applicant is able to get treatment elsewhere, he may never be in a position to canvass his appeal.

Because of those special circumstances, I find that justice demands that the applicant be granted bail. I therefore order that the applicant be granted bail in the sum of KShs.500,000/-. In the alternative, he is to execute a personal Bond of Kshs.700,000/- with one surety of like sum.

Dated, Signed and Delivered at Nairobi, this 25th day of April, 2012

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FRED A. OCHIENG
JUDGE