REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

MISCELLANEOUS CRIMINAL APPLICATION 634 OF 2011

DAVID TIMAIYO MUTII .....APPLICANT

VERSUS

REPUBLIC .....RESPONDENT

RULING

1. **David Timaiyo Mutii**, the applicant herein was charged with eight counts of stealing contrary to **Section 275** of the **Penal Code** and two other counts on attempting to steal contrary to **Section 275** of the **Penal Code** and as read with **Section 389** of the **Penal Code**. He was subsequently convicted of stealing contrary to **Section 275** of the **Penal Code** in **count 1, count 3, count 5, count 6, count 8 and count 10**.

2. He has now filed an application under **Section 349** of the **Criminal Procedure Code** and is praying for bail pending the hearing and determination of his appeal.

3. The application is grounded on reasons that given the time that the appeal will take to be determined and the nature of the sentence, the appeal will be rendered nugatory if successful because the applicant will have served an illegal sentence.

4. Mr. Maingi the learned counsel for the applicant, submitted that the applicant's appeal has overwhelming chances of success because of glaring inconsistencies in the prosecution evidence and unreliable contradictory witnesses. He urged that this led to a defective judgment. In the learned counsel's opinion the glaring inconsistency is to be found in the testimony of the document examiner who found that the slips used to perpetrate the theft in cheques No. 2 and No. 5 were written by the person who wrote the rest of the documents he examined, yet **PW8**, testified that she filled those two slips herself.

5. The learned counsel also submitted that the relative shortness of the sentence, the ill-health of the applicant, and his clean record form the existing special circumstances that would warrant the appellant's release on bail pending appeal.

6. Miss Maina the learned state counsel opposed the application on behalf of the respondent on grounds that his appeal has no chances of success, is not arguable and there are no exceptional circumstances to warrant the granting of bail. The learned state counsel submitted that the stolen cheques

resurfaced at the KCB Kajiado Branch. They were deposited in the account for the Kajiado County Council and withdrawn by the applicant, and that the applicant was well known to the employees of the bank since he was the Town Clerk of Kajiado County Council.

7. The principles to be considered in an application for bail or bond pending appeal are now settled. In the case of **Dominic Karanja v Republic [1986] KLR pg. 612,** the Court of Appeal held that:

1. 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.

2. The previous good character of the applicant and the hardships, if any, facing his family were not exceptional or unusual factors.

8. Without delving into the substance of the appeal, I have considered the submissions of both parties in the application together with the record of the lower court and I am not persuaded that the appeal has overwhelming chances of success.

9. On the second limb, neither the shortness of the sentence nor the asthmatic condition of the applicant amount to exceptional circumstances upon which I may conclude that the applicant may be released on bail. The Court of Appeal also held in Dominic Karanja Supra that ill health per se would not constitute exceptional circumstances where there existed medical facilities for prisoners.

10. The applicant lost the presumption of innocence when he was convicted in the lower court. He is therefore serving a lawful sentence. His ailment is not exceptional. It may be managed at the prison clinic and at Kenyatta National Hospital on referral if need be.

Reasons wherefore I decline to grant the application sought.

L. A. ACHODE

JUDGE

SIGNED DATED and **DELIVERED** in open court this **16th** day of **May 2012.**

F. A. OCHIENG

JUDGE