REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

MISCELLANEOUS APPLICATION 182 OF 2012

ENOS MESHAK MAGWA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The applicant, **ENOS MESHAK MAGWA**, was convicted on one count of Fraudulent Acquisition of Public Property contrary to **section 45 (1) (a) as** read with **section 48 (1) of the Anti-Corruption and Economic Crimes Act 2003.** He was also convicted on one count of False Accounting by a Public officer contrary to **section 331 (1) as read with section 331 (2) of the Penal Code.**

For the offence of Fraudulent Acquisition of Public Property, the applicant was sentenced to three (3) years imprisonment. In addition, he was fined Kshs.2,686,400/-, as provided for under **section 48 (2) of the Anti-Corruption and Economic Crimes Act.**

The trial court ordered that should the applicant fail to pay that fine, he would serve one (1) year imprisonment.

Meanwhile, for the offence of False Accounting, the sentence was a fine of KShs.1,000,000/- failing which the applicant was to serve one (1) year imprisonment.

The applicant has lodged an appeal to the High Court, challenging both the convictions and sentences.

Having now filed the appeal, the applicant has asked this court to grant him bail pending the hearing and determination of the said appeal.

It is the contention of the applicant that his appeal has overwhelming chances of success.

Indeed, he submits that there had been a miscarriage of justice in his case.

The property which he is alleged to have acquired fraudulently is money. The applicant concedes having received money from the Ministry of Education on or about 3rd November 2008. The said money

was intended to cater for a workshop on the Management of Instructional Materials for Secondary Schools in the Coast Region.

Obviously, the applicant was required to use the money for the intended purpose, and to thereafter account for the same.

However, the applicant points out that shortly after he arrived in Mombasa, where the training workshop was to be held, his boss summoned him back to Nairobi. He was required to be in Nairobi because his boss was going to travel out of the country, on official business.

In the event, the applicant says that he handed over the responsibility of running the workshop to a senior officer in the Ministry of Higher Education, Science & Technology, Mr. Robert Muinde Omosa **(PW 1).** Officially, **PW 1** was deputizing the appellant, whose role at the workshop was "the Coordinator".

Some prosecution witnesses said that the applicant was present throughout the workshop, whilst the applicant and some other prosecution witnesses indicated otherwise.

The question that then arises is whether or not his obligation, to account for the money he had received for the workshop, would be any less due to the fact that he was not present at the workshop all through the said workshop.

How does a person who is supposed to account for funds exonerate himself, even if he was then not physically present at the place where he would have personally managed the issue?

Would his absence from the venue excuse his obligation? Or would his absence from the venue lead to administrative sanctions against him, if some or all the money given to him was not properly accounted for?

I am posing questions at this stage, rather than providing answers because that exercise will be undertaken by the Judge who will hear and determine the substantive appeal.

It would appear that the accounts in this case were not prepared by the applicant. **PW 3,** Charles Osango Obindi, an Accounts Assistant said that it is he who prepared the Surrender Vouchers.

PW 3 did not do so on the instructions of the applicant. It is the applicant's boss, Mrs Ondiek, who not only instructed **PW 3** to prepare the Surrender Voucher, but who also provided **PW 3** with the documents to support the expenditure. That was the evidence of **PW 3**.

In those circumstances, could the applicant be held criminally culpable for the alleged false accounting?

The handwriting expert testified that the applicant did not author any of the documents that were used to support the Surrender Voucher. That would appear to be more consistent with the applicant's defence, than with the case advanced by the prosecution.

Meanwhile, it would appear that there was no proof of the nexus between the sum of Kshs.1,000,000/- which the applicant credited to his account on 22nd September 2008, and the sum of Kshs.1,945,000/- which he received from the Ministry of Education on 3rd November 2008.

The point I am making is that the appeal filed by the applicant appears to have a better than even chance of success.

Ms Mwanza, learned state counsel, conceded that the appeal was arguable. I find that she was right to do so. I would only add that the respondent's estimation of the appeal's chances of success appear to be less than my own assessment.

Having come to the conclusion that the appeal has a reasonable chance of success, it follows that there would be no justification for depriving the applicant of his liberty pending the hearing and determination of his appeal.

His illness, as was discerned from the medical records he made available to this court, is another reason, (although not the primary one) for granting bail to the applicant.

He is to deposit Kshs.700,000/- cash bail. In the alternative, he is to execute a Personal Bond of Kshs.1,200,000/-, with two (2) sureties of similar amount.

Dated, Signed and Delivered in Nairobi, this 16th day of May, 2012.

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FRED A. OCHIENG
JUDGE
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