



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CRIMINAL APPLICATION 183 OF 2012

BASILEO MWIANDI *Alias*
JAMES KASYULAAPPLICANT

VERSUS

REPUBLICRESPONDENT

RULING

1. This is a Chamber Summons dated 5th April 2012 brought under **Section 356** and **357** of the **Criminal Procedure Code**. The applicant herein **Basileo Mwiandi Miriti**, seeks to be admitted to bail pending the hearing of appeal **No. 104 of 2012**, that he has already filed in the High Court. The grounds of the application are that the conviction was contrary to **Section 313** of the **Penal Code**, and the offence was not proved beyond reasonable doubt.
2. Learned counsel Mr. Ombete for the applicant urged that the rights given to an arrested person under **Article 49(1)(h)** of the **Constitution** to be admitted to bail, are preserved for a convicted person under **Article 51** of the **Constitution**.
3. Learned counsel Mr. Ombete also urged that the applicant was convicted for the offence of obtaining Kshs. 2 million by false pretences in count No. 4, having been acquitted on the counts of forgery and uttering a false document. However, that Kshs. 1 million was paid in the office of the lawyer while the other Kshs. 1 million was deposited in the account of a 3rd party, and there is no evidence that the lawyer, or the 3rd party, subsequently gave that money to the appellant. That therefore, there is a good chance that the 18 months imprisonment imposed upon the appellant may be set aside on appeal, yet the appeal itself may be heard in two or three years to come.
4. The Learned state counsel, Miss Wang'ele, opposed the application on behalf of the respondent, urging that whereas the court has discretion under **Section 356** of the **Criminal Procedure Code** to grant bail pending appeal, the powers of the court under the said section, are purely discretionary. That no rights of the applicant have been violated to warrant the court invoking **Article 51** of the **Constitution** referred to, since the applicant is serving a legal sentence until a court of law overturns it. That the record shows that the applicant uttered those forged documents to the Advocate who drafted the sale agreement, and in the office of the Advocate, he was paid a down payment of Kshs. 1 million. That he subsequently acknowledged receipt of Kshs. 2 million.
5. The learned state counsel urged that there is therefore, no likelihood of this court upsetting the conviction and that the circumstances of the applicant have changed since he is now a convicted person yet the court has not been told how he will be availed in court for the hearing.

6. Bail is indeed a constitutional right as urged by learned counsel Mr. Ombete. **Article 49(1)(h)** of the **Constitution**, however, applies to bail pending trial and provides as follows:

“An arrested person has the right to be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons.”

In the case before me, the appellant has already been convicted and has therefore lost the presumption of innocence that was available to him prior to the conviction. At the hearing of his appeal the burden will be upon him to convince the court that he was convicted wrongly. I must therefore balance between his right to bail as urged by the learned counsel on his behalf, and the lawful sentence that he is serving following a trial regularly conducted.

7. The principles to be considered in an application for bail or bond pending appeal were captured in the case of **Dominic Karanja v Republic [1986] KLR pg. 612**, where the Court of Appeal held *inter alia* 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.

In the above case the Court of Appeal also stated that a solemn assertion by an applicant that he will not abscond if released, even if it is supported by sureties, is not sufficient ground for releasing a convicted person on bail pending appeal. In the instant case it is not demonstrated how the applicant will be availed for the hearing of the appeal.

8. Upon considering the material before me in this case, and without delving into the merits and demerits of the appeal, I find that it has not been demonstrated that the said appeal has overwhelming chances of being successful nor that there are exceptional or unusual circumstances, upon which the court may find that it is in the interest of justice to grant bail pending appeal. The judgement of the lower court shows that the question of the receipt of money was considered by the learned trial magistrate in his judgment.

For the foregoing reasons I find that the application is lacking in merit and is dismissed.

SIGNED DATED and DELIVERED in open court this **19th** day of **July 2012**.

L. A. ACHODE

JUDGE