



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**CRIMINAL DIVISION**  
**MISCELLANEOUS CRIMINAL APPLICATION NO. 217 OF 2011**

**FAITHA JASHO KAMWERU.....APPLICANT**

**V E R S U S**

**REPUBLIC.....RESPONDENT**

**R U L I N G**

The Applicant was the 2<sup>nd</sup> accused who together with the 1<sup>st</sup> and 3<sup>rd</sup> accused were jointly charged before the Chief Magistrate’s Court at Kibera with stealing by servant contrary to section 281 of the Penal Code that on diverse dates between 11<sup>th</sup> April 2009 and 14<sup>th</sup> April 2009 while employed by the Bank of Baroda at Thika Branch in Thika District of the Central Province stole KShs. 17,735,000/= from the Branch and the money had come into their possession by virtue of their employment. The 1<sup>st</sup> accused was the Acting Branch Manager, the Applicant was the Bank Officer and the 3<sup>rd</sup> accused was the Chief Cashier at the Branch. The 1<sup>st</sup> accused and the Applicant were jointly convicted and sentenced to 2 years imprisonment each. The court further ordered that they each pay KShs. 5,000,000/= and in default serve one year in jail. The learned magistrate called this later sentence “an economical sentence”.

The Applicant has appealed against the conviction and sentence. She considers this “economical sentence” to be illegal. On the face, this sentence does not find a basis in law. It is, however, not the only sentence meted out. For the offence under section 281 of the Penal Code, an accused may serve up to 7 years in jail if convicted. The Applicant will have to show that given the amount stolen, the circumstances of the case and her mitigation, the sentence was manifestly harsh or illegal.

The Applicant had worked for the bank for 27 years, is a mother of three and a grandmother of one. She is married and some of children go to school. All this information, including her health problems, was given to the trial court in mitigation. These facts on their own do not present an exceptional case that would justify her being released on bail (**Raghibir Singh Lamba –Vs- Republic [1958] EA 337**).

The state was represented by Mr. Mulati who conceded the Applicant's request for bail pending appeal on basis that the:-

“appeal is arguable.”

The Applicant can only be released on bail pending appeal if it is shown that the appeal has overwhelming chances of success; that the court will most likely interfere with either the conviction or the sentence (**Mundia –Vs- Republic [1986] KLR 623**). Mr. Omondi for the Applicant appreciated this principle and went to great length to try and disparage the evidence called by the prosecution to support the charge. The prosecution case was basically circumstantial. There was no dispute the amount was in the bank safe by close of business on 11<sup>th</sup> April 2009. The safe could only be locked and opened by two people at the same time. The 1<sup>st</sup> accused and the Applicant were the ones who had locked the safe on 11<sup>th</sup> April 2009. The court found that between 11<sup>th</sup> April 2009 and 14<sup>th</sup> April 2009 it was only the two who had the keys. On 14<sup>th</sup> April 2009 the money was found missing from the safe. The lock had not been tampered with and there was no breakage. The court concluded that only the 1<sup>st</sup> accused and the Applicant had the opportunity to open into the safe and take the money; and that indeed they had stolen the money.

This court is not hearing the appeal and it would be prejudicial and embarrassing both to the parties and the court that will hear the appeal to discuss the merits of the prosecution and the defence case, or the findings by the trial court. And yet this court must have a provisional view of the case to be able to determine whether the appeal has overwhelming chances of success. I am unable to find that it has been demonstrated that the appeal has such chances.

I consider that when an accused is awaiting trial he has in his favour the presumption of innocence and is therefore entitled bail. At this stage, however, the Applicant is a convicted person and is not entitled to bail. The presumption is that she has been properly convicted and sentenced. The chances of the appeal succeeding would then be a factor in deciding whether or not to release her on bail .

In conclusion, I dismiss the application.

**DATED AND DELIVERED AT NAIROBI THIS 29<sup>TH</sup> DAY OF APRIL 2011**

**A. O. MUCHELULE**

**J U D G E**