



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL DIVISION**

**MISCELLANEOUS CRIMINAL APPLICATION NO. 213 OF 2011**

**GEORGE ODONGO OCHORO.....APPLICANT**

**V E R S U S**

**REPUBLIC.....RESPONDENT**

**R U L I N G**

The Applicant (as 1<sup>st</sup> accused), Faithia Jasho Kamweru (2<sup>nd</sup> accused) and Mary Atieno Oluoch (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. The particulars were that on diverse dates between 11<sup>th</sup> April 2009 and 14<sup>th</sup> April 2009 at Bank of Baroda, Thika Branch in Thika District of the Central Province while being servants of the Bank as Acting Branch Manager, Bank Officer and Chief Cashier, respectively, they jointly stole KShs. 17,735,000/= belonging to the Bank and which had come into their possession by virtue of their employment. Following trial, the Applicant and the 2<sup>nd</sup> accused were jointly convicted of the charge on 6<sup>th</sup> April 2011. On the following day they were each sentenced to serve 2 years in jail. On top of that, each was asked to pay a fine of KShs. 5 million and in default to serve over year in jail. The trial magistrate referred to this later sentence as “economic sentence”. That will certainly be a problematic sentence to justify on appeal. However, stealing by servant invites a sentence of up to 7 years in jail under section 281 of the Penal Code.

The Applicant filed a Petition of Appeal on 15<sup>th</sup> April 2011 challenging both the conviction and sentence. Regarding sentence, the Applicant questions the legality of two sentences for the same offence. As for conviction, he basically states that there wasn’t sufficient circumstantial evidence upon which he could have been found guilty. He further alleges that the trial court shifted the burden of proof to him. Pending the hearing and determination of the appeal, he seeks to be released on bail. The Application was prosecuted for him by Mr. Biwott. The state was represented by Mr. Mulati who conceded the Application on the basis that the evidence of PW8 and PW9 created credibility gaps in the prosecution case. Quite unfortunately, only the copy of the judgment was annexed to the Application. The proceedings were not annexed to be able to show the kind of evidence either PW8 or PW9 gave that led to the alleged gaps. The judgment shows the trial magistrate considered the evidence of the two witnesses in reaching the conclusion that the prosecution had proved its case beyond doubt.

When the Applicant was awaiting his trial he was presumed to be innocent and was therefore entitled to bail. Following his conviction and sentence, he is no longer entitled to bail. This is because it is presumed that he has been properly convicted and sentenced (**Mundia –Vs- Republic [1986] KLR 623**). This is why he can only be released on bail if he can show that the appeal he has preferred has overwhelming chances of success and that the circumstances presented in his application are exceptional and unusual (**Somo –Vs- Republic [1972] EA 476**).

It is also noted that the appeal will eventually come for hearing and therefore nothing should be said at this stage that may prejudice any party to the appeal or embarrass the court that will deal with it. At the same time, however, the court has to take a provisional view of the appeal to be able to say that the Applicant has demonstrated that there are overwhelming chances of success. The burden to establish that the appeal has overwhelming chances of success is on the Applicant. I have not found that there has been such demonstration, and neither has the court discerned from the copy of Judgment or the Petition of Appeal that the appeal has such obvious chances of success.

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**