



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISC. CR. APPL. NO. 433 OF 2010**

**JACKSON NGALA KILUNDU.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The applicant, JACKSON NGALA KILUNDU, was convicted for the offence of Stealing goods in transit contrary to **section 279 (a) of the Penal Code**. The learned trial magistrate then sentenced him to 14 years imprisonment.

Being dissatisfied with the conviction and the sentence, the applicant lodged an appeal with the High Court. Having done so, and whilst awaiting the hearing and determination of the appeal, the applicant has asked the Court to grant him bail.

In his supporting affidavit, the applicant states that he suffers from Kidney problems, a condition which makes it very difficult for him to survive in prison.

He also says that his unskilled wife and their two children will be exposed to extreme physical and mental torture, if he continues to remain in jail for a prolonged period of time.

As he believes that his appeal has high chances of success, he asks this court to grant him bail pending appeal. However, if the court is unable to grant him bail, the applicant requests the court to hear his appeal as a matter of urgency. When canvassing his application, the applicant said that he did not commit the crime for which he was convicted. He blamed his troubles on a disagreement which he had with his employer, over his salary.

Mr. Mulati, learned state counsel, opposed the application. He submitted that the issues raised by the applicant were not borne out from the record.

In his view, the conviction and sentence were justified. By that submission, I understand the respondent to be saying that the applicant's appeal does not have overwhelming chances of success.

In law, it is the obligation of anyone who makes an assertion to prove it. Therefore, it was the duty of the applicant herein to demonstrate to the court that his appeal had high chances of success. Regrettably, however, the applicant did not make any efforts to persuade the court about his perceived chances of success in the appeal.

In any event, his employer produced evidence of both the applicant's driving licence and National Identity Card, to show that he had engaged him as a driver.

Thereafter, it appears that the applicant kept in touch with his employer whilst he was driving the truck from Mombasa. Through that means, the owner of the truck knew that the applicant had passed Mlolongo by 2.00p.m. on 29<sup>th</sup> March 2009. However, the applicant could not be contacted by phone thereafter.

The applicant's employer drove to Mlolongo on the following day, and verified that the applicant had passed through the weigh-bridge.

Later, the truck was recovered at a petrol station in Tigoni, where it had been abandoned, without its cargo. The cargo was worth KShs.3.3 million.

A *prima facie* analysis of the evidence on record indicates to me that the applicant's appeal does not have high chances of success, as he asserts.

In the circumstances, I find that there is no sound reason, in law, to warrant the grant of bail to the applicant. I therefore dismiss the application.

**Dated, Signed and Delivered at Nairobi, this 25<sup>th</sup> day of May, 2011**

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**FRED A. OCHIENG**

**JUDGE**