



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

MISCELLANEOUS CRIMINAL APPLICATION NO. 273 OF 2011

FAITHA JASHO KAMWERU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

Para 1. The Applicant Faitha Jasho Kamweru was tried and convicted together with a co-Accused at Kibera Chief Magistrate’s court for the offence of stealing by servant contrary to Section 281 of the Penal Code. Each was sentenced to two years imprisonment with a further “economical sentence” of a fine of Kshs. five million each in default to serve an additional one year in jail.

Para 2. The Applicant being aggrieved by the decision of the court filed an appeal against conviction and sentence, and while the appeal was pending she lodged an application for bail pending appeal.

Para 3. In the first instance the application for bail pending appeal was canvassed before Hon. Justice Muchelule who dismissed it for reasons that the Applicant had not demonstrated that her appeal had an overwhelming chance of success.

Para 4. The Applicant sought leave of court before the Hon. Justice Ochieng to apply for bail pending appeal for the second time citing new circumstances which had arisen necessitating the filing of the application for the second time.

Para 5. The said new circumstances pertained to health complications which had developed within her body requiring surgical intervention. The honourable court granted the leave sought hence the application now before me.

Para 6. Mr. Wasuna for the Applicant relied on MOTICHAND VS. REPUBLIC 1972 E.A. L. R at pg 399 in which Justice Muli as he then was held that there were two grounds upon which bail pending appeal may be granted.

Para 7. The first was that of the overwhelming chances or a probability of success and the second was that all other grounds if taken alone would not suffice but taken together would suffice to allow bail.

Para 8. These “all other grounds” to be taken together are to be found in the body of the Notice of Motion and also in the supporting affidavit of Alex Kamweru the husband to the Applicant.

Para 9. These are: her medical condition which includes high blood pressure, haemorrhage due to fibroids, anaemia and ulcers. Besides the averments in the supporting affidavits I see no medical report from the Prisons’ Doctor or the Applicant’s Doctor, to support the above but even if there was a medical report there is no reason why Doctors cannot attend to the Applicant while she is in prison.

Para 10. I also note that this is not a new ground because she raised it with the trial court in her mitigation and with the High Court in her first bail application.

Para 11. In fact the Hon. Justice Muchelule relied on the case of RAGHBIR SINGH LAMBA VS. REPUBLIC [1958] EA 337 to find that these facts on their own plus those of her family circumstances that she had raised did not present an exceptional case to warrant her being released on bail.

Para 12. The second ground was that if bail was not granted pending appeal she would end up serving the entire sentence by the time her appeal is heard.

Para 13. On this I agree entirely with the Hon. State Counsel Miss Wangele who is on record for the State that the sentence that the Applicant is serving is legal in so far as it was meted out by a court of competent jurisdiction and has not been overturned by a superior court. The Hon. Judge who mentioned the sentence handed to the Applicant did not delve into its merits or demerits.

Para 14. The last factor is that the Appellant is a first offender who observed the conditions set in the bail terms during trial to the letter and that the court should be alive to the new constitutional dispensation which reinforces the people’s liberties.

Para 15. Art 49 of the Constitution deals with rights of arrested persons and I see nothing in that Article which would entitle a person who has been jailed and convicted by a court of competent jurisdiction to be released on bail pending the determination of their appeal just to safeguard their liberty.

Para 16. I am minded of JIVRAJ SHAH V REPUBLIC (1986) KLR 605 which sets out the principles upon which a person may be admitted to bail pending appeal. The principal consideration is the existence of “exceptional or unusual circumstances” upon which the court can fairly conclude that it is in the interest of justice to grant bail. This is of course apart from the likelihood of the success of the appeal.

Para 17. This was reiterated by the court of Appeal in JOSEPH MAINA KARIUKI V REPUBLIC [2011] e-KLR
The Appellant being a first offender or having observed the conditions of her bail terms is neither unusual

nor exceptional. It is what was expected of her.

Para 18. The court has a discretion to release a convicted person on bail pending appeal but that discretion must be exercised judiciously. As was pointed out by the learned State Counsel M/s Wangele, the right of the Appellant does not exist in absolute terms. The constitution itself recognises that fact by providing that, that liberty may be taken away as provided by law.

Para 19. Upon conviction the Appellant lost the presumption of innocence conferred upon her by the very constitution and, in fact, during the hearing of appeal the burden is upon the Appellant and not the State to prove that the conviction was wrong.

Para 20. Having considered the submissions of parties on both sides I find that none of the three grounds amounts to new circumstances and all of them taken together would still not suffice to entitle the Appellant to bail at this stage.

The Applicants notice of motion fails and is hereby dismissed.

Signed dated and delivered in open court this 18th Day of October, 2011.

L. A. ACHODE
JUDGE
18th October 2011