



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

Criminal Appeal 80 of 2009

JASRON SANDE SAFANIA..... APPLICANT

VERSUS

REPUBLIC

RULING

1. The Applicant, Jasron Sande Safani seeks bail pending appeal under section 357(1) of the Criminal Procedure Code.

2. In Dominic Karanja vs Republic [1986] KLR 612 it was held as follows;

“(i) 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.

ii. The previous good character of the applicant and the hardships, if any, facing his family were not exceptional or unusual factors. Ill Health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners.

iii. 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.

iv. Upon considering the relevant material in this case, there was no overwhelming chance of the appeal being successful.”

3. Has the present Applicant passed the test and should he be released on bail pending appeal?

4. He was tried, convicted and sentenced to serve 3 years imprisonment and 4 years respectively for stealing of a cheque leaf valued at Kshs. 21/= serial no. 100313 for Kshs. 224,384/= the property of Foam Mattresses Company contrary to section 275 Penal Code and making a document without authority contrary to section 357(a) Penal Code. The sentences were to run concurrently.

5. I have read the evidence on record and without pre-determining the Appeal and only to glean whether the Appeal has overwhelming chances of success. The unchallenged evidence tendered by PW1, Dev Makand Patel, PW2 Evans Mwanje Kareka and PW3, Igbal Jusain Keshvaw was that a cheque leaf was stolen from the premises of Foam Mattresses and Kshs. 224,384/= withdrawn and transferred to the Applicant's account at Habib Bank, Koinange Street. The drawer of the cheque was one Joseph Wanjohi Macharia, a customer of Foam Mattresses who had delivered the cheque. He was PW4 and he confirmed that fact. PW5, PC Raphael Makumbi investigated the case, traced the encashment of the cheque and arrested the Applicant who said that the cheque was given to him by his brother to deposit into his account and that when he deposited the cheque, he indicated that he was doing so on behalf of his brother.

6. The Applicant repeated in his defence that the cheque was only deposited in his account on behalf of his brother. That later, he withdrew the money and gave his brother.

7. His brother was never named and it is unclear why the Applicant failed to point PW5 to arrest him and in fact PW5 said that he was unable to trace the said brother and ultimately from where I sit, the brother may or may not exist. What is not in doubt is that the Applicant handled the cheque that was stolen, had his name inserted into it, deposited it in his bank account and within 2 months withdrew the whole amount in 3 installments. What other hypothesis can be drawn other than that the accused either stole the cheque leaf or knew who had stolen it and certainly had something to do with the insertion of his name on it.

8. With such evidence, it is not my view that the Appeal has overwhelming chances of success.

9. The Application for bail pending Appeal is disallowed and the Applicant may fix his Appeal for hearing.

10. Orders accordingly.

Dated and delivered at **Machakos** this **11th** day of **November 2009**.

Isaac Lenaola

Judge

In the presence of; Mr. Omirera for Republic

Appellant - present

Isaac Lenaola

Judge