REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(*Coram: Ojwang, J.*)

MISC. CRIMINAL APPLICATION NO.675 OF 2007

ANVESH KESHAVLAL SHAH

[also known as ANVESH SHAH HIRJI)……..…….APPLICANT

-VERSUS-

REPUBLIC…….....….RESPONDENT

RULING

The applicant came before this Court by way of Chamber Summons dated 4th October, 2007, and brought under s.357(1) of the Criminal Procedure Code (Cap.75). He was asking for two things:

> (a) that the Court be pleased to order stay of execution of the sentence imposed against the applicant by the trial Court in Nairobi Chief Magistrate's Court Criminal Case No. 3216 of 2003;
>
> and
>
> (b) that the Court be pleased to grant bail to the applicant pending the hearing and determination of Criminal Appeal No. 498 of 2007, filed on 23rd August, 2007.

The general grounds founding the application are as follows: that the appeal has high chances of success; that the sentence is excessive, and not founded on law; that the applicant is not likely to abscond, and that his past conduct when undergoing trial has been exemplary; and, that the applicant would be prejudiced if part, or the whole of the sentence imposed, were executed during the pendency of the appeal.

Evidence in support of the application is in the applicant's affidavit, sworn on 4th October, 2007. He avers that he was, on 30th December, 2003 charged in Criminal Case No. 3216 of 2003, with the offence of fraudulent appropriation or accounting by a director contrary to s.328(a) of the Penal Code; and stealing by a director contrary to s.283 of the Penal Code. The applicant avers that he was, on 10th August, 2007 convicted on the first count, and sentenced to three years' imprisonment. He then filed Criminal Appeal No. 498 of 2007 in the High Court, against the said judgment. The deponent states his belief that he has "very high chances of success in Criminal Appeal No. 498 of 2007 which is pending hearing and determination in this Honorable Court''. He depones that unless the sentence imposed on him in Criminal Case No. 3216 of 2003 is stayed, pending the hearing and determination of his appeal, he

"stands to suffer the entire jail term and/or a substantial part of it". He avers that he stands to suffer "irreparable loss and damage unless this Honourable Court grants [him] bail pending the hearing and determination of [the appeal]". He depones that he is ready and willing to "abide by such terms of bond and/or conditions that this Honourable Court may deem fit and just to grant" pending the hearing and determination of the appeal. The applicant deposes that at all material times during the trial in the Magistrate's Court, he had been at liberty, on bail, and "at no time did [he] abscond and/or deliberately fail to attend Court whenever required".

Learned Counsel ***Mr. Mbiyu*** urged this application on behalf of the applicant, and submitted that the appeal case had high chances of success, noting in particular that the sentence imposed by the trial Court had been "excessive." Counsel submitted that the trial Court had not complied with the terms of s.169 (2) of the Criminal Procedure Code (Cap.75), for failing to specify the law which supported the punishment imposed. He contended that conviction had been entered on the basis of "highly contradictory evidence", and that the burden of proof had been shifted to the applicant, contrary to established trial procedure.

Counsel invoked in aid of the applicant's case, the persuasive authority of ***Somo v. Republic*** [1972] E.A. 476. From that decision, the following passage (***Trevelyan, J.)*** may be set out (p.480):

> ***"There is little, if any, point in granting the application if the appeal is not thought to have an overwhelming chance of being successful, at least to the extent that the sentence will be interfered with so that the applicant will be granted his liberty by the appeal Court. I have used the word "overwhelming" deliberately and for what I believe to be good reason. It seems to me that when these applications are considered it must never be forgotten that the presumption is that when the applicant was convicted, he was properly convicted. That is why, where he is undergoing a custodial sentence, he must demonstrate, if he wishes to anticipate the result of his appeal and secure his liberty forthwith, that there are exceptional or unusual circumstances in the case. That is why, when he relies on the ground that his appeal will prove successful, he must show that there is an overwhelming probability that it will succeed. That the appeal has not summarily been rejected, taken in isolation, is of no account….."***

It was learned counsel's view that tests for granting bail pending appeal, such as those set out in the ***Somo*** case, were well satisfied by the instant application considering, especially, that for the entire period of trial spanning through from 2003 to 2007, the applicant had been on bail but had not absconded.

For the respondent, learned State Counsel ***Mr. Makura*** opposed the application. He urged that it had not been demonstrated that the applicant, in his appeal, stood overwhelming chances of success. Counsel contested the value of the pleas made by the applicant, that he had in the past been of good conduct while he remained at liberty, during trial; in counsel's words: "Even a solemn assurance that the applicant will not abscond, is not good enough; a conviction is a conviction, unless set aside on appeal".

Without canvassing the details of the criminal case in the trial Court, ***Mr. Makura*** urged that reliable evidence had been adduced through PW1, PW2, PW5 and PW7, showing that the applicant as a director, fraudulently misappropriated Kshs.2.5 million, and that, consequently, there was no overwhelming chance that the applicant's appeal would succeed.

Learned Counsel urged that the applicant's reliance, at this stage, on the possibility that the trial Court did not comply with the terms of s.169 of the Criminal Procedure Code (Cap.75), was contestable – as the learned Magistrate had handed down a conviction for fraudulent appropriation of monies, based on evidence.

Mr. Makura submitted that the appellant having served only three months in jail, out of a term of three years, was unlikely to be prejudiced if he remained in prison during the pendency of the appeal.

In support of his position, learned counsel relied on the Court of Appeal decision in ***Dominic Karanja v. Republic*** [1986] KLR 612, in which the following passage appears (p.613):

"The most important issue here is if the appeal has such overwhelming chances of success that there is no justification for depriving the applicant of his liberty. The minor relevant considerations would be whether there are exceptional or unusual circumstances. The previous good character of the applicant and the hardship, if any, facing the wife and children of the applicant are not exceptional or unusual factors: see *Somo v. Republic* [1972] EA 476. A solemn assertion by an applicant that he will not abscond if he is released is not sufficient ground, even with the support of sureties, for releasing a convicted person on bail pending appeal''.

On the strength of the foregoing authority, ***Mr. Makura*** urged that the fact that the applicant will be of good conduct and will comply with all requirements of Court attendance during the hearing of the appeal, was of no moment, in legal terms, and could not advance his case in this application; and in that behalf counsel had more authority: ***Mundia v. Republic*** [1986] KLR 623.

Mr Makura further urged that the applicant had demonstrated no special circumstances which should move the Court to depart from the main principle which determines grant of bail pending appeal.

Learned counsel ***Mr. Mbiyu***, in his response, laid the burden of his case on the contention that there were contradictions in the evidence adduced before the trial Court – and this was with regard to the monetary figures testified to by different witnesses. He also urged that the applicant's past conduct was a relevant consideration, in relation to the prayer for bail pending appeal. It was learned counsel's view that this Court might appreciate his contention by reviewing the entire judgement.

It would not be appropriate, with respect, for this Court to delve in great detail into the testimonies given before the trial Court, as such a course of action must be reserved to the Court only in an appellate capacity. The applicant is only required to raise *basic issues of merit* which would demonstrate that there are high chances the judgment which has been delivered, will be set aside. To so persuade this Court, *some fundamental considerations of law, or principles of assessment of evidence,* would have to be urged, as derogating from the verdict of the lower Court, so as to hold out high chances of success to the appeal.

A meritorious depiction of the nature of the "overwhelming- chances-of-success" principle, as the main consideration in granting bail during the pendency of an appeal, is that by ***Trevelyan, J*** in ***Somo v. Republic*** [1972] E.A. 476. Relying on the safeguards of the trial process to produce a fair verdict, the High Court must take a *prima facie* position, that the applicant's serving of sentence at the moment, is in accordance with the law, unless some irregular feature of the trial process is shown which could predispose the appeal to likely success. Unless such unusual feature in the judgment is shown, then it remains the duty of this Court to uphold the integrity of the trial process itself, and to see to the due observance of the decisions judicially taken.

In my assessment, the applicant has not succeeded in demonstrating that any element exists in the trial Court decision, which disposes the appeal to likely success. In line with the authorities (notably ***Dominic Karanja v. Republic*** [1986] KLR 612), I have endeavoured to see if the applicant raises any circumstance so special as to warrant an interruption to his jail- service, during the pendency of his appeal. I did not find any such special circumstances.

I must, therefore, hold that the applicant has not persuaded the Court that he deserves to be released on bail pending appeal. His application is dismissed.

DATED and DELIVERED at Nairobi this 12th day of March, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Applicant: Mr. Mbiyu

For the Respondent: Mr. Makura