



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**(CORAM: OJWANG, J.)**

**MISC. CRIMINAL APPLICATION NO. 49 OF 2008**

**MURABU CHAKA TSUMA..... APPLICANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**RULING**

The applicant moved this Court by Chamber Summons of 30<sup>th</sup> January, 2008, brought under s.357 of the Criminal Procedure Code (Cap.75, Laws of Kenya), and s.72(5) of the Constitution of Kenya.

The substantive prayer in this application was for bail pending the hearing and determination of the applicant's appeal.

In the general grounds it was stated that the applicant was suffering from acute peptic ulcers, hypertension, depression and asthma, and that he needed urgent specialized treatment. It was stated that the applicant had filed an appeal which raises substantial points of law, with overwhelming chances of success, the appeal being High Ct. Crim. Appeal No. 800 of 2007. It was contended that it was in the interest of justice that the applicant be admitted to bail pending the hearing and determination of his appeal.

The relevant points of fact were addressed in the supporting affidavit of one *Lily Belinda Kadogo*, wife to the applicant, who made depositions regarding the applicant's state of health, and stated that her husband had, in September, 2006, been arrested, charged, and subsequently convicted on a charge of conspiracy and theft by servant.

Learned respondent's counsel, *Mr. Makura* was in agreement with the applicant's counsel, *Mr. Ondieki* that suspicion had been the foundation of the conviction entered in the Court below, and consequently, the pending appeal had overwhelming chances of success. It was common cause between counsel that the circumstances relied on by the trial Magistrate, did not point irresistibly to guilt on the part of the applicant.

Counsel invoked as the governing principle of law, the content of a passage in the Court of Appeal decision in *Mary Wanjiku Gichira v. Republic*, Cr. App. No. 17 of 1998:

***“We are satisfied upon a careful analysis of the evidence that the circumstances relied upon in the instant case do not irresistibly point to the appellant as the one who had started the fire inside the house of her deceased husband. We have come to the conclusion that though there were circumstances of suspicion, the circumstantial evidence properly considered did not establish a case against the appellant with the degree of certainty which would justify a finding that the charge was proved beyond reasonable doubt or that the conviction was safe. Suspicion, however strong, cannot provide a basis for inferring guilt which must be proved by evidence.”***

**Mr. Makura**, who acknowledged the relevance of the foregoing passage, submitted that the conviction was not safe.

After considering the content of the application document, and of the supporting affidavit, hearing the submissions of counsel, and taking into account the authorities cited, I made certain orders *extempore*, as follows:

**“The applicant has come before this Court seeking bail pending appeal. I have carefully listened to the submissions by counsel on both sides, and it has become necessary I should make certain orders, pending delivery of the reasoned ruling of the Court, which is to take place on [15<sup>th</sup>, October, 2008].**

- 1. I hereby admit the applicant to bail pending appeal.**
- 2. The applicant shall pay into the High Court’s Cash Office a cash bail of Kshs.10,000/=, and shall thereafter be released, and shall enjoy the bail terms until such time as the appeal is heard and determined.”**

By this detailed ruling, I hereby provide the reasons for, and the context in which the said Orders were made.

The said orders are hereby restated and reaffirmed.

**DATED and DELIVERED** at Nairobi this 15<sup>th</sup> day of October, 2008.

**J.B. OJWANG**

**JUDGE**

**Coram: Ojwang, J.**

**Court Clerk: Hukah**

For the Applicant: Mr. Ondieki

**For the Respondent: Mr. Makura**