



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Appeal 331 of 2008**

**NICHOLAS NJIRU NGARI ..... APPLICANT/APPELLANT**

**- VERSUS -**

**REPUBLIC .....RESPONDENT**

**RULING**

The appellant brings an application before this Court, by his Chamber Summons of 2<sup>nd</sup> October, 2008. The application has one substantive prayer: “that this Court be pleased to grant the appellant/applicant bail pending appeal.”

The applicant states in a supporting affidavit that he was charged with three counts of theft by servant contrary to s. 281 of the Penal Code, and sentenced to a fine of Kshs. 100,000/- or, in default, 12 months’ imprisonment on each of several counts, and the sentences to run consecutively. He depones that the trial Magistrate erred in law in convicting him on counts 2, 3, 4 when the evidence on record does not support the charge. Most of the affidavit’s averments are devoted to *contestable points of law*.

In his presentation of the application, the applicant contended that he had been wrongly convicted – that there had been no corroboration of evidence; that conviction was on the basis of hearsay evidence; that the conviction was against the weight of the evidence; and that the trial Court had shifted the burden of proof to him.

Learned counsel **Ms. Gateru**, for the respondent, opposed the application – primarily because it had not been shown that the pending appeal had *overwhelming chances of success*. Counsel urged that there was strong evidence on the record to support the charge of theft by servant contrary to s. 281 of the Penal Code.

Counsel urged that the fine of Kshs. 100,000/- which had been imposed on the applicant was not harsh or excessive, and thus there was no basis for the application; and besides, it was urged that the applicant had shown no *special circumstances* which would weigh in favour of a grant of bail pending appeal.

The applicant in his response, thus urged:

*“I have nothing to do with the theft. I was convicted against the weight of the evidence.”*

That statement by the applicant is significant, as it tells this Court something about the essence of the instant application: precisely, that the application is, in fact, the *appeal itself*, which is passing as an interlocutory application such as has come by way of this Chamber Summons.

A conversion of the points of substance in the appeal to a claim in a quick application, cannot in principle, be allowed. The merits of the appeal must await the hearing of the appeal itself.

The more significant consideration, however, is that this Court is, in general, not to grant bail pending appeal, unless it is shown that the appeal itself has *overwhelming chances of success*. That condition is not mere formality; it has a purpose of merit.

Illustration is to be found in the following decision of the Court of Appeal in *Jivraj Shah v. Republic* [1986] KLR 605, at pp. 606-607:

**“If it appears *prima facie* from the totality of the circumstances that the appeal is likely to be successful on account of some substantial point of law to be urged, and that the sentence or a substantial part of it will have been served by the time the appeal is heard, conditions for granting bail will exist. The decision in *Somo v. Republic* [1972] E.A 476 which was referred to by this court with approval in Criminal Application No. Nai 14 of 1986, *Daniel Dominic Karanja v. Republic* where the main criteria was stated to be the existence of overwhelming chances of success does not differ from a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed. The proper approach is the consideration of the particular circumstances and the weight and relevance of the points to be argued.”**

The relevant principle has thus been stated by this Court, in *John Bosco Saria v. Republic*, Nbi High Ct. Misc. Criminal Application No. 702 of 2007:

**“The main consideration of principle to determine whether to grant bail pending appeal is clearly stated in *Somo v. Republic* [1972] E.A. 476. It is that a trial which, to all outward appearances, has been properly conducted, results in valid determination of the standing of the accused in the criminal proceedings, and, where such a trial ends in a committal of the accused to jail, it may be considered the right position in law, unless and until the judgment is set aside on appeal. Therefore, the applicant ought to be in a position to persuade the Court that his [or her] appeal is so strong, so meritorious, that at the end, the probabilities will favour acquittal. The applicant, to discharge that burden, will need to raise some critical issue of law, or an issue as to the mode of application of the evidence. Although it is recognized that a particular case may have special circumstances that could weigh in the Court’s mind, the basic consideration remains: whether or not the appeal stands clear chances of success.”**

I have anxiously read the documents of application in the instant matter, and paid attention to the drift in the applicant’s presentation; but I have only come to the conclusion that he is prematurely urging an appeal that is evenly-balanced. The applicant brought to the Court’s attention no decisive point which signals his likely success on appeal; and there was no special circumstance at all, which he urged should be introduced into the overall picture of contending claims.

This is the *prima facie* demonstration that no case has been made in favour of grant of bail pending appeal. Accordingly, the application is refused.

***Orders accordingly,***

**DATED and DELIVERED** at Nairobi this 27<sup>th</sup> day of November, 2008.

**J.B. OJWANG**

**JUDGE**