REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 214 of 2008

MERCY WANGECHI MWANGI…….....APPELLANT/APPLICANT

-AND-

REPUBLIC……..……...…….RESPONDENT

RULING

The appellant brings an application by the Chamber Summons of 27th August, 2008, under s.357 of the Criminal Procedure Code (Cap.75, Laws of Kenya). She seeks admission to bond pending the hearing and determination of her appeal from the judgement of the learned Magistrate in Makadara Law Courts Criminal Case No. 5181 of 2007.

The applicant states as a ground of the application, that her pending appeal has overwhelming chances of success; that if she is not admitted to bond, she "stands to suffer irreparable loss and damage by the time the appeal is heard and determined"; that the trial Court erred in law and fact in convicting her and the said errors beckon from the face of the record; that the applicant is ready and willing to abide by such terms as this Court may attach to a grant of bond.

It is the applicant's advocate, ***Mr. Joseph Irungu Mwangi*** who has sworn the supporting affidavit accompanying the application. He depones that the applicant had been charged with theft- offences, and sentenced to a five-year term of imprisonment without the option of a fine. The deponent avers that the record of trial proceedings makes it manifest that the applicant's appeal has overwhelming chances of success, as the conviction was based on errors of law and fact. The deponent avers that the learned Magistrate, during trial, had attempted to shift the burden of proof from the prosecution to the accused, and that this raises the prospect of overwhelming chances of success to the pending appeal.

Learned counsel, when he appeared before the Court, attributed the prospect of success of the appeal to still *other* considerations: in particular, that the applicant had been held for longer than 24 hours by the Police, before being charged in Court, contrary to provisions of the Constitution.

Learned respondent's counsel, ***Mr. Makura*** contested the application, especially on the ground that no evidence had been placed before the Court showing that the pending appeal had overwhelming chances of success. The applicant had been charged with as many as eight counts of stealing, contrary to s.275 of the Penal Code (Cap. 63, Laws of Kenya); the basic facts were that the applicant had the custody of certain monies, and the same disappeared in circumstances which pointed accusing fingers at her as the thief. There was, counsel urged, very strong evidence that was the basis of the conviction entered by the Magistrate's Court.

As to the contention by the applicant's counsel that the arrest and charging of the applicant had entailed a breach of s.72(3) of the Constitution, ***Mr. Makura*** urged that the bare fact that the specified time of 24 hours could have been exceeded while the applicant was still held by the Police, was not by and of itself proof, that there had been a violation of a constitutional safeguard. This question, counsel urged, was being raised for the very first time – and this had the difficulty that no opportunity had yet been availed to the respondent to provide an explanation for the delayed prosecution; yet reasonable explanation was provided for in s.72(3) of the Constitution itself, as giving a sufficient excuse for any such delay.

Learned counsel also contested the claim that the trial process had involved an unlawful shifting of the burden of proof to the accused person.

It is well established in judicial authority that there is an exception to the 24-hour rule, in bringing a suspect before the Court: see ***Albanus Mwasia Mutua v. Republic,*** Cr. App. No. 120 of 2004; ***Gerald Macharia Githuku v. Republic,*** Cr. App. No. 119 of 2004; ***Eliud Njeru Nyaga v. Republic***, Cr. App. No. 182 of 2006; ***Ponnuthurai Balakumar v. Republic***, Nbi High Ct. Crim. Application No. 218 of 2008; ***Robert Mwendo & Another v. Republic,*** Nbi High Ct. Cr. Application No.809 of 2007; ***Shem Karanja Waigwa v. Republic,*** Nbi High Ct. Crim. Application No. 186 of 2008; ***Republic v. Talib Abubakar & 5 Others,*** Nbi High Ct. Crim. Revision No.1 of 2008; ***Alfred Kimathi Meme v. Republic***, Nbi High Ct. Crim Application No. 857 of 2007; ***Republic v. Peter Githongo Maina & Others,*** Nbi High Ct Crim. Case No. 79 of 2005; ***Republic v. Joseph Ndirangu Nungari & Another,*** Nbi High Ct. Cr. Case No. 42 of 2006; ***Republic v. Joseph Zakayo Maithia & 4 Others***, Nbi High Ct. Crim. Case No. 105 of 2005.

Does that exception have a place in the instant case? I believe not; because this issue has *never been raised*, and so it was not at all an issue that a reasonable explanation was or was not available.

The only other relevant point is whether, truly, the pending appeal has *overwhelming chances of success*. I do not think so; for no evidence at all has been placed before me which points in that direction.

The question whether or not the burden of proof had been shifted to the accused contrary to law, is not transparently illuminated at this stage. That makes the issue a *contentious* one which must await the canvassing of the appeal itself.

It follows that no case has at this stage been made, which would justify a grant of bond pending the hearing and determination of the appeal.

Accordingly, I hereby dismiss the application by Chamber Summons dated 27th August, 2008.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 24th day of November, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Appellant/Applicant: Mr. Mwangi

For the Respondent: Mr. Makura