



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

**Misc. Crim. Appli. 248 of 2008**

**PATRICK WAMBUA NZOKA.....APPLICANT**

**- VERSUS -**

**REPUBLIC OF KENYA .....RESPONDENT**

**RULING**

From the conviction and sentence in Chief Magistrate’s Court Criminal Case No. 2344 of 2004, the applicant moved this Court by Chamber Summons dated 5<sup>th</sup> May, 2008. He had one substantive prayer: that he be granted bond/bail pending the hearing and determination of his appeal, No.137 of 2008.

The general grounds founding the application were that the appeal was meritorious and having overwhelming chances of success; that the conviction had been a miscarriage of justice; and that the finding by the Subordinate Court lacked evidence to support it.

In the supporting affidavit the applicant depones that he had been convicted on a charge of obtaining goods by false pretences, and consigned to jail for a period of 18 months. The applicant stated that he was dissatisfied with the trial Court’s decision. He stated that his appeal had overwhelming chances of success because the trial Court erred in fact and in law, in entering a conviction.

The applicant deponed that he had been out on bond during trial proceedings, and had not defaulted in attending Court during trial.

The applicant averred that he had school-going children for whom he was the sole bread-winner. He deponed that he was “a sick man suffering from diabetes and high blood pressure” ; and that while in prison, he lacked access to the hospitals and the doctors that, and who, were familiar with his health condition.

Learned counsel *Mr. Nyaberi*, for the applicant, submitted that an appeal had already been lodged which had overwhelming chances of success. He urged that the conviction entered was not supported by the evidence, and that the decision of the trial Court amounted to a miscarriage of justice. Counsel urged that the trial Court had given no good reason for entering a conviction; and that the release on bond of the applicant would occasion the respondent no prejudice.

Learned counsel *Mr. Makura*, for the respondent, opposed the application, on the ground that overwhelming chances of success to the appeal had not been demonstrated. It was the complainant’s evidence that he did sell a motor vehicle to the applicant and this was witnessed by PW2; and PW3 testified that the payment made in return was a “ dud cheque” – clearly meaning, a pretence of a cheque;

and the applicant himself had admitted that he had insufficient funds in his account to sustain the purchase price for the motor vehicle.

Counsel urged that some of the contentions made for the applicant – such as the character of the charge sheet, or the languages used in Court during trial – were issues on appeal, and it was premature to raise them at this stage.

Upon considering the terms of the application, as well as the issues raised by both counsel, I am by no means left with the impression that the pending appeal, indeed, has overwhelming chances of success. Since the trial Court's decision is to be taken as having been arrived at, *prima facie*, according to law, an applicant such as the one herein must raise such a fundamental challenge to the trial Court's proceedings as would dislodge that *prima facie* perception. Unless that is done, then this Court presumes that the applicant was, on *prima facie* perceptions, properly convicted and subjected to the prescribed legal consequences – consequences which can only be challenged *on appeal*. So at this stage, unless this Court is shown that the pending appeal has *overwhelming chances of success*, then there will be no legal ground for disturbing the *status quo* of the sentence already in place.

Such overwhelming chances of success have *not* been shown by the applicant, and this position is unaffected by the plea that he is ailing, or that he has to care for his school-going children. The applicant's health status can only be cared for through medical facility: and the prison institution is able to make appropriate arrangements. The appellant's personal and family hardships, such as they have been presented, are not so overwhelming as to amount to a call on this Court's discretion to disturb the *status quo* of the sentence properly imposed by the trial Court.

Consequently, I hereby dismiss the application.

*Orders accordingly.*

DATED and DELIVERED at Nairobi this 24<sup>th</sup> day of November, 2008.

**J.B. OJWANG**

**JUDGE**

Coram: Ojwang, J.

Court Clerk: Huka

For the Applicant: Mr. Nyaberi

For the Respondent: Mr. Makura