



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

Misc Crim Appli 614 of 2006

(CORAM: LESIIT, J.)

JULIUS MURANGA GICHURE.....APPLICANT

VERSUS

REPUBLICRESPONDENT

(CORAM: LESIIT, J.)

R U L I N G

The application is a Chamber Summons dated 27th November 2006 in which the Applicant seeks bail pending the hearing and determination of his appeal no HCCRA 513 of 2006 and any other orders the Court may think fit.

The Applicant grounds his application on four grounds.

1. The appeal has overwhelming chances of success.
2. The Applicant is seriously ill and needs urgent specialized treatment.
3. The Applicant is bestowed with vital public responsibilities that will stall against public good if he continues to be in jail.
4. It is in interest of justice that the Application be allowed.

Mrs. Kingoo argued the application. Counsel submitted that the evidence adduced by the prosecution witnesses did not support the charge in that none of the Complainants said that the Applicant took money pretending that he intended to buy a visa and tickets to the USA. Counsel submitted that PW1 had said that the Applicant promised to arrange the trip while PW2 said he could plan the trip. PW3 and PW4 on the other hand said that the Applicant had merely said that the trip could 'cost' the amount asked for and that what PW4 paid was meant for training and travel.

Counsel also submitted that the learned trial magistrate ignored the Applicant's defence and that the matter was civil in nature but had been criminalized. She relied on High Court Misc. Civil Appl. No. 367 of 2005.

Holding 9 at page 17 stated thus:

“9. I think the principle is clear that to institute proceedings to exert pressure for the payment of debt bona fide disputed, where those proceedings are not for the purposes of deciding the disputed debt, constitutes an abuse of the process of the court...”

Counsel submitted further that the reason the Visa failed was because of a call to the US Embassy warning about persons going for the Visa that morning. That the said call frustrated the Applicant from getting Visas for the Complainants.

Counsel further submitted that since the agreement between the parties provided for a penalty, the matter was civil in nature and should have been tried in a civil court.

Counsel for the Applicant submitted that the Applicant suffers from cancer of the skin and psychological problems.

Mr. Makura, learned Counsel for the State did not oppose the application. Learned Counsel submitted that the intention to defraud is a major issue in such charges and that, in his view, it was not proved. Counsel also submitted that the proceedings were defective on account of the prosecutor being unqualified. Counsel also agreed that at the time of the alleged offence the Applicant was suffering from loss of judgment according to medical records.

Starting with the submissions by the State, the mere fact that the proceedings are defective are not good ground to grant the application for bail pending appeal since the court on appeal may order a retrial.

On the Applicant’s mental state, this should be a ground for ventilation before the appeal court which *inter alia* has to decide whether **Section 382** of the **Criminal Procedure Code** would operate against the Appellant.

As to the weaknesses in the evidence, which the Applicant’s advocate also dealt with at length, I do find that the said arguments only make the appeal arguable and is no proof of overwhelming or likelihood of success of the pending appeal.

Having perused the record I do not find it a fit case to grant bail as sought on the grounds argued. Even the grounds raised that the case was civil in nature would not give merit to granting of application on the simple basis that many civil cases are also criminal in nature and nothing stops such cases being prosecuted simultaneously.

I find that the appeal should be set for hearing and determination. I direct that the registry should grant a hearing date early in the next High Court term.

The Application has not merit and is dismissed.

Dated at Nairobi this 23rd January 2007.

.....

LESITT, J.

JUDGE

Ruling read and delivered in presence of:

Applicant present

Mrs. Kingoo for the Applicant

No appearance for State

Tabitha CC

.....

LESIT, J.

JUDGE