

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Criminal Appeal 73 of 2007

STEPHEN KEYA SHIKUKU APPELLANT

V E R S U S

REPUBLIC RESPONDENT

R U L I N G

The Appellant, **Stephen Keya Shikuku**, has made an application to this court seeking bail pending the hearing and determination of his appeal against conviction and sentence in Butere Senior Resident Magistrate Court Criminal Case No. 310 of 2006 in which he was sentenced to imprisonment for a period of seven years for stealing Shs.2,540,000/=, the property of Mumias Sugar Company which was alleged to have come into his possession by virtue of his employment with the said company. Before sentence was meted out in the trial court, the Appellant told the court through his counsel that he was 48 years old and had two wives and eleven children five of whom were in secondary school and two in colleges. In seeking leniency, he told the trial court that he was the bread winner of his family and a first offender who was remorseful.

During the hearing of the application for bail pending appeal, the court was told by Mr. Amasakha, learned counsel for the Appellant, that the Appellant had a good appeal with overwhelming chances of success and further, that the appellant was hypertensive and had a mild stroke in May, 2007. Annexure SKS 5 attached to the Appellant's affidavit in support of the application for bail was a letter dated 30.7.2007 by Lubinu Medical Clinic signed by Dr. Charles M. Andai in which the latter stated that he was the applicant's doctor and that the Appellant had symptoms of chronic renal failure which was a complication of his hypertension and that it required specialized treatment at Kenyatta National Hospital including kidney dialysis.

Mrs. Kithaka, the learned Senior Principal State Counsel opposed the Appellant's application for bail on the grounds that while the appeal did not have overwhelming chances of success, the condition of the Appellant could be attended to in government hospitals. It was Mrs. Kithaka's submission that there was a likelihood of the Appellant absconding if released on bail due to the long sentence he was serving.

The Appellant's application was premised on **section 357** of the Criminal Procedure Code, Cap 75. This section confers on this court, unlimited discretionary power to admit an applicant to bail where such applicant has lodged an appeal and has demonstrated that his appeal has overwhelming chances of success or where the decision appealed from was plainly wrong in law or was not supportable in law. The rationale in granting bail pending appeal in these circumstances is that where an applicant will in all probability be successful in his appeal, there would be no point in holding him in prison during the pendency of the appeal only to quash or set aside the decision appealed from later. It was in the case of **JIVRAJ & HATT v. R. [1986] KLR 605** that the Court of Appeal also held that bail pending appeal will be granted if there are exceptional or unusual circumstances upon which the court can conclude that it is in the interest of justice to grant bail. The court in that case also pointed out that substantial merit in an appeal is synonymous with overwhelming chances of success.

In the instant application, I have perused the evidence adduced in the trial court. It appears overwhelming. Without wishing to prejudice the determination of the appeal, I am not at this stage satisfied that the appeal has substantial merits or overwhelming chances of success. The other issue for consideration in the application is whether there are exceptional or unusual circumstances upon which the

court can conclude that it is in the interest of justice to grant bail. The Appellant's counsel, Mr. Amasakha, submitted that the Appellant was in a critical condition in that he required treatment at Kenyatta National Hospital as the district and provincial hospitals in the area where the Appellant is serving sentence do not have the facility the Appellant requires. It was not the Appellant's position that he intends or would be in a position to pay his way in private health facilities. This being the case, and there being no suggestion that the prison authorities would be unable to ferry the Appellant to the government health facility in Kenyatta National Hospital if need arose, I am unable to find that a case has been made out in which it can be said that there are exceptional or unusual circumstances upon which the court can conclude that it is in the interest of justice to grant bail. I bear in mind that sentences are supposed to be correctional. For these reasons, I am unable to grant bail pending appeal. But it is necessary that the appeal, like all other appeals, is heard with expedition. I direct that the appeal which has now been admitted to hearing be fixed for hearing before Easter next year.

Delivered, dated and signed at Kakamega this 22nd day of November, 2007

G. B. M. KARIUKI

J U D G E