



**REPUBLIC OF KENYA**

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

**Misc Crim Appli 257 of 2006**

*(From original conviction and sentence in Criminal Case No.353 of 2003of the Chief*

*Magistrate’s Court at Nairobi- A. O. Muchelule- CM)*

**JEFFREY KITWAKE WABUGE.....1<sup>ST</sup> APPLICANT**

**JOEL KIPKURUI KOSKEI .....2<sup>ND</sup> APPLICANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**RULING**

**JEFFREY KITWAKE WABUGE** and **JOEL KIPKURUI KOSKEI**, hereinafter referred to as the Applicants seek to be admitted to bail or bond pending the hearing and determining of their Criminal Appeal numbers 230 of 2006 and 231 of 2006 that they have filed respectively. The two Applications for bail pending the haring of the above Appeals of the parties as they arose from the same Criminal Case in the subordinate Court. The main ground argued by the Counsels for the Applicants in both the supporting Affidavits to the Applications in their oral submissions was that e Appeals filed had overwhelming chances for the first Applicant contended that the sentence imposed on the Applicant in respect of count 1 was unlawful. That although the Applicant had been charged with attempted theft he was nonetheless sentenced as though he had been convicted for the offence envisaged for the offence attempted theft is half of that permitted for the offence of theft. According to the Leaned Counsel therefore the Applicant should have been sentenced to a maximum of 18 months and not 24 months imprisonment.

With regard to count II, Learned Counsel submitted that the trial Magistrate amended the charge sheet in the course of writing the Judgment when he stated that:-

“.....Both Certificates 180527 (for Elgon Properties Company) and 180524 (Elgon Development Company) are dated 11. 4. 91 are false documents. Count 3 reads Elgon Properties Company **but should be Elgon Development Company** (emphasize mine). That amendment prejudiced the Appellants case and was uncalled for. Learned Counsel further submitted that the Learned trial Magistrate admitted secondary evidence without the Prosecution laying the basis for such admission. That on Appeal Counsel will be arguing that the Learned trial Magistrate relied on extraneous matters in convicting the Applicant and that the ingredients of the offences charges were not met by the Prosecution. Counsel further submitted the entire evidence of the defence was to considered although the Applicant gave a sworn statement of defence on which he was not cross-examined at all. Counsel further pointed out that at the hearing of the Appeal, the Applicant shall be conceding that the sentence imposed was ahrsh and excessive.

At a more general level, Counsel contended that it was unlikely that the Appeal would be heard soon and given that the Applicant was sentenced to 24 months jail in count 1 and 12 months in respect of count II both sentences to run concurrently the Applicant is likely to have served the entire period by the time the Appeal comes up for hearing, in which case the appeal will have been rendered nugatory. Counsel further submitted that the Applicant had been of good conduct throughout the trial in the subordinate. It was unlikely to abscond if granted bail finally Counsel submitted that the Applicant takes care of his immediate family and widowed mother. To Counsel these were unusual and exceptional circumstances that should tilt the counts in favour of granting the Application Counsel relied on the following authorities in support of the entire Application.

(i). **DOMINIC KARANJA VS REPUBLIC (1986) KLR 612**

(ii). **SOLO VS REPUBLIC (1972) EA 476 AND**

(iii). **JIVRAJ SHAH VS REPUBLIC (1986) KLR 605**

I have carefully read and considered the aforesaid authorities in determining this Application.

On his part, Mr. Ong'anda, Counsel for the 2<sup>nd</sup> Applicant first associated himself with the submissions of Counsel of the 1<sup>st</sup> Applicant. He however added that the offence of attempted theft was not proved by the Prosecution. In offences of this nature there must be intention to commit the offence and then the Act. In the instant case, Counsel submitted the trial Magistrate merely relied on the act itself without reverting to the intention. The Applicant is an Advocate of this Court and was involved in the transaction that led to the Criminal charges in his capacity as an Advocate. His involvement in the matter was pursuant to the discharge of his calling, Mr. Ong'anda submitted. Counsel further submitted that the Applicant stated as much in his defence but the Learned trial Magistrate never took that defence into account.

In support of his submissions, Counsel relied on the same authorities as the 1<sup>st</sup> Applicant's the only addition being **MUSA S/O SAIDI VS REPUBLIC (1962) EA 454.**

Mr. Kaigai, Learned State Counsel appeared for the state. He opposed the Application in respect of the 1<sup>st</sup> Applicant. He contended that the 1<sup>st</sup> Applicant's Appeal had very slim chances of success. That his conduct of concealing his true identity and adopting the issue of an alias clearly indicated that he intended to commit the offence. That there was no doubt that he was the one who instructed the 2<sup>nd</sup> Applicant and provide the documents that supported his claim against the Central bank of Kenya.

With regard to the 2<sup>nd</sup> Applicant, he conceded to the Application. He submitted that his Appeal had high chances of success. That in all his transaction with Central bank of Kenya, the Applicant never concealed his identity. He was acting as an Advocate to the co-Applicant and that he write the demand letter in furtherance of his client's instructions.

This being an Application for bail pending the hearing and determination of the Appeal, I have no intention of pre-empting the possible outcome of the Appeal by engaging in detailed and exhaustive re-evaluation and analysis of the evidence tendered during the trial so as to reach the decision whether the Application should be allowed. Suffice to say that I have glanced through the record of proceedings. I have also perused the petitions of Appeal filed herein in by the Applicants. I have also considered the length submissions of Learned Counsel for the Applicants and the State's response. The principles upon which the Court acts on Application of this nature are well settled now. The Applicant must demonstrate to the satisfaction of the Court that he has filed the Appeal, two, that the Appeal as filed has overwhelming chances of success and three, that there were exceptional or unusual circumstances pertaining to the Appeal. See **DOMINIC KARANJA VS REPUBLIC, SOMO VS REPUBLIC, JIVRAJ SHAH VS REPUBLIC (Supra)**

On the material before me, I have no doubt at all that the Applicant's Appeals are arguable whether the

sentence of 24 months imposed for the offence of attempted theft is legal is certainly a contestable matter. There is also the issue of the trial Magistrate amending certain aspects of writing the Judgement. Whether such action is permissible or lawful is certainly a contestable matter. There is also the issue of the trial Magistrate amending certain aspects of the charge sheet in the course of writing the Judgement. Whether such action is permissible or lawful is certainly a matter that shall be canvassed during the Appeal. It is certainly not a frivolous issue. Then there is the issue as to whether the ingredients of the offence of attempted theft were met. See **MUSSA S/O SAIDI VS REPUBLIC (SUPRA)**.

I also take into account the fact that though the Appeals have been filed, they are not likely to be heard very soon. I am aware that the mere fact of delay in hearing an Appeal is not in itself an exceptional circumstance. However it is not an issue that cannot be ignored. The Applicant's having been entered to 24 months imprisonment with remission they are likely to serve lesser sentence, say 16 months. Most likely by the time their Appeal come up for hearing, they are likely to have served the term or a substantial portion of it. It has been held that the good character of the Applicant may, for example, together with the delay in hearing the Appeal constitute an exceptional circumstance. Counsel of the 1<sup>st</sup> Applicant submitted that the Applicant demonstrated good character during the hearing of the case in the trial Court. This submission was not rebutted by the Learned State Counsel. The State Counsel. The State Counsel only opposed the Application with regard to the 1<sup>st</sup> Applicant on the basis that his Appeal has slim chances of success because of his conduct of concealing his identity and adopting the issue of an alias indicated that he intended to commit the offence. In my view this is a contentious issue that should be left to be dealt with or canvassed during the Appeal. I will say no more.

In the end then I am satisfied that the Applicant's have succeeded showing of their Appeals succeeding and that consequently there was no justification for depriving them of their liberty. Accordingly I would admit them to bail pending the hearing and determination of their Appeals.

Each Applicant shall be released on a bond of Kshs.20,000,000 with sureties of similar amount. Upon release the Applicants shall be attending the mention of their Appeals every after ninety (90) days before the Deputy Registrar of this Court until the Appeals are heard and determined. The first of such mention shall be on 22. 9. 2006.

Dated at Nairobi this 23<sup>rd</sup> day of June, 2006.

.....

**MAKHANDIA**

**JUDGE**