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

Crim Appli 380 of 2006

JOSEPH KHAFELI HALIANYA …….....……
APPLICANT

VERSUS

REPUBLIC …….....……...RESPONDENT

R U L I N G

The Applicant herein has, through Counsel, **Mr. Wamwayi** applied for bail pending the hearing and disposal of his appeal, **HCCC No.366 of 2006**. In his chamber summons application dated 18.7.2006 he seeks a second prayer which is that his said appeal be heard on a priority basis.

The grounds for the application are set out on the face of the Chamber Summons and are three:-

1. That the appeal has an overwhelming chance of success.

2. That it may be rendered nugatory if it is not heard on a priority basis.

3. That the applicant is serving an illegal sentence.

The Respondent was represented by **Miss. Konuche**, State Counsel and she opposed the application.

Counsel for the Applicant submitted that the Applicant was convicted on the 3rd July 2006 for a charge of failing to prevent a felony and jailed for 3 years. Counsel submitted that the offence was a misdemeanour and therefore 3 years imprisonment was an illegal sentence. That the hearing of appeal may delay rendering the appeal nugatory.

Miss Konuche for the State submitted that even if the sentence was not legal, the Applicant may not have served the entire sentence by the time the appeal was heard. Counsel submitted that the Applicant had not demonstrated that there was an anticipated delay in the hearing of the appeal.

The other ground argued by the Applicant's advocate was that there were high chances that the appeal would succeed. Counsel submitted that the learned trial magistrate had not entered any finding on charges of theft which the Applicant also faced. Counsel further submitted that the learned trial magistrate failed to evaluate the evidence adduced in Court before entering a conviction and further that the court based the conviction on a balance of probabilities.

Learned Counsel for the State opposed the Applicant's submission stating that contrary to the Applicant's submission, the court had analyzed the evidence. Counsel submitted that there was strong evidence adduced against the applicant and therefore the application for bail was not justified. Counsel relied on the case of **Njenga vs. Reginam [1954] 21 EALR 399** on the issue of failure to enter convictions on alternative counts.

I have considered the Applicant's grounds in support of the application, the affidavit sworn in support of this application, submissions by both Counsels and the petition of appeal and proceedings and judgment of the Court which are annexed to this application.

The Applicant was convicted for the alternative counts of **failing to prevent a felony** contrary to **Section 392** of **Penal Code**. These two counts of failing to prevent a felony were alternative counts to those of **theft of motor vehicle** contrary to **Section 278(A**) of **Penal Code.** The learned trial magistrate entered convictions for the alternative counts. The Judgment is silent on the principle charges of theft and it was the basis of the Applicant's advocate's submission that there was no finding entered on those main counts. **Miss Konuche** has given a very important precedent on the issue **WACHIRA NJENGA vs. REGINAM** (supra) where it was held by the Court of Appeal for Eastern Africa thus:-

"***5. where there are alternative counts and a conviction is recorded on one, a verdict should not be given on the other."***

That holding is not only binding on this Court but is the guiding principle or rule on this issue. Where an accused person is charged with two counts one of which is an alternative charge to the other or principle charge, if a conviction is entered on the one count, then no finding should be entered on the other charge, whether principle or alternative. The learned judges gave the reason for that rule in the above cited case which simply put is the fact that it gives the appellate court room to substitute a conviction for the other count which it would not do if an acquittal was recorded. The learned trial magistrate entered no finding on the principle counts which was the correct thing to do even though I believe she went about it improperly. I leave that for the appellate court to deal with.

I would also not wish to go into the manner in which the judgment was written as I believe it as a matter for the appeal court to decide and at the same time determine whether it prejudiced the Applicant and with what result.

As to the sentence, **Section 292** of **Penal Code** does not give any punishment for the charge. However the general punishment for a misdemeanor where none is provided within the section creating the offence, is provided under **Section 36** of the Penal Code. It is given as "**punishable with imprisonment for a term not exceeding two years or with a fine or both."** The sentence of three years imprisonment in the instant case was therefore excessive and illegal. However, this court has discretion not to grant bail pending the hearing of the appeal and of course with reason. I will get back to that later.

The ground argued was that the appeal had overwhelming chance of success due to the fact that the learned trial magistrate failed to evaluate the evidence. That ground is potent for ventilation in the appeal but not as a ground to grant bail pending appeal. The only other ground which could serve as a good ground to support the application is the issue of delay in the hearing of the appeal itself. I am in touch with the Registry and am aware that this appeal will be heard within the next High Court term if not in the current one. There is no chance that any substantive part of the sentence will be served before the appeal is heard. The appeal will not be rendered nugatory. I am not satisfied that there is an overwhelming chance that the appeal against conviction will succeed, and given the fact the issue of sentence can be handled within the appeal before any substantive part is served, I find that the application for bail pending appeal ought to fail. I dismiss the application on these grounds.

Dated at Nairobi this 20th day of September 2006

J. LESIIT

JUDGE

Ruling read and delivered in presence of:

Applicant absent

Miss Konuche for State – Miss Wafula for State

No appearance for advocate for Applicant

Tabitha CC

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LESIIT, J.

JUDGE