



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

Misc Crim Appli 246 of 2005

GABRIEL GATHOGO GITHIGA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH Misc Crim Appli 247 of 2005

CHARLES MBINDYO NZIOKA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

The Applications by **GABRIEL GATHOGO GITHIGA** and **CHARLES MBINDYO NZIOKA** have been consolidated. They both apply for bail pending the hearing and determination of their appeals. They both also asked court to make further orders as they may be just and expedient. The 2nd Applicant also asks the court to stay execution of the sentence imposed by the lower Court pending the hearing of the Appeal.

On the face of the Chamber Summons Application by the Applicant **GITHIGA** (1st Applicant) his Application is grounded on three grounds.

1. That the Appeal has an overwhelming chance of success.
2. That the Applicant is sick and suffering from diabetes mellitus and his family needs him to take care of them.
3. The Applicant shall comply with bail terms.

There are no grounds cited in the 2nd Applicant's Application. In the submissions of **MR. NYABERI** on behalf of the 1st Applicant he submitted that the Applicant has since taken ill while in prison and was admitted at Mbagathi hospital between 25th April and 5th May 2005. He submitted that the 1st Applicant still suffers in prison. He relied on medical documents annexed to the supporting affidavit. I have considered the said affidavit with all its annexures.

The 2nd Applicant's advocate was **MR. KANGAHI**. The said advocate submitted that the Application

was based on the grounds that the appeal had high chances of success. He submitted that no evidence was adduced in support of counts 1, 2 and 3 since those who testified in respect of the said counts did not know the 2nd Applicant. In respect of counts 4 and 5, **MR. KANGAHI** submitted that the learned trial magistrate relied entirely on the evidence by PW8 who was the document examiner. He submitted in essence that the trial court did not handle the evidence of the document examiner as required by law.

MISS OKUMU for the State opposed the Application. She submitted that in regard to the Application by the Applicant's ill health per se would not constitute an exceptional circumstance as relied on **Karanja vs. Republic 1986 KLR 612.**

On the side of the 2nd Applicant, **MISS OKUMU** submitted that there were no overwhelming chances that the appeal would succeed. She also submitted that the evidence was sufficient to prove that the 2nd Applicant was one of those who wrote the cheque. **MISS OKUMU** also submitted that the evidence was corroborated by PW4 and PW5 who positively identified the 2nd Applicant on identification parade. **MISS OKUMU** further submitted that the envelopes in issue were addressed by the 2nd Applicant and that there was sufficient evidence against the two Applicants.

I have considered these Applications together with the supporting affidavits, the annexures thereto and submissions made by all sides. I have also had occasion to peruse the record of the proceedings of the trial court. The issues that a Court should consider in an Application for bail or bond pending appeal are now well settled. The most important issue is whether the appeal has overwhelming chances of success. The criteria always is that if the appeal has such an overwhelming chance of success, there would be no justification to deprive the Applicant of his liberty. The 2nd Applicant has based his Application solely on this ground. He has through counsel also contended that the basis of his conviction, at least in some counts (charges) was the evidence of the document evidence. He argued that the Court did not handle that evidence as required in law. **MISS OKUMU** did not agree with that contention.

Having perused the record of the trial Court I do agree that the appeal is arguable. The directions or otherwise taken by the learned trial magistrate will also be issues that the appellate Court will consider at length. At this stage however, this Court is only entitled to grant the application if it is satisfied, at a glance as opposed to studious minute examination that the chances of the Appeal succeeding are high. I am unable to arrive at such a finding after perusing the record. The chances of the Application succeeding cannot be described as apparent and overwhelming. As such the Application cannot succeed on that ground. On the ground argued by the 1st Applicant, I agree with the second holding in **Karanja vs. Republic 1986 KLR 612** cited by the learned counsel for the State. In fact I agree with all the holdings in that authority. The 1st Applicant's ill health should be taken in isolation from the key issue of success of the appeal. Taking it into consideration against the first issue, I find that no exceptional or unusual factors are demonstrated to warrant this Court to grant the prayers sought. That is especially so when it is on record that the 1st Applicant has been accorded the necessary medical treatment while in prison. The mere fact that it is not as good as he would get if he were a free man is only an inconvenience and not a ticket to earn him bond or bail pending his appeal.

Having considered both Applications I find that they must both fail.

I dismiss the applications accordingly.

Dated at Nairobi this 9th day of June 2005.

LESIT, J.

JUDGE

