

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION**

MISC CRIMI APPLI 378 OF 2005

LUCY NJERI NENEAPPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

This is an Application for bail pending the hearing and determination of the Appeal. It is expressed to be brought under Section 357 of the Criminal Procedure Code. The Appellant was convicted on 4th May, 2005 and sentenced to a jail term of 1 year for being in possession of Chang'aa contrary to Section 3 (1) of the Chang'aa Prohibition Act, Cap 70 of the Laws of Kenya. The Applicant being aggrieved by the conviction and sentence has lodged an Appeal being Criminal Appeal Number 317 of 2005 which is pending hearing before this Court. In support of the Application the Applicant has deponed that the Appeal raises serious issues of Law and fact and has high chances of success. Further the Applicant depones that she is a sick woman suffering from mental condition called Manic Deprive Psychosis. That she is a single mother of 3 school going children who do not have anybody to take care of them. Finally, the Applicant depones that she is ready and willing to abide with any conditions that may be set by this Honourable Court when granting her bail pending Appeal and that she will not abscond. In his oral submissions in support of the Application, Mr. Mburu, Learned Counsel for the Applicant submitted that the Appeal has overwhelming chances of success. That from the proceedings it would appear that the exhibits were not recovered from the Applicant. They were obtained from a locked room, which was not her house. Counsel further submitted that the custodial sentence imposed was excessive considering that she was a first offender, a single mother of 3 and her medical condition.

Mrs. Gakobo, Learned State Counsel opposed the Application. She submitted that the Appeal had no chance of success at all. That the evidence on record showed that the Chang'aa was retrieved from a bar owned by the Applicant. Indeed the Applicant opened the door to the premises. As regards her mental condition, Counsel submitted that this was not an exceptional circumstance. That the records show that her condition is manageable and that prison facilities are available to take care of the condition. On sentence, Counsel submitted that the Applicant was sentenced to 1 year imprisonment whereas the offence carries a maximum sentence of 2 years and fine of Kshs.10,000/- or both. The Court did not therefore act on wrong principles in sentencing the Applicant.

The principles upon which this Court acts in determining whether to grant bail pending Appeal are I think now well settled., In the case of **DOMINIC KARANJA VS REPUBLIC (1986) KLR 612**, the Court of Appeal stated as follows:-

“The most important issue was that if the Appeal had such overwhelming chances of success, there was no justification for depriving the Applicant of his liberty and the minor relevant considerations would be whether there were exceptional circumstances. The previous good character of the Applicant and the hardships, if any facing his family were not exceptional or unusual factors. A solemn assertion by the Applicant that he will not abscond if released, even if supported by sureties is not sufficient ground for releasing a convicted person on bail pending Appeal.”

The above holdings would seem to answer the Applicant's submissions as regards her medical

condition, that she is a single mother of 3 children; that she is willing to abide by any conditions that may be imposed by Court while granting bail or that she will not abscond if admitted to bail pending Appeal.

As I have had occasion to state in the past, an Applicant's ailment cannot be construed as a special reason that could by itself, justify the grant of bail pending Appeal. If the ailment were to be so construed then most people who are convicted would automatically be granted bail, as I am aware that the most common Complaint of most convict's in this sought of Application is illhealth. I agree with the Learned State Counsel that the Applicant's mental condition is manageable and can be redressed through prison medical facilities.

Does the Applicant's Appeal however stand overwhelming chances of success? Having carefully studied the proceedings of the Lower Court and without pre-empting or pre-judging the possible success or otherwise of the pending Appeal, I am nonetheless of the considered view that the Applicant may have an uphill task in overturning the conviction having regard to the mode of recovery of the exhibits. Similarly the sentence imposed was legal and cannot be faulted. For these reasons, I decline to admit the Applicant to bail pending Appeal with the consequence that the Application dated 13th July, 2005 is dismissed.

Dated at Nairobi this 19th, September, 2005.

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M. S. A. MAKHANDIA

JUDGE