

REPUBLIC OF KENYA

Geofrey Karanja Wainaina v Republic

**High Court, at Kericho
February 26, 2004**

Musinga Ag J

Criminal Miscellaneous No 14 of 2003

February 26, 2004, Musinga Ag J delivered the following Ruling.

The applicant was charged with the offence of shop breaking and committing a felony contrary to section 306 of the Penal Code. He was tried and convicted and sentenced to serve three years imprisonment. At the time of his sentence, he was serving two years imprisonment for a related offence. The trial Magistrate therefore ordered the sentence was to commence after completing the two year jail term aforesaid.

On 31st October 2003 he filed an appeal against conviction and sentence and at the same time he filed an application for admission to bail pending appeal. The applicant's application was supported by an affidavit sworn on 31st October, 2003 by Mr. Julius Mongare Motanya the applicant's Advocate.

Mr. Motanya submitted that the appeal had overwhelming chances of success. He stated further that the applicant's conviction was based on a charge that was not proved by the prosecution witnesses. He further argued that the sentence meted out against the applicant was excessive, harsh and oppressive because it was to run after the applicant completed the two year jail term which was serving at the time of the present conviction.

He also submitted that the applicant was sickly, suffering from ulcers and he could not get suitable treatment in prison.

The Learned state counsel Mr. Koech opposed the said application and submitted that the appeal had no chance of success. He argued that the applicant was properly convicted, having been caught in the very act of shop breaking. He referred the court to the evidence of PW1, PW2 and PW3 which clearly implicated the applicant. He submitted that the applicant's defence was totally rejected by the trial court as being unmeritorious. He further submitted that the sentence imposed on the applicant was lawful because he had been convicted and sentenced earlier for another related offence and there was no basis of urging that the two sentences should have been ordered to run concurrently.

With regard to his state of health, Mr. Koech submitted that there was nothing to suggest that the applicant's health was at stake. In any event, he stated, the applicant was entitled to medical treatment in the prison. He therefore urged the court to dismiss the application.

I have gone through the proceedings and the judgment and considered the submission made by the applicant's learned counsel as well as the reply by the learned state counsel.

The Principles for granting bail pending appeal were set out in the case of **SOMO -vs- REPUBLIC (1972) E.A 476**. The applicant must prove that his appeal has overwhelming chances of success. He also has to show that there exists exceptional or unusual circumstances to justify the grant of bail.

It is not enough for one to merely state that an appeal has overwhelming chances of success, he must show to the appellate court why he believes that to be so. One can do so by pointing out any glaring irregularities or mistakes in law which may be standing out either in the proceedings or in the judgment as would be likely to cause the court to see that the appeal is prima facie well founded and thus has high

chances of success.

The applicant's learned counsel, with respect to him, did not succeed in doing so. I am not persuaded, either by the counsel's submissions or by perusal of the proceedings and the judgment that the applicant's appeal has any chance of success, leave alone an overwhelming one. There are also no special circumstances which exist in this matter so as to justify grant of bail pending appeal. There is also no allegation that if bail is not granted, the sentence will have been served by the time the appeal is heard. The applicant's jail term is long enough to enable his counsel prosecute the appeal.

Regarding the applicant's medical condition, if he is not in good health, there are medical facilities in prison and if for any reason he requires specialised treatment which cannot be availed to him there, he can make an application to be treated else where and the court would consider such an application.

In conclusion, the application for release of the appellant on bail pending the hearing and determination of his appeal is rejected.