**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**
**CRIMINAL APPLICATION NO. 181 OF 2004**

**JOHN RIGII KAGUMA ……. APPLICANT**

**VERSUS**

**REPUBLIC …… RESPONDENT**

**R U L I N G**

This is an application pursuant to the provisions of sections 354, 355, 356 and 357 of The Criminal Procedure code, the Judicature Act, and all other enabling provisions of the law.

As far as I can see, Section 354 sets out the procedure to be adopted at the hearing of an appeal at the High Court. As this application is for the appellant to be admitted to a bail pending the hearing and determination of his appeal, I do not see the relevance of section 354.

The next section cited by the applicant as the basis for his application is section 355, which basically stipulates that when a case is decided on appeal by the High Court, it shall certify its judgment or order to the court by which the conviction, sentence or order appealed against was recorded or passed. In my understanding this section spells out the steps to be taken as and when a case is decided on appeal by the High Court. To my understanding, the section cannot be the foundation for an application for an appellant to be admitted to bail pending the hearing and determination of his appeal.

Section 356 applies to persons who were applying for bail or stay of execution pending the entering of an appeal. From my reading of the record before me, the appellant filed his Petition of Appeal on 2nd April 2004. The said appeal had not yet been admitted to hearing, as at the date when this application was canvassed before me, on 14th April 2004. It would therefore follow that this is the proper provision under which the application could be made.

But the appellant has nonetheless cited section 357 of the Criminal Procedure Code, The judicature Act. The High Court Rules, and All other enabling provisions of law.

A reading of section 357 of the Criminal Procedure Code reveals that it is available to an appellant who wishes to be admitted to bail pending appeal, after the entering of the appeal. In effect, if an appeal has not yet been admitted to hearing, the provisions of section of 357 would not come into play. On the other hand if an appeal had been entered for hearing, section 356 would no longer be applicable. Therefore, it follows that the provisions of sections 356 and 357 cannot be relied upon in one application.

The citation of the Judicature Act, The High Court Rules, and All Other Enabling Provisions of Law, is to my mind the action of someone who is desperate, yet not focused.

Desperate, because it smacks of an attempt to grasp at any reeds that may come the way of the applicant. Not focused, because if there were provisions in the Judicature Act, the High Court Rules or All Other Enabling Provisions of Law, the applicant's counsel ought find them, and specify them. By telling the court the specific provisions of statute governing an application, the applicant helps both himself and the court in advancing the course of justice. I say so because, after identifying the applicable provision of law, the applicant will strive to illustrate how his client's case fits the various requirements stipulated in the particular provisions(s). On its part, the court too would concentrate its attention on ascertaining whether or not the applicant had satisfied the requirements for the grant of the orders sought, under the specified provisions.

I believe that is about time that counsel are reminded that they do not gain any advantage by appearing to cast their nets far and wide, to catch such "fish" and "All other enabling provisions of Law, or whole statutes, without specifying particular sections or parts thereof.

In this case, Mr. J. Kimanthi, advocate submitted that the appellant ought to be admitted to bail pending the hearing of this appeal, on the grounds that the applicant is a person of an advanced age. The said applicant is 75 yeas old. Due to his age, it is contended that the applicant's continued stay in prison will expose his life to real danger. I was informed that the applicant's health had deteriorated since his conviction on 25th March 2004. In support of this assertion, that the applicant's health had deteriorated, his "2nd wife", Anne Nduta Chege, swore an affidavit. In the said affidavit Anne Chege states that the applicant's health had deteriorated to the extent that he was not able to recognize anybody.

The deterioration in the applicant's health is said to be a far cry from his state of health during the trial period, when the applicant was out on bond. And the court was informed that during the trial the applicant who was out on a 50,000/- bond, never failed to attend court. It is also said that he always complied with the terms of bond. For those reasons, the applicant's 2nd wife says that the applicant will dutifully attend court, if he is admitted to bail.

The court was also reminded that the applicant has two families, that of his first wife, who was the complainant, and that of his second wife. These facts were cited as reason enough why the applicant would have no reason to abscond, if he was released on bail pending appeal.

The other factor that was brought into play is the fact that although the applicant's ignorance of the law is no defence, the court ought nonetheless to take into account the fact that the offence for which the applicant was convicted was more of a civil than criminal nature. In support of his application, the applicant cited the authority of Raghbir Singh Lamba V Republic [1958] E A 337. That case held that the principle to be applied was that bail pending appeal should only be granted for exceptional and unusual reasons. Applying the said principle to this case, counsel says that the advanced age of the applicant is the exceptional reason. He also submitted that the appeal against sentence had an overwhelming chance of success.

Finally, the applicant stated that he would be willing to deposit any security as the court may direct. He emphasized that he was definitely going to make himself available at the hearing of the appeal, if he is released on bail.

In response to the application, the Respondent mounted a vigorous opposition. Learned state counsel Miss L.A. Okumu first submitted that Mrs. Ann Nduta Chege had absolutely no locus to swear the affidavit in support of the application. It is to be recalled that Mrs. Chege is the "2nd wife" to the applicant. The charges against the applicant emanated from the fact that he had contracted a ceremony of marriage with the said Anne Chege, whilst he knew that he had a living wife, Jane Frances Wanjiku.

Notwithstanding that fact, the respondent asserts that Anne Chege did not have locus to swear the affidavit. The basis for that submission was said to be the provisions of section 77 (2) (d) of the (Constitution of Kenya. The said section provides as follows;

> "Every person who is charged with a criminal offence – ……

(d) shall be permitted to defend himself before the court in person or by a legal representative of his own choice".

It is the respondent's contention that this section enables only the person charged or his advocate to swear an affidavit to support an application such as the one before me. When I sought legal authority for that contention, the respondent had none. However, the respondent submitted that by swearing the affidavit in support of the present application, Mrs. Anne Chege was flouting the afore-cited legal provisions. In answer to that contention, the applicant explained that the term "legal representative", as used in Section 77 (2) (d) of the Constitution extends to cover the members of the family, of the person charged. He said that by virtue of being the Applicant's wife, by itself, gave locus to Mrs. Anne Chege to swear the affidavit. However, when I asked Mr. Kimanthi advocate how, in law, the fact of being the applicant's wife made her his legal representative, he did not offer any explanation. To my mind, the fact that a lady was the wife of an applicant would not make her the legal representative of such an applicant. The term "legal representative" is not a meaningless phrase. In different circumstances, it has very specific meanings. For instance, in relation to Probate and Administration matters, the term means that person to whom the court has granted the requisite authority. Under the Civil Procedure Act, the phrase "legal representative" means a person who, in law, represents the estate of the deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or being sued. I believe that the use of the term "legal representative" in section 77 (2) (d) of the Constitution o Kenya is not to be understood in the manner in which it is defined in the Civil Procedures Act. To my mind the term as used in section 77 (2) (d) must be intended to mean the applicant's advocate. Therefore, the said phrase cannot extend to cover members of the applicant's family, as suggested by the applicant's counsel.

Having said so, does that mean that the deponent did not have locus, as submitted by the respondent? Should I therefore strike out the affidavit? Whereas, the applicant's wife could not be construed as his "legal representative" as defined above, I nonetheless think that the objection to the affidavit is not well founded. My considered view is that by swearing an affidavit to support the present application, Mrs. Anne Chege was not arrogating to herself the role of the applicant's advocate. She was only trying to put evidence before the court to support the application. I do not therefore find any issue as to her locus, when she was no more than a witness. In the case of Mundia Vs Republic [1986] KLR 623 Tanui J. handled an application for bail pending appeal. One of the pieces of evidence that was placed before him, in support of the application was a medical certificate issued by Dr. Mngola.

Although the application was refused by the court, the evidence of Dr Mngola was taken into consideration. I thefore find that the affidavit of Mrs. Anne Chege is properly before the court, and will thus be given due consideration in the course of this Ruling.

The next ground for opposing the application was that the applicant had failed to show that his appeal had overwhelming chances of success. The respondent noted that the applicant's counsel had conceded that the applicant had 2 wives. This concession is further verified by the affidavit of Anne Nduta Chege, in which she describes herself as "the second wife of the Appellant/Applicant".

In the light of these admissions, the respondent contends that the appeal against conviction would have absolutely no chances of success. But that assessment is not only founded on the material before this court. It is also supported by the evidence adduced at the trial, which showed that at the time when the appellant went through a ceremony of marriage with Anne Nduta Chege, he (the applicant) had a living wife, Jane Frances Wanjiku, with whom he had celebrated a monogamous marriage, on 2nd July 1960. To that extent, the court accepts the respondent's submission.

But I must pause hear to ask whether the deposition by Anne Nduta Chege, that she is the applicant's second wife, is an accurate statement of law. I deem it necessary to pose this question because not only did Anne Nduta Chege term herself as the "second wife"; her advocate and the respondent both also reiterated the same understanding. However, I believe that the correct position must be that Anne Nduta Chege is not, legally, the wife of the applicant. She could not have become the applicant's wife because as at the time when she and the applicant went through the ceremony of marriage, the applicant did not

have legal capacity to marry. He had already contracted a monogamous marriage with Jane Frances Wanjiku in 1960. That marriage to Jane Frances Wanjiku had not been annulled, and the two parties to the marital union were both alive.

It is to be noted that the offence of Bigamy is defined at section 171 of the Penal Code, in the following terms;

> "Any person who, having a husband or wife living, goes through a ceremony of marriage which is void by reason of its taking place during the life of the husband or wife, is guilty of a felony and is liable to imprisonment for five years:
>
> Provided that this section shall not extend to any person whose marriage with the husband or wife has been declared void by a court of competent jurisdiction, nor to any person who contracts a marriage during the life of a former husband or wife if the husband or wife, at the time of the subsequent marriage, has been continually absent from such person for the space of seven years, and has not been heard of by such person as being alive within that time".

The ceremony between the applicant and Anne Nduta Chege was therefore void, pursuant to the provisions of section 171 of the Penal Code. It could not confer on Anne Nduta Chege the title of "wife".

Moving on now to the third ground upon which the application is opposed, the learned state counsel submitted that the offence was definitely of a criminal nature, as it was spelt out in the Penal Code. However, I do not think that just because an offence is spelt out in the Penal Code would render it incapable of being described as being more of a civil, than criminal nature. If is first recognized that unless an offence was clothed with criminality through legislation, it would not be a criminal offence. But on the other hand, there are some criminal offences which are often termed as "technical" e.g. failure to remit levies; some are described as "economic crimes", or "offences against the person" etc. To my mind, a criminal offence is capable of being described as being more of a civil than criminal nature. The description does not undo the tag of criminality pinned to the offence. It is perhaps more descriptive of the probable state of mind of the offender, at the time when he was committing the offence and also the perception of the society to the offence itself. I do take judicial notice of the fact that in the Kenyan society, it seems to be widely accepted that a man who has contracted a monogamous marriage may "marry" another wife. I say that it seems to be widely accepted because, provided that the man continues to look after both or all his wives properly, society hardly ever frowns at the said man. This example is in sharp contrast to a robber, murderer, child snatcher etc. However, even though the society may not frown upon such a union of the man who marries more wives than permitted by law, the said man would, in law, be liable to prosecution for bigamy.

The fourth ground for opposing the application was that there was no medical evidence to support the claim that the applicant's health had deteriorated. It was the respondent's contention that evidence of ailment would only be admissible if it emanated from a doctor. Whilst this court accepts that the best evidence in relation to matters of ill-health is that given by doctors or other persons with medical qualification, it would be wrong to make a hard and fast rule that evidence by any non-medical person would be worthless. Every case must be assessed on its own merits. There would be instances wherein the court may even reject the evidence of doctors; whilst, on the other hand, the court may in some circumstances accept the evidence of a person unqualified in medicine.

In the case before me, Anne Nduta Chege deponed that the applicant was ailing at the time of his conviction. She also states that since the applicant was sentenced, she had visited the applicant in prison, and had found that his health had deteriorated, to the extent that he was not able to recognize anybody. The observations made by Anne Nduta Chege, regarding the applicant's health, would not, in my view require a doctor to recognize. If the applicant had deteriorated in health and was not recognising people, Anne Nduta Chege should be able to know. From the evidence on record, she had lived with the applicant for many years. First she stayed at his home, whilst working as the house-help to Mukami Rigii, the applicant's daughter. Her said employment commenced in 1991. Thereafter, she started living with the applicant in a rented house, from 1995. In those circumstances, I have no reason to doubt Anne Nduta

Chege's assessment of the applicant's ill-health.

In the case of Dominic Karanja V Republic [1986] KLR 612 the Court of Appeal gave due consideration to the principles applicable to the grant or denial of bail pending appeal. And first, I must say that their Lordships explained that they had the same authority and jurisdiction as that of the High Court in relation to applications for bail pending appeal. Having given that explanation, the Court of Appeal set down the following principles, at page 613

> "The most important issue here is if the appeal has such overwhelming chances of success that there is no justification for depriving the applicant his liberty. The minor relevant considerations would be whether there are exceptional or unusual circumstances. The previous good character of the applicant and the hardship, if any, facing the wife and children of the applicant are not exceptional or unusual factors: see Somo V Republic [1972] E A 476. A solemn assertion by an applicant that he will not abscond if he is released is not sufficient ground, even with support of sureties, for releasing a convicted person on bail pending appeal. The applicant was certified to be fit by a doctor on September 23, 1986 and so no issue of ill-health arises.
>
> We are not to be taken to mean that illhealth per se would constitute an exceptional or unusual circumstance in every case. There exist medical facilities for prisoners in the country".

In this case, the applicant is over 75 years old. Clearly, as the trial magistrate observed just before she delivered her sentence, the applicant is well advanced in age. His health is also deteriorating. Already he is not able to recognize people. I therefore believe that his life could be in real danger if he continued to stay in prison. I consider those to be circumstances that are peculiar to this person. Thus whereas ill-health alone may not necessarily constitute exceptional circumstances, I deem the combination of the applicant's age and ill-health to be exceptional. The other peculiarity in this case is the nature of the offence for which the applicant was convicted. It is an offence which has always existed in our statutes, but in respect of which there has been hardly any prosecutions. However, it would be wrong for me to give the impression that the conviction was not well founded. From the evidence on record, I believe that conviction was sound. To that extent, I do not think that there would be any chances of success against conviction. However, bearing in mind the nature of the offence and the circumstances in which it was committed, I hold the view that the sentence of 3 years is probably harsh.

I also have noted that the applicant did not fail at all to attend court during the trial, when he was out on bond. Given the nature of the offence, the age of the applicant and his state of health, I believe that there is little likelihood of his absconding. In these circumstances, I believe that the interests of justice will be best served by admitting the applicant to bail pending appeal. I say so because I hold the considered view that whilst the applicant should be punished for the offence he has committed, he perhaps needs more rehabilitation than condemnation. At any rate, I do not see the need to have to keep him away from society, as I would a rapist, car-jacker or robber.

I therefore order that the applicant may be released on bond pending the hearing and determination of his appeal, on the following conditions:-

(a) The applicant shall execute his own personal bond of Kshs 100,000/-.

(b) The applicant shall provide one Kenyan surety, in the sum of Kshs 100,000/-.

**Delivered at Nairobi this 26th day of April 2004.**

**FRED A. OCHIENG**

**Ag. JUDGE**