REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPL. NO. 534 OF 2004

(Being an Application for bail pending Appeal from the Judgment, Conviction and Sentence (Mr. Aggrey Muchelule, Chief Magistrate) dated 23rd August 2004 in Nairobi Chief Magistrate's Court CriminalCase No. 1013 of 2003)

KETAN SOMAIA………………..………………………………..APPLICANT

VERSUS

REPUBLIC ……………………..………………….………..RESPONDENT

CONSOLIDATED WITH

MISC. CRIMINAL APPL. NO. 535 OF 2004

Being an Application for bail pending Appeal from the Judgment, Conviction and Sentence (Mr. Aggrey Muchelule, Chief Magistrate) dated 23rd August 2004 in Nairobi Chief Magistrate's Court Criminal Case No. 1013 of 2003

JASON WELLINGTONE OLUGA…...………………………..APPLICANT

VERSUS

REPUBLIC ……………………..………………….………..RESPONDENT

RULING ON PRELIMINARY OBJECTION AND ON THE BAIL PENDING APPEAL APPLICATION

The Applicant herein, **KETAN SOMAIA** (hereinafter referred to as the 1st Appellant) and **JASON WELLINGTONE OLUGA** (2nd Applicant) had their Applications consolidated having arisen from the same trial. Both Applicants sought for the same prayers and although argued by **MR. OPIYO** and **MR. ORENGO** separately, for the 1st and 2nd Applicants respectively, shall be considered together.

MISS KAMAU learned State Counsel appeared for the State. The Applications are brought under Section 10 of the Judicature Act and **Section 357 (1)** of the **Criminal Procedure Code**.

Section 10 of the **Judicature Act** provides: -

"10, The Chief Justice may make rules of Court for regulating the practice and procedure of the High Court and subject to any other written law, that of subordinate Courts, and the power to prescribe fees and scales of remuneration."

Section 357(1) of the Criminal Procedure Code provides: -

"357 (1). After the entering of an Application by a person entitled to appeal, the High Court, or the subordinate Court which convicted or sentenced that person, may order that he be released on bail with or without sureties, or, if that person is not released on bail, shall at his request o***rder that the execution of the sentence or order appealed against shall be suspected pending the hearing of his Appeal;***

Provided that, where an application for bail is made to the subordinate Court and is refused by that Court, no further application for bail shall be to the High Court, but a person so refused bail by a subordinate Court may appeal against refusal to the High Court and, notwithstanding anything to the contrary in sections 352 and 359, the appeal shall not be summarily rejected and shall be heard, in accordance with such procedure as may be prescribed, before one judge of the High Court sitting in chambers."

The prayers sought were in pertinent: -

3. THAT the Applicant be released on bail or bond and/or the execution of the sentence be suspended or stayed pending the hearing and determination of High Court Criminal Appeal No. 428 of 2004 and 429 of 2004 lodged herein on the 3rd September 2004.

4. THAT alternatively, there be a stay of execution of the judgment and sentence passed in Nairobi Chief Magistrate's Criminal Case No. 1013 of 2003 pending the hearing and determination of the said High Court Criminal Appeal No. 428 of 2004 and 429 of 2004 lodged herein on the 3rd September 2004

. ***5. THAT the Appellants be at liberty to apply for such further or other orders and/or directions as this Honourable Court may deem fit and just to grant and the Honourable Court makes such further or other orders it deems appropriate in the circumstances.***

The Applications were supported, in respect of the 1st Applicant by the Affidavit of his wife **ALKA SOMAIA** dated 3rd September 2004, and that of his Counsel **JAMES OCHIENG ODOUL** also of the same date, and in respect of the 2nd Applicant, by two affidavits one sworn by **ELIJAH ADUL**, the 2nd Applicant's younger brother dated 3rd September 2004 and the other by **JAMES A. B. ORENGO**, the 2nd Applicant's advocate also dated 3rd September 2004.

The grounds and reasons for the Application are cited on the face of each of the Applications as follows: -

a***) THAT the Applicants on 3rd September 2004 lodged an Appeal to wit High Court Criminal Application Nos. 429 of 2004 and 428 0f 2004 against judgment conviction dated 23rd August 2004 in Nairobi Chief Magistrate's Court CMC case No. 1013 of 2003 and sentence of imprisonment of 2 years.***

b) THAT the Applicants' Appeals raises several issues on the legality of the judgment conviction and sentence dated 23rd August 2004. the Appeal has overwhelming chances or probability of success.

c) THAT the Applicants' Appeals have overwhelming chances or probability of success as the conviction is based on no evidence at all.

d) THAT if the Applicants succeed on Appeal, they would have suffered a custodial sentence on

a conviction that is based on no evidence at all and whose legality is under challenge.

e) THAT the Appeals stand to be rendered nugatory if the Applicants are not granted bail or bond pending appeal.

f) THAT the Applicant has a medical condition that warrants him to be released on bail or bond.

In respect of the 2nd Applicant further ground;

g) THAT the Applicant is physically challenged and cannot move on his own without a wheelchair and his imprisonment in a facility for the non-challenged amounts to inhuman treatment within the meaning of Section 74(1) of the Constitution of the Republic of Kenya.

When the Application came up for hearing on the 17th September 2004, **MISS KAMAU,** learned Counsel for the State notified the Court that the Respondent had raised a Preliminary Objection, which it was desirous to argue before the Application was heard. **MISS KAMAU** argued the Objection. In the **NOTICE OF PRELIMINARY OBJECTION** dated 9th September 2004 and signed by **MISS KAMAU,** the preliminary objection raised was based on two grounds in pertinent;

1. THAT the Application by Chamber Summons dated 3rd September 2004 is incompetent and bad in law and should be struck out as it offends the provisions of Section 357 (1) of the Criminal Procedure Code.

2. THAT the Application is frivolous, vexatious and an abuse of the process of the Court.

In her submission, **MISS KAMAU** contended that Section 357 (1) of Criminal Procedure Code under which provisions the Applications were brought did not allow for further Applications for bail pending appeal where such an Application had been refused by the lower Court. **MISS KAMAU** submitted that the two Applicants had unsuccessfully made Applications for bail pending appeal before **MR. MUCHELULE**, Chief Magistrate, who convicted and sentenced the Applicants. She submitted that since the lower Court had declined bond, then in such circumstances under the said section of the Law, the Applicants' only option was to appeal to the High Court. **MISS KAMAU** submitted that the provision of Section 357(1) of the Criminal Procedure Code was in mandatory terms and could not be avoided. It was her contentions that in those circumstances the Applications were incompetent and should be dismissed.

MR. ORENGO did not agree with **MISS KAMAU.** He submitted and rightly so, that **Section 357(1)** of the Criminal Procedure Code created several jurisdictions of the High Court. He submitted that the Applicants had brought the Applications not only for bail pending appeal but also for suspension of sentence. **MR. ORENGO** submitted that whereas **Section 357(1)** gave the High Court jurisdiction to grant bail pending Appeal and or to suspend the execution of sentence pending the hearing of an Appeal, the Proviso under the sub-section only touched on bail. I agree with the interpretation of **Section 357(1)** of the Criminal Procedure Code. It provides that once a person entitled to Appeal has entered an appeal, the High Court or the trial Court which convicted him can either;

1. Admit him to bail,

2. Suspend the execution of sentence passed against him.

Such an Application would only be competent after an Appeal has been entered by the convicted person and not before.

I perused the record of the proceedings of the trial Court dated 23rd August 2004. After the learned trial magistrate, **MR. MUCHELULE**, read the sentence in which he committed the Applicants to an imprisonment term of 2 years, **MR. ORENGO** on behalf of the 2nd Applicant herein, and **MR. ONYANGO,** on behalf of the 1st Applicant herein, applied for bail pending appeal invoking the provisions of Section 356 of the Criminal Procedure Code. The Applications were promptly declined.

As at 23rd August 2004, when the Application for bail pending Appeal was made before the trial Court, no Appeal had been entered by the Applicants. The Application before that Court fell under **Section 356** of the **Criminal Procedure Code. Section 356** provides for bail and stay of execution pending the entering of an Appeal. In my understanding, the Applicants having made the initial Application before the trial Court before entering the Appeal were entitled to lodge a fresh Application for bail pending the hearing of the Appeal, before the High Court on condition that they met the requirement under **Section 357(1)** of the **Criminal Procedure Code.**

The basis of my holding that the High Court has jurisdiction to hear a fresh Application for bail pending Appeal and/or suspension of sentence before hearing of the Appeal is fortified by Section 60(1) of the Constitution.

Section 60(1) of the Constitution provides;

> ***"60. (1) There shall be a High Court, which shall be a superior Court of record, and which shall have unlimited or final jurisdiction in Civil and Criminal matters and such other jurisdiction and powers as may be conferred on it by this Constitution or any other law."***

Section 60(1) of the Constitution gives the High Court unlimited original jurisdiction in both civil and criminal matters.Any other written law cannot oust this jurisdiction. In fact **Section 3** of the Constitution declares the Constitution the Supreme law of the land so that where any other law is found to be inconsistent with the Constitution, the Constitution shall prevail and the other law shall to the extent of the inconsistency, be void. In my understanding therefore, even on the basis of the unlimited original jurisdiction of the High Court in Criminal matters, this Court has power to entertain the Application before it, whether or not other similar Applications had been made before in the lower Court.

In my understanding the Law, The Constitution gives the High Court inherent jurisdiction to hear a fresh application for bail even where that person had unsuccessfully made the application before the lower Court. Such an Applicant could also opt to appeal against the lower Court's decision to deny bail under **Section 357(1)** of the Criminal Procedure Code.

If, for any reason my finding is wrong, which I believe is not; the Applicants have annexed their petition of Appeal to this Application and have submitted that indeed they had also invoked the High Court's jurisdiction on Appeal, by appealing against the Chief Magistrate's decision to grant bail pending Appeal.

I have considered the authorities cited by the Applicants' advocate particularly **MR. ORENGO.** These authorities demonstrate the frustration of Applicants, and sometimes Courts in circumstances such as prevail in this case, in deciding on the proper procedure to follow, whether to make a fresh Application for bail or to Appeal against the decision by the lower Court to decline to grant bail pending the entering of an Appeal or before Appeal. In that regard, I find the decision of **MULI, J.** as he then was in **MOTICHAND vs. REPUBLIC 1972 E.A. 399** quite persuasive and I adopt its findings on that issue.

This Court dismissed the Preliminary Objection raised by the Respondent on the basis of the reasons given hereinabove. Having ruled against the Preliminary Objection, I proceeded to hear the main Application for bail pending Appeal and or suspension of the execution of sentence.

Turning now to the main Application, I will start by commending all the Counsels who argued this Application before me for their great insight in the matter, their preparedness, their display of a deep knowledge and understanding of the issues involved and their great effort in assisting not only their clients but also the Court.

I have already set out, in this ruling, the basis and reasons for the Applications as contained on the face of the Applications. I will deal with each ground as argued by the Counsels.

MR. ORENGO submitted that there exists unusual and exceptional circumstances which, if

considered together with the Appeals have a probability of success and which would warrant the Applicants being granted bail as prayed. He classified those unusual and exceptional circumstances as follows: -

1. (A) That the Applicants were convicted and sentenced to 2 years imprisonment. That in the circumstances there was a probability that the Applicants will have served a substantial part, if not all, their sentence by the time the Appeal was heard and determined. He gave the following reasons for that preposition: -

(i) That due to the nature of the case, prosecuting the appeal would take a long time.

(ii) That even though the matter was not complex, that there were several grounds of Appeal that would take time to argue from the petition of Appeal annexed to this Application, there is 29 grounds in all.

1. **(B)** The Applicants health. On the part of his client the 2nd Applicant, **MR. ORENGO** submitted that his client was physically challenged and that he suffered from a medical condition that is so grave and adverse that he could not manage the rigors of custodial sentence. He relied on a medical report annexed to **MR. ELIJAH's** supporting Affidavit, made and signed by one **DR. JOSEPH ALUOCH,** a Consultant Physician. In that report, the Doctor discusses the ailments that the 2nd Applicant suffers a severe hypertension, severe arthritis and a victim of Polio. That he had extensive bed sores which had developed by 23rd August 2004, which made him unable to move.

MR. ORENGO continued to submit that due to the state of Kenyan prisons, the lack of any facilities for physically challenged people, the 2nd Applicant had been exposed to indignity and degrading circumstances.

MR. OPIYO also submitted on the 1st Applicant's medical condition which was ably summarized in the Doctors reports. **MR. ORENGO** indicated in passing that due to the medical conditions of both Applicants, both had been admitted in hospital. In the Affidavit of 1st Applicant's wife, **ALKA SOMAIA,** she has deposed that the 1st Applicant was diabetic and needed regular medical attention. Annexed to the Affidavit of **ALKA** is a medical report signed for **DR. M. M. WARSHOW.** In that report signed by **DR. MUSAU** for **DR. WARSHOW,** the doctor states that the 1st Applicant has severe Type II Diabetes Mellitus, hypertension, high cholesterol and recurrent attacks of gout.

On the issue of the Applicant's health **MISS KAMAU** submitted that, that alone could not be a ground on which to grant bail. She submitted that both Applicants could get treatment in prison where necessary**. MISS KAMAU** relied on the case of **NGUI vs. REPUBLIC 1985 KLR 268.** That case is not applicable to this case since it dealt with the issue of grant of bail to an accused person who was facing capital offence, which rendered the accused ineligible for bail.

Many authorities have been cited in this matter generally on the grounds raised by the Applicants in support of their Applications. I will highlight some of those, which discuss the test that should be applied in determining what is exceptional or unusual circumstance.

REX vs. KANJI (1946) 22 (1) KLR 17 **LESTANG** Ag. J. then, was of the view that in deciding whether exceptional circumstances exist, the Court is entitled to take into considering the good character of the Appellant coupled with the delay in hearing the Appeal, the fact that the Appeal has been admitted to hearing and the fact that the co-appellant has been released on bail. The test suggested by **LESTANG, J**. if applied to this case would not justify the granting of bail.The Appeal is yet to be admitted to hearing and none of the Applicants, the only ones charged in the lower Court have been granted bail.

As for the delay in the hearing of the Appeal, this in my view does not include a consideration of the length of time that the Appeal will take to be argued and determined as suggested by **MR. ORENGO.** The delay meant, in my view, has to do with the availability of dates for the hearing of the appeal, and whether considering them, the Applicants would have either served a substantial or the entire sentence

imposed. I see no such a happening in this case. The dates for the hearing of the Appeal, if at the end of this ruling the Court rules that the Application fails, will be availed within a reasonable time in the next High Court session.

Arising from **KANJI's** case, it is quite clear that the learned Judge did not consider that the Applicant's previous good character could on its own, support such an Application. I agree entirely with him. That finding was in agreement with **SOMO vs. REPUBLIC 1972, E.A. 476** **by TREVERLY A. N.** Judge **SPRY, Ag. J.** was of the view that neither the complexity of the case nor the good character of the Appellant, nor the alleged hardship of his dependants justify the grant of bail. In his view, those grounds could only be argued together with other grounds for example the probability that the appeal would succeed.

In **CHIMAMBHAI vs. REPUBLIC 1971 E.A. 343** **HARRIS, J.** was of the view that anticipated delay in the hearing of the Appeal could only contribute a good ground of granting bail if taken together with other factors. I have already stated that the issue of delay in hearing of the Appeal is ruled out. Since the Court diary can accommodate the Appeal within a reasonable time, if necessary.

The last two cases I wish to cite on the issue of exceptional and unusual circumstances, one **KARANJA vs. REPUBLIC 1986 KLR 612** and **MUTUA vs. REPUBLIC 1988 KLR 497**. In the **KARANJA's** case, **NYARANGI, PLATT** and **GACHUHI JJA,** were of the view that the Applicants' good character and the hardships, if any, facing his family were not exceptional or unusual factors. That ill health *per se* would also not constitute an exceptional circumstance where there existed medical facilities for prisoners.

It will be noted that **KARANJA's c**ase is a Court of Appeal case and is fairly recent case and binding in this Court. It is the view of the Court of Appeal that ill health per se however severe as the Applicants attempted to demonstrate would not constitute an exceptional or unusual circumstance.

In **MUTUA vs. REPUBLIC 1988 KLR 497, PLATT, APALOO JJA and MASIME Ag. JA** expressed similar views as in Karanja's case. They held: -

> ***"It must be remembered that an Applicant for bail has***
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> ***been convicted by a properly constituted Court and is***
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> ***undergoing punishment because of that conviction which***
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> ***stands until it is set aside on appeal. It is not wise to set the***
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> ***Applicant at liberty either from the point of view of ill health***
>
> ***or the state unless there is a real reason why the Court should do s***o."

Having considered this ground at length, I find that no real reason exists that could justify this Court to grant both Applicants herein bond pending appeal and or the suspension of the execution of their sentences. The reasons advanced in support of this ground cannot stand on their own. They reveal that the Applicants are in poor state of health, and, in the case of the second Applicant, in addition to his poor health, is physically challenged and finds life in prison difficult. However, as revealed in the authorities cited above, the Applicants own welfare or ill health cannot on their own sustain such an Application. Looking at all the medical reports on the Applicants on record, I would say that their complaints of illness have been given due attention by the prison authorities who have availed to them the best medical care to the extent of having them admitted in the best government institution in the country. They have not complained that medical care and or medication have been illusive or inaccessible to them while in prison. The fact of the matter is that they have received the best there is.

The Applicants, through Counsels argued that the ground of exceptional and unusual circumstances

must be considered together with that raised, that the appeal had high chances of success. I agree with that submission. That ground solicited lengthy discussions from both sides of this Application to such an extent that at some point I had to caution the parties that the matter for consideration before me was an Application for bail pending Appeal and or suspension of sentence and not the main Appeal. It is my very sincere belief that in an Application such as the one under consideration, an Appellate Court is not called upon to perform microscopic examination, in minute detail, of the proceedings of the trial Court in order to determine whether or not there are overwhelming chances that the Appeal may succeed. The correct position is that the onus is on the Applicants to demonstrate to the Court that, based on grounds or reasons they should advance, that there exists reasons that would rebut the presumptions which is always against the Appellant after conviction, that a man who has been convicted has been properly convicted until the conviction is set aside by an Appellate Court.At least in **MOTICHAND.V.REP 1972 EA 399, MULI J.** as he then was went on further and declined to be drawn into making any finding on the possible outcome of the pending appeal. He states in part as follows;

"The authorities on the point appear to have established the principle that bear pending an appeal should only be granted on grounds of exceptional special or unusual reasons appearing on the case…. I am not sitting as a Court of appeal to here the Applicants appeal on its merits and consequently I cannot predict the outcome of his appeal. I will say no more than that, having perused the Petition of Appeal and the judgment of that trial magistrate coupled with careful analysis of the submissions of both Counsels, I formed the opinion that the pending appeal may very well have overwhelming probability of success if not probability of success…"

I ascribe to the learned judges view that an Applicant need only demonstrate an overwhelming probability of success but I do not agree with that to prove merely a probability of success is sufficient. The point I am making is that the Court, while considering such an application, should not be turned into a Court of Appeal to decide conclusively on the merit of the Applicants appeal to do so will preempt the Appeal itself an may tempt an Applicant to demonstrate conclusively this point. It would be tantamount to requiring the Court to conclusively determine the appeal on the guise of determing whether factors exist that would justify the granting of bail pending the Appeal. Having said this, I will conclude that point by saying that the Applicants herein took the Court through the entire trial Court proceedings by reading almost word for word whole sections of the record which, in their view demonstrated that the appeal would with certainty succeed.

I have considered the Applicants' submissions at depth and carefully as laid out before me. **Mr. ORENGO** started by stating the Applicants were jointly charged with **STEALING STERLING POUNDS 3,500,000** between 27th of October 1988 and 27th July 1989 contrary to **Section 275** of the **Penal Code**. After laying the facts of the case at length, which I am not desirous to repeat; **MR. ORENGO** then proceeded to demonstrate from the evidence that was insufficient to sustain the convictions of both Applicants. In brief it was **MR. ORENGO'S** submission that there was no evidence and if there was it was insufficient from the prosecution, which could not establish the charge against the Applicants. He made submission on what constitutes stealing and concluded that:

1) Fraud was not proved against the Applicants.

2) There was no evidence of taking against either of the Applicants since they were not in a position to access anything.

3) There was nothing capable of having stolen since the evidence transaction was a paper transaction.

4) Criminal negligence did not constitute criminal intent.

MR. ORENGO went ahead to site several authorities to fortify his submissions on the insufficiency of the evidence against the Applicants. I have considered those authorities.

Suffice it to say that in **MR. ORENGO'S** view, the 2nd Applicant, who was a mere employee of the Bank (**NATIONAL BANK OF KENYA**) acted in his official capacity and had no control or say in the transactions that involved the money in issue, he concluded by submitting that there was no iota of evidence against the two Applicants and therefore there Applicants should be successful

MISS KAMAU on her part submitted that even though none of the Applicants were shown in evidence to the Directors or shareholders of the various companies involved in the case, there was sufficient evidence adduced from which to conclude that they were privy to the fraud and that they acted in concert with others for a common criminal intention. She also submitted that it was not necessary for the prosecution to prove that the Applicants gained anything from the transaction herein since that alone is not the basis of determining theft or fraud.

As I have already stated in the body of this ruling, the role of the High Court in granting bail pending appeal does not entail going into deep analysis of the evidence and the facts of the case nor to determine the merits of the appeal. The onus is on the Applicant to demonstrate either a combination of factors exists, in the form of exceptional or unusual circumstances, and or that the appeal has overwhelming probability of success, which would justify the Court to grant bail to the Applicants. I have already ruled on the issue of the unusual or exceptional circumstances. On the overwhelming chances of success, having carefully analyzed the submissions by the Counsels in these applications, the petition of appeal, the judgment of the trial Court and the affidavits sworn in support of these applications, I find as follows:

That the issues raised and argued in support of the ground that the appeal has overwhelming chances of success concerned: - (a) The evaluation of evidence and inferences drawn there from.

(b) The evaluation of evidence and inconsistencies in the prosecution case and the credibility of the witnesses.

(c) The amount of money alleged to have been stolen in the charge sheet as against that which the Applicants were convicted of and the legality of such a conviction.

(d) The ambiguity of the learned trial magistrate's judgment and the propriety and sustainability of it on appeal.

(e) The civil nature of the case.

(f) The nexus between the Applicants and the theft charged and so on.

These are very weighty issues. They would require a serious analyses of the entire evidence adduced before the trial Court, which evidence contains a great deal of detail. It would require an evaluation of the entire case.Such an analyses and evaluation of evidence can properly form the basis of arguments and consideration on appeal. From the voluminous record of the trial Court proceedings, it is not apparent that the Applicants have an overwhelming chance that their appeal will succeed. The fact that the judgment was ambiguous does not per se justify a finding that the judgment would necessarily be overturned on appeal. The mere fact that a judgment is defective would not per se render it incurable since that would depend with the nature of the defectiveness involved. Likewise, the mere fact that the Applicants were

convicted of stealing a sum that was not the one quoted in the charge sheet would not per se lead to a finding that the conviction was illegal or erroneous. The mere fact that there exist inconsistencies in the evidence may not necessarily affect the conviction since the Appellate Court may resolve such inconsistencies. Further, what the learned Counsels termed a lack of nexus between the Applicants and the Companies involved in the fraud alleged in this case are not apparent.

In conclusion, having considered the Applicants applications at length, I am not satisfied that there are overwhelming chances that the Applicants appeals will succeed. That there are overwhelming chances that the appeals will succeed is not apparent.

The upshot of this application is that it fails in its entirety.

Dated at Nairobi this 10th day of December 2004.

LESIIT,

JUDGE.

Read, signed and delivered in the presence of;

Mr. Orengo for 2nd Applicant

Miss Kamau for Respondent

Muia Court Clerk

LESIIT

JUDGE