



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL APPLICATION NO.452 OF 2001**

BONIFACE MUTUNGA KIMEU ..... APPLICANT

VERSUS

REPUBLIC ..... RESPONDENT

**RULING**

In this Notice of Motion filed on 25th June, 2001 by Mr. Newton Mungalla Advocate, one Boniface Mutunga Kimeu (Applicant) seeks to be released on bond or bail pending the hearing and determination of his appeal No.452 of 2001, on the grounds that the appeal raises serious points of law and fact and that the judgement of the lower court was erroneous. These grounds are verified by the affidavit sworn by Mr. Mungalla.

It is now an established legal principle that before an appellant/applicant can be admitted into bail pending the hearing and disposal of his appeal it must be shown that there are overwhelming chances that the appeal will succeed. The test is not that the appeal raises serious points of law and fact or that the judgement of the lower court was erroneous.

The appellant/applicant was charged with three counts (a) making a document without authority c/s 351(a) Penal Code, namely, with intent to defraud made a certain Kenya Commercial Bank Cheque No.022624 purporting it to be good and valid order for KShs.267,000 issued by the University of Nairobi for payment to genuine Merchants; (b) Stealing Shs.160,000; (c) Stealing another Shs.105,000, the property of Kenya Commercial Bank. The appellant/applicant was acquitted of making a document (cheque) without authority but was convicted of theft in counts 2 and 3.

The prosecution's case is that a forged cheque in question was deposited into the appellant/applicant's account and then on 7th September,2000 the appellant withdrew Shs.160,000 and on 8th September, 2000 he withdrew the balance of Shs.105,000. It was the prosecution's case that the appellant/applicant must have known that he was not entitled to this money and yet he voluntarily made the two cash withdrawals.

It is the evidence of MARY MUTUKU (PW 3) that on 1st September, 2000 she received cheque No.622624 Exhibit 3 (forged cheque) from a customer vide a deposit slip Exhibit 5. She checked all the details of the deposit slip and confirmed they tallied with details on the cheque. She accepted the cheque (Exhibit 3) stamped acknowledgement of the same and retained the original deposit slip (Ex.5) and gave the customer the duplicate. She did not know the customer before. She also did not identify the appellant/applicant as the customer who had presented both the cheque and the deposit slip to her.

It is further the evidence of RICHARD MUIINDE KITUKU (PW 2) that indeed the cheque Exhibit 3 was deposited into the appellants account on 1st September, 2000 and it matured on 5th September, 2000. And it is the evidence of MARTIN ONYANGO (PW 4) that he paid Shs.160,000 to the appellant on 7th September, 2000 and paid him again Shs.105,000 on 8th September, 2000. There is overwhelming evidence to show that this Shs.265,000 was the proceeds of the forged cheque.

The appellant gave an explanation of how this money came to be deposited into his account. This explanation is contained in his sworn evidence. Essentially the appellant said that he is a business man, dealing in stationery and printing and that one JOHNSON MULINGE was his friend but not a business associate. He said that on 7th September, 2000 Johnson Mulinge informed him that he had deposited a cheque into his (appellant's) account on 1st September, 2000 and that he wanted the appellant to accompany him to the bank so that he could make some withdrawals. He duly obliged and withdrew Shs.160,000 on 7.9.2000 and a further Shs.105,000 on 8.9.2000 which he claimed to have handled over to

that Johnson Mulinge. The appellant, of course, did not explain how the man Johnson Mulinge had known his account and why he permitted that transaction to be conducted through his account.

The appellant also led the police to a house in Dandora where this Johnson Mulinge allegedly lived but, of course, Johnson was nowhere to be seen.

The trial magistrate rejected the appellant's explanation and convicted him for theft of that money, holding that the prosecution had proved his guilt through circumstantial evidence. With that I respectfully agree.

This application for bail pending appeal lacks merit and the same is hereby dismissed.

It is so ordered.

Dated and delivered this 13 July, 2001.

**A.G.A. ETYANG'**

**JUDGE**