



**REPUBLIC OF KENYA**  
**IN THE HIGHCOURT OF KENYA AT MILIMANI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NO. 246 OF 2019**  
**JOSHUA KIPROP KISORIO.....APPLICANT**  
**=VERSUS=**  
**REPUBLIC.....RESPONDENT**

*(Application for bail pending appeal).*

**RULING**

1. The Applicant was charged with six counts of offences in the trial court. In count I, he was charged alongside another with conspiracy to defraud contrary to **Section 317** of the **Penal Code**. In counts II, III, IV and V, he was charged with making a document without authority contrary to **Section 357 (a)** of the **Penal Code**. In count VI, he faced a charge of obtaining money by false pretences contrary to **Section 313** of the **Penal Code**. He was convicted on all six counts and sentenced as follows; three years imprisonment in count 1; seven years imprisonment each in respect of counts II, III, IV and V; and three years imprisonment in count VI. The sentences were ordered to run concurrently.
2. By an application dated 3<sup>rd</sup> January, 2019, the Applicant seeks to be admitted to bail pending appeal and/or the suspension of his sentence pending the hearing and determination of the appeal. The application is based on the grounds that the appeal has overwhelming chances of success and that he is in need of urgent medical treatment which cannot be provided urgently by the prison health facility and the Kenyatta National Hospital.
3. The said Application is supported by a self-sworn Affidavit in which the Applicant avers that the trial magistrate failed to consider his closing submissions on the inconsistencies and discrepancies in the prosecution's evidence. He also states that reasonable doubt was established between the evidence of the document examiner (PW3) and that of DW1 regarding his identification but the trial magistrate maliciously altered the evidence in her judgment with a view to finding him guilty. Further, he avers that he was involved in a nasty motorcycle accident on 15<sup>th</sup> November, 2019 shortly before his incarceration and as a result thereof, he experienced chest pain, difficulty in breathing, rapid heartbeat, lower back pain and lower abdominal pain. He claims that the pain worsened on 21<sup>st</sup> November, 2019 and he started seeing blood in his stool whenever he went to the toilet. As such, the prison health facility referred him to Kenyatta National Hospital where he was taken on 3<sup>rd</sup> December, 2019 and given hyperacidity medicine then booked for OGD (which I think stands for Oesophago-gastroduodenoscopy) and colonoscopy test on 21<sup>st</sup> February, 2020. He therefore prays that the orders sought be granted to enable him seek urgent diagnosis and treatment which he has been unable to receive in prison.
4. The application was heard virtually through Microsoft Teams video conferencing platform. The Applicant who appeared in person reiterated that his appeal has overwhelming chances of success. To support that contention, he argued that it was not proved beyond reasonable doubt that he was George Jack Tobias, the loan applicant who defrauded CFC Stanbic bank of Kshs. 13,700,000/=. He also contended that the elements of the subject offences were not all proved. Further, he blamed the trial magistrate for misinterpreting expert evidence and distorting material evidence which in his view occasioned a miscarriage of justice. The Applicant further reiterated that his health is deteriorating and urged the court to consider the medical reports attached to his Affidavit
5. The learned state counsel Ms. Ndombi for the Respondent opposed the Application. She submitted that the case of ***Jivraj Shah v Republic [1986] eKLR*** sets the principles to be applied in the circumstances namely, that the appeal has overwhelming chances of success and that there exist unusual circumstances. She argued that the Appellant has failed to demonstrate that the appeal has high chances of success and noted that the prosecution proved the case beyond reasonable doubt. The learned state counsel further cited the case of ***Chimambai v Republic (1971) EA, 353***, where it was stated that an Appellant seeking bail lacks the presumption of innocence which is only available to an accused seeking bail pending trial.
6. Miss Ndombi further submitted that the Applicant was identified as the person who presented the documents to open the account into which the loan money was deposited. She noted that the evidence of PW1 confirmed that it is the said Tobias who is the Applicant herein

that received the payment in the account he had opened. Ms. Ndombi further stated that the Applicant's ill health is not an unusual circumstance to warrant the grant of bail. She argued that if the Applicant is sick, he can be treated at the prison facility or referred to another medical facility. She therefore urged that the application be dismissed since in her view, no miscarriage of justice will be occasioned by so doing.

7. In rebuttal, the Applicant argued that his medical condition is unusual as the medical tests cannot be conducted at the prison facility. He complained that he was not taken to Kenyatta National Hospital for the test that was scheduled for 21<sup>st</sup> February 2020 since the machine was said to be broken and that the test was then rescheduled to 22<sup>nd</sup> May 2020. The Applicant also reiterated that the report by the officer in charge of the prison facility recommends that he gets an alternative means of treatment.

8. Section 357 (1) of the Criminal Procedure Code provides for admission to bail or suspension of sentence pending appeal. It states thus:

***“After the entering of an appeal 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 order that the execution of the sentence or order appealed against shall be suspended pending the hearing of his appeal.*”**

9. The grant of bail pending appeal is a matter of the court's discretion which must be exercised judiciously. The Court of Appeal in the case of **Jivraj Shah v Republic [1986] KLR 605** laid down the principles to be considered as follows:-

***“The principal consideration in an application for bail pending appeal is the existence of exceptional or unusual circumstances upon which the court of Appeal can fairly conclude that it is in the interest of justice to grant bail. If it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of some substantial point of law to be urged and that the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail will exist. The main criteria is that there is no difference between overwhelming chances of success and a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed and the proper approach is the consideration of the particular circumstances and weight and relevance of the points to be argued...”*”**

10. I have carefully perused the trial court's proceedings as well as the judgment of the trial court. I am however not convinced that the Appellant has demonstrated that the appeal has chances of success on the grounds raised. I say so because I note that seven prosecution witnesses (PW1, PW2, PW7, PW9, PW10, PW13 and PW14) testified that the Appellant presented himself to them as George Jack Tobias. I have also taken note of the expert evidence presented by the document examiner (PW3) that the signatures on some of the documents used in the course of the subject transaction by George Jack Tobias were made by the Applicant herein. In my view however, the question as to whether the identification of the Applicant was proved to the required standard can only be best canvassed at the hearing of the appeal.

11. Further, although the Court sympathizes with the Appellant's medical condition, this does not constitute exceptional and/or unusual circumstances which would entitle him to bail pending appeal unless it is shown that the prison does not have the facilities to attend to such a condition. (See **Dominic Karanja v Republic [1986] KLR 612**). The Applicant has annexed medical records (“JKK 5”) showing that he was treated at Kenyatta National Hospital on 3<sup>rd</sup> and 4<sup>th</sup> December, 2019 after his incarceration. He has also confirmed that he is now scheduled to be taken for a test at Kenyatta National Hospital on 22<sup>nd</sup> May 2020 from the prison. This shows that his condition can and is indeed being managed well in prison.

12. Further, I have perused the annexed report by the in charge of the prison health facility dated 17<sup>th</sup> December, 2019. The report had recommended that the Applicant be facilitated to undergo an OGD and colonoscopy test promptly instead of waiting until 21<sup>st</sup> February, 2020 as scheduled by the Kenyatta National Hospital. However, there is no evidence that the Applicant's medical condition has persisted to date or worsened such that bail pending appeal would be the only way to manage the condition. In the absence of cogent and specific proof in that regard therefore, his medical condition does not qualify to be considered as an exceptional circumstance.

13. The upshot of the foregoing is that the Applicant's Notice of Motion dated 3<sup>rd</sup> January 2020 lacks merit and is hereby dismissed.

14. Further, I am aware that plans are underway for up scaling of court operations in the near future. As such, I direct and order the Deputy Registrar to liaise with the executive officer at the Chief Magistrates Court at Kibera to ensure the lower court record is promptly availed as soon as court operations are scaled up. Thereafter, the Deputy Registrar will also ensure that a date for directions on the hearing of the appeal is set down on priority basis. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 2<sup>ND</sup> JUNE, 2020.**

**G.W.NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. Applicant in person.

2. Miss Akunja for the Respondent.