

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION 131 OF 2020

1. SILAS AMAGA SINGORO.....1ST APPLICANT

2. MICHAEL WECHER OTWERO.....2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicants have sought bail pending appeal. They were charged with two counts of stealing by servant contrary to **Section 281 of the Penal Code**. The particulars in Count I were that on diverse dates between 16th November, 2011 and 24th December, 2011 at Equity Bank, Kariobangi and Luanda Branches jointly being servants to Maendeleo Afya Kwa Wote Korogocho Wote from the said Maendeleo Afya Kwa Wote cash ksh. 650,000/ which came into their possession by virtue of their employment. In count II, it was alleged that on 23rd August, 2011 at Equity Bank Kariobangi Branch in Nairobi within Nairobi County joined being servants to Maendeleo Afya Kwa Wote stole from the said Maendeleo Afya Kwa Wote cash Ksh. 300,000/ which came to their possession by virtue of their employment.

2. At the conclusion of the trial they were convicted and sentenced to pay a fine of Kshs. 50,000/- in default serve eighteen (18) months imprisonment. In addition they were ordered to pay Kshs. 200,000/- each as compensation to the complainant. They were aggrieved by the decision and sought an appeal.

3. In their application for bail pending appeal dated 1st April, 2020 the Applicants made oral submissions supplemental to the Supporting affidavit sworn by the 1st Applicant on 1st April, 2020. It was the submission of counsel for the Applicants, Mr. Mitullah that the appeal stood high chances of success. This was because the sentences passed by the trial contravened **Section 28(2) of the Penal Code**. As well, because there was non-compliance with **Section 106B of the Evidence Act**. Further, that the trial court failed to establish that the Applicants were servants of the complainant. Secondly, that the Applicants were currently serving an illegal sentence owing to this fact and the further fact that the sentences had already been fully satisfied in line with **Section 46 of the Prisons Act**.

4. Miss Nyauncho, counsel for the Respondent, conceded to application. It was her submission that indeed the Applicants were serving an illegal sentence as the sentence passed was incompatible with the law. This was particularly owing to the incompatibility with **Section 28(2) of the Penal Code** as the sentence in default of the fine should not have exceeded 12 months.

5. As to the suitability to be released on bail pending appeal on the ground that the appeal has high chances of success I hold the following view. The court in **Jivraj Shah V R [1986] eKLR** marginally discussed the ground of an exceptional and unusual circumstance to admit an Applicant on bail. In this case, the Applicants' had already served sufficient sentence as at the time they were filing this appeal. This is because they were convicted on 15th February, 2019 to serve an 18 months default sentence which was illegal and ought to have been a maximum of 12 months. This then meant that they were supposed to have been released in February 2020 latest. Therefore, this is an exceptional and unusual circumstance warranting the release of the Applicants' on bail.

6. It follows that the application is meritorious. I accordingly confirm the earlier bail terms I had released them on in my extemporal ruling on 19th May, 2020 pending the determination the substantive appeal. That is to say that each of the Appellants be and is hereby released on a cash bail of Ksh. 20,000/. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 2ND JUNE, 2020.

G.W.NGENYE-MACAHRIA

JUDGE

In the presence of:

1. *Mr. Mitulla for the Appellants/Applicants.(Applicants present).*

2. *Miss Akunja for the Respondent.*