REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

MISCELLANEUS CRIMINAL APPLICATION NO. 28 AND 29 OF 2016

CONCELIA AOKO ONDIEK……1ST APPLICANT

DOROTHY NDIA……2ND APPLICANT

VERSUS

REPUBLIC……..RESPONDENT

RULING

1. The Applicants Concelia Aoko Ondieki and Dorothy Ndia (herein the 1st and 2nd Applicants respectively) filed two applications, one a Notice of Motion dated 7th October 2016 and the other a chamber summons dated 10th October, 2016. The applications were brought under **Section 357** of the **Criminal Procedure Code** and they seek orders of the court admitting them to bail/bond pending the hearing and determination of their respective appeals. Their applications were consolidated and argued together on 3rd November, 2016.

2. The appeals stem from convictions in **Anti-Corruption Case No. 24 of 2011** by Mr. F. Kombo, the Senior Principal Magistrate at Nairobi Chief Magistrate Court, Milimani Law Courts. The 1st Applicant was convicted in one count for the offence of false accounting contrary to **Section 33(1),** as read with **Section 33 (2)** of the **Penal Code,** and in two counts for the offence of forgery contrary to **Section 349** of the Penal Code.

3. The 1st Applicant was sentenced to serve two years imprisonment on each of the three counts without option of fine. The sentences were ordered to run concurrently. The 2nd Applicant who was convicted in one count for knowingly giving a false document to one's principal, contrary to **Section 331(1)** of the **Penal Code** was sentenced to serve two years imprisonment with no option of fine.

4. The grounds of the application, as appears on the face thereof and as urged by learned counsel Mr. Osoro Mogikoyo on behalf of the 1st Applicant are that the 1st Applicant was convicted and sentenced to two years in prison without the option of a fine. He urged that the Applicant's appeal has substantial points of law to be argued at the hearing and her appeal has overwhelming chances of success.

5. Mr. Mogikoyo made reference to the affidavit dated, 2nd November, 2016; a medical report stating that the 1st Applicant suffered from life threatening medical conditions that require her to have specialized

treatment regularly. Counsel signified his applicant's willingness to comply with any conditions upon which the court would grant bail. He further urged that the 1st Applicant had not absconded while she had been on bond during the trial in the lower court.

6. In the 1st Applicant's supporting affidavit, she deponed that she is a widow and the sole breadwinner for her children, who were in desperate need of her personal care and attention. That one of the children is sickly and the other was due to sit for his Kenya Certificate of Secondary Education examinations.

7. Counsel contended that the circumstances which disclose the merit of the appeal are that the prosecution's case was not established to the required standard. That the prosecution did not provide sufficient evidence to prove that the receipts in question had been forged. He urged that the trial court was flawed in its finding that false accounting had occurred as the return in question was not made to a Principal as required in **Section 42 (1)** of the **Anti-Corruption and Economic Crimes Act**.

8. Counsel further contended that the Applicant had no obligation to account for the imprest, as she was not the imprest holder, and that the trial court had greatly erred by placing this burden upon her.

9. Learned Counsel Mr. Kibue Thumi appearing for the 2nd Applicant associated himself wholly with the submissions of Mr. Mogikoyo. He urged that the appeal was arguable with overwhelming prospects of success. He contended that the learned Trial Magistrate erred by failing to find that the 2nd Applicant's acquittal in count II should have concurrently occasioned and acquittal in Count I.

10. Counsel submitted that for the 2nd Applicant to be found liable for the charge on Count I it would require her to have made the false return to a person. That that is the import of the word 'furnish' as read in **Section 331 (1) of the Penal Code.** Counsel stated that no evidence was produced to show that the receipts annexed to the payment voucher or that the payment voucher itself was surrendered by the 2nd Applicant.

11. Counsel contended that no evidence was led to show whom the payment voucher and receipts were surrendered to. That on appeal, the court will come to the irresistible conclusion that the 2nd Applicant was convicted on mere suspicion. On exceptional circumstances counsel urged that the 2nd Applicant suffers from ulcers which require medical attention. He also stated that the 2nd Applicant is a mother of two children who require their daily provision from her. That the Applicant was out on cash bail and attended court as and when required during the trial.

12. Ms. Aluda learned State Counsel opposed both applications. The appeals, she urged, had no chances of success as the elements of the counts of which the appellants were convicted were sufficiently proven. She argued that the Applicants were serving lawful sentences.

13. The State Counsel asserted that the Applicants had not proven that their ailments cannot be treated in prison. Further that sickness is not an exceptional circumstance warranting the grant of bail pending appeal, as the prison authorities are fully capable of attending to the applicants' health needs. Ms. Aluda also urged that being a parent and of good character do not meet the required criteria of exceptional circumstances for grant of bail pending appeal, she thus urged the court to dismiss the applications.

14. The main issue for determination in an application such as the one before the court as stated by the Court of Appeal in the case of **Jivraj Shah vs. Republic [1986] LLR 605**, to which Mr. Mogikoyo and Mr. Kibue referred was, *inter alia*, that bail pending appeal would be considered where there were existing exceptional or unusual circumstances upon which the court could fairly conclude that it was in the interest of justice to grant bail.

15. Secondly, the court in the Jivraj case also held that bail may be granted where 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.

16. In exercising its discretion, the Court has to bear in mind that a person who has been convicted by a competent court has lost the presumption of innocence conferred on him by the Constitution. The court must also remind itself that during the hearing of the pending appeal the burden will be upon the convicted person to demonstrate that the conviction was wrong. This is a well settled guideline in the case of **Isaack Tulicha Guyo vs. Republic, Court of Appeal, Nairobi Criminal Appeal No. 16 of 2010;**

17. Solemn assertions by the Applicants that they will not abscond if released, even if it is supported by sureties, are not sufficient ground for releasing a convicted person on bail pending appeal. The previous good character of the Applicants, the hardships, if any, facing their families and ill health where there is existence of prison medical facilities for prisoners, are not exceptional or unusual factors either.

18. The intended appeal must in itself be shown to have overwhelming chances of success. See – the Court of Appeal decision in **Dominic Karanja v Republic [1986] KLR pg.612**. In that light I perused the lower court record including the judgment of the trial court, to establish whether the appeal could be said to have overwhelming chances of success.

19. The rationale behind bail pending appeal is that appeals take long to be heard and determined so that where there are overwhelming chances of the appeal succeeding, the appellant is admitted to bail so that the success of the said appeal is not rendered nugatory when it comes after the Appellant has served the sentence or a substantial part thereof.

20. In circumstances such as those prevailing in this applications where the court record is available and the court is ready to hear the appeals immediately, there is no danger of the Appellants serving the sentences or a substantial part thereof before the appeal is disposed of. It is not clear why the parties themselves have been reluctant to ventilate their appeals at the earliest opportunity provided to them.

21. I cannot in this ruling anlyze and evaluate the evidence in depth without prejudicing the hearing of the appeals. Suffice it to say that having perused the testimonies of the witnesses and without pre-empting the intended appeal I find that it cannot be said that prima facie, the appeals have overwhelming chances of success based on the insufficiency or inconsistency of the evidence.

For the foregoing reasons, I find that the two applications before me are lacking in merit. The applications are dismissed and the appeals should be set down for hearing forthwith.

SIGNED DATED and **DELIVERED** in open court this **7th day** of **December, 2016**.

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L. A. ACHODE

JUDGE