

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 54 OF 2014

ROBERT WANJOHI KINYUA.....APPELLANT/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

By a notice of motion dated 15th August, 2014, the appellant moved this court for an order to be released on bail pending the hearing of his appeal. He had been convicted and sentenced in **Mukurweini Senior Principal Magistrate's Court Criminal Case No. 420 of 2013** in which, together with one Daniel Wakahia Wangai, he had jointly and severally been charged with nine counts ranging from the offence of conspiracy to commit a misdemeanour, stealing, handling stolen property, attempted stealing, making a false document, uttering a false document and attempted stealing under various provisions of the Penal Code.

The two of them were found guilty of the offence of conspiracy to commit a misdemeanour contrary to **section 394** of the **Penal Code** and sentenced to serve three years in prison. The applicant was also found guilty of the offence of attempted stealing contrary to section **389** of the **Penal Code** and for this particular offence he was sentenced to two years imprisonment. The sentences were to run concurrently.

At the hearing Mr Njue for the state submitted that he was not opposing the application because if the appellant's defence is considered alongside the prosecution case, the appellant 'stands a chance' of succeeding more particularly because the appellant explained his relationship with the other persons who are alleged to have been involved in the offences with which they were charged. Perhaps because the state was conceding the application counsel for the applicant did not prosecute it and never made any submissions as to why he thought the application should be allowed.

I understood the learned counsel for the state to say in his concession that the offence of conspiracy may not have been established and therefore the appellant should have been given the benefit of doubt. The learned magistrate addressed this issue in her judgment and while citing the decision of **Kimaru J in Benson Kang'ethe Njenga & Others versus Republic, Criminal Appeal No. 163 of 2003**, she held that the essential ingredient to prove the offence of conspiracy to commit a felony is the agreement between two or more persons to put into effect a scheme whose purpose is to commit a criminal offence. According to that decision, so held the learned magistrate, proof of existence of a conspiracy is generally a matter of inference, deduced from the criminal acts of the parties accused and done in pursuit of an apparent criminal purpose common between them.

According to the learned magistrate, the prosecution evidence that the accused persons including the appellant had withdrawn money transferred from dummy accounts opened by one Paul Ndungu who was apparently at large demonstrated a common intention between them to commit a criminal offence.

Although it is not for this court to consider the appeal on its merits at this particular stage, neither of the counsel demonstrated to me why they believed the learned magistrate was wrong in the interpretation of the law and why they think, therefore, that the appellant is entitled to be released on bail because a proper interpretation of this aspect of the law favour him.

Again, as noted, the appellant was not just convicted of the offence of conspiracy to commit a felony alone; he was also charged and convicted of the offence of attempted stealing contrary to **section 389** of the **Penal Code**. Neither counsel mentioned anything about the conviction of this particular offence.

It is apparent therefore, that it has not been demonstrated by the applicant that the appeal has overwhelming chances of success; Mr Njue submitted that the appeal ‘stands a chance’ of succeeding but ‘standing a chance’ alone is not enough; the chances of success must be ‘overwhelming’ before an appellant can be released on bail.

In the Court of Appeal decision of **Dominic Karanja versus Republic (1986) KLR at page 612**, it was held that where an appeal has overwhelming chances of success, there was no justification for depriving the applicant of his liberty.

Again in the Court of Appeal decision of **Jivraj Shah versus Republic (1986) KLR 605**, the court was also of the view that 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, then bail should be granted.

As I have noted in this application, it has neither been demonstrated that the appeal has overwhelming chances of success as was stated in the case of **Dominic Karanja versus Republic (ibid)** nor can it be said that there is a serious question of law to be argued and whose determination is likely to be in favour of the appellant as was stated in the case of **Jivraj Shah versus Republic (ibid)**. In these circumstances I do not find any merit in the applicant’s motion dated 15th August, 2014 and I am inclined to reject it. It is therefore dismissed.

Dated, signed and delivered in open court this 6th March, 2015

Ngaah Jairus

JUDGE