

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO. 197 & 198 OF 2015

JOSEPH MUKONGU GETATE.....1ST APPLICANT

JOSEPH JUMA NYAPETE.....2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicants were charged with others, with various offences under the **Penal Code** relating to fraudulent conversion of the sum of Kshs.28,885,756/- from Kenya Roads Board. After the hearing of the case, the trial court convicted the Applicants and sentenced them to serve various sentences, the maximum being that thirty-six (36) months imprisonment. The sentences were ordered to run concurrently. The Applicants were aggrieved by their conviction and sentence. They have duly filed their respective separate appeals to this court. Pending the hearing and determination of the said appeals, the Applicants have applied, pursuant to the provisions of **Section 356** and **357** of the **Criminal Procedure Code**, to be released on bail pending appeal.

Both Applicants stated that the respective appeals that they have filed have overwhelming chances of success. They were apprehensive that if they were not released on bail pending appeal, by the time the appeal is heard they would have served the sentence thereby rendering the appeal nugatory. They stated that they were willing to abide by any terms that the court may impose for their release on bail pending appeal. The 2nd Applicant on his part pleaded with the court to take into consideration the fact that he was disabled and therefore could not cope with the challenges of life in prison. The Applicants swore affidavits in support of their respective applications. They basically reiterated the plea made in their respective applications. For added measure, they stated that, during trial, they faithfully attended court without fail when they were released on bail pending trial. They urged the court to take this fact into consideration in determining their application to be released on bail pending appeal.

At the hearing of the appeal, this court heard rival submission made by Mr. Bw'Omote for the 1st Applicant, Mr. Moindi for the 2nd Applicant and by Mr. Mureithi for the State. This court has carefully considered the submission made. The principles to be considered by this court in determining whether or not to release a person who has been convicted by a trial court on bail pending appeal are settled. In **Jivraj Shah –vs- Republic [1986] KLR 605** at page 606 the Court of Appeal held thus:

*“There is not a great deal of local authority on this matter and for our part such as we have seen and heard tends to support the view that the principal consideration is if there exist exceptional or unusual circumstances upon which this court 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 a substantial part of it, will have been served by the time the appeal is heard, conditions for granting bail will exist. The decision is **Somo –vs- Republic [1972] EA 476** which was referred to by this court with approval in **Criminal Application No. NAI 14 of 1986, Daniel Dominic Karanja –vs- Republic** where the main criteria was stated to be the existence of overwhelming chances of success does not differ from*

a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed. The proper approach is the consideration of the particular circumstances and the weight and relevance of the points to be argued. It is almost self-defeating to attempt to define phrases or to establish formulae. There is a helpful passage in Archbold, Criminal pleading Evidence and Practice, 41st Edition page 783, paragraph 7 -86.”

In the present application, Mr. Mureithi for the State conceded to the application filed by the 1st Applicant. He was not opposed to the 1st Applicant being released on bail pending appeal. As regard the 2nd Applicant, Mr. Mureithi submitted that there was overwhelming evidence that was adduced by the prosecution witnesses which established to the required standard of proof that indeed the 2nd Applicant was a beneficiary of the fraudulent transfer of the said money. Mr. Moindi for the 2nd Applicant, apart from submitting that the 2nd Applicant’s appeal had an overwhelming chance of success, urged the court not to discriminate against the 2nd Appellant because his co-accused in the lower court who had been convicted with him, had all been released on bail pending appeal.

Having carefully evaluated the proceedings before the trial court, this court, without prejudice to the pending appeals, is of the view that the Applicants herein have raised issues which may raise reasonable doubt regarding their conviction on the charges that were brought against them. Of particular regard is the fact that it appears that the investigators did not pursue all the leads in the investigations with a view to tracing the actual beneficiaries of the fraudulent transfer of the said sum of money. The Applicants have, in the circumstance of this application, and without prejudice to the pending appeals, established that their appeals raises issues which may lead the court to reach a finding other than that of guilt. A co-accused of the Applicants was released by Ngenye-Macharia J on 22nd June 2015 on bail pending appeal. That was in **Nairobi HC Criminal Appeal No.146 of 2015 Patrick Saidi Musyoka –vs- Republic**. This court agrees with the 2nd Applicant that it would amount to a discrimination if the 2nd Applicant’s co-accused in the lower court are released on bail pending trial while he himself, on the same facts, is denied bail pending trial. This court also noted that the Applicants attended court during trial without fail when they were released on bail pending trial. That stands them in good stead in the present application.

In the premises therefore, the Applicants are released on bail pending trial on condition that they each post bond of Kshs. 1 million with one surety of the same amount or in the alternative they deposit a cash bail of Kshs.500,000/-. The Applicants are ordered to prepare the records of appeal within sixty (60) days of today’s date so that the appeal may be admitted for hearing. This court has made this order because the proceedings of the trial court have already been typed. It is so ordered.

DATED AT NAIROBI THIS 1ST DAY OF JULY 2015

L. KIMARU

JUDGE