



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**MISCELLANEOUS CRIMINAL**  
**APPLICATION NO. 297, 331 & 332 OF 2013**

SYVESTER KIOKO NGUI .....1<sup>ST</sup> APPLICANT

SIMON MWANGI MUGI .....2<sup>ND</sup> APPLICANT

ALPHUS DADIES WAFULA .....3<sup>RD</sup> APPLICANT

VERSUS

REPUBLIC .....RESPONDENT

**RULING**

1. The three applications herein were brought by way of Chamber Summons dated 16<sup>th</sup> September 2013, under **Section 357(1)** of the **Criminal Procedure Code**. The applicants, **Sylvester Kioko Ngui, Simon Mwangi Mugi** and **Alphus Dadies Wafula** seek orders admitting them to bail and stay of execution of the sentence imposed upon them by the lower court pending the hearing of appeal **No. 168** of **2013**, that they have filed in the High Court. The applications were consolidated and proceeded as Misc. Cr. App No. 297 of 2013.
2. The appeal stems from a conviction in **CM Cr. Case No. 4218 of 2009** by Mr. Ochenja, the Ag. Chief Magistrate Kibera, for the offence of stealing contrary to **Section 275** of the **Penal Code** in which each applicant was sentenced to serve three years imprisonment.
3. Learned counsel Mr. Ayora for the first applicant, Sylvester Kioko Ngui relied on the applicants' supporting affidavit. He urged that the first applicant was condemned to serve three years imprisonment, of which he had already served six months. Therefore that he was in danger of serving the whole or a substantial part thereof before the appeal was heard, which would render the said appeal nugatory.
4. Mr. Ayora contended that the first appellant had been convicted against the weight of the evidence and that in fact the evidence upon which he was convicted was engineered and manufactured by the trial court itself. That the trial court faulted the first applicant for being escorted by police officers to the ATM with a small amount of money leaving the van unguarded. This finding was said to have ignored the evidence of **PW1** the Processing Manager who gave a detailed account on the procedures in their work.
5. Mr. Ayora urged that the first applicant did not have a choice on which officers would accompany

- him and further that he had alerted the manager on the fact that the remote control allocated to them was faulty. Mr. Ayora also submitted that the motor vehicle used in the trip was allocated to the first applicant by **PW2**, and that some routes had been merged following several accidents concerning the company motor vehicles which had resulted in a crisis.
6. The exceptional circumstances said to stand the first applicant in good stead for consideration for bail pending appeal, were that the applicant was out on bail during trial and he complied with all the terms granted by the trial court. That he is a married man who hailed from Machakos and had strong family ties. That he was therefore not a security threat. He was also said to be ailing, suffering from ulcers.
  7. Learned counsel Mr. Kinyanjui for the second and third applicants also relied on their supporting affidavits and associated himself with the submissions of Mr. Ayora for the first applicant. He urged that there was no iota of evidence to warrant the conviction of any of the three applicants.
  8. Mr. Kinyanjui urged that count I and II were defective since G4S were only couriers and not the owners of the money said to have been stolen. That there was nothing to show that the money stolen from G4S was found on any of the applicants. That it was not shown how the motor vehicle was driven off while the applicant had the keys.
  9. He further urged that the rider of the motor bike upon which the third applicant was said to have been found and arrested did not testify, while the cash said to have been found in his custody was not proved to be part of the consignment that was stolen.
  10. For the foregoing reasons Mr. Kinyanjui contended that the pending appeals for the three applicants have overwhelming chances of success and their bail application should be granted.
  11. Miss Maina, learned state counsel, conceded the first applicant's appeal on grounds that the record shows that it was the second applicant who drove off in the motor vehicle in question and was later found unconscious in it. She contended that the latter scenario was stage managed but that there was no evidence of conspiracy between the applicants. Miss Maina opposed the application of the second and third applicants since there was no evidence of any struggle at the scene of the alleged robbery. Further that the second and third applicants were arrested hours after the theft and found with a substantial amount of money whose origin they could not explain.
  12. The principles that guide the court in applications of this nature were canvassed in the case of **Dominic Karanja v Republic [1986] KLR pg. 612**, wherein the Court of Appeal held that the most important issue was that if the appeal had such overwhelming chances of success, there was no justification for depriving the applicants of their liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances.
  13. I have perused the evidence and judgment from which the intended appeal emanates as well as the submissions from the applicants and the respondent. Without delving into the merits and demerits of the appeal, I am not persuaded that the applicants have demonstrated that their appeal has overwhelming chances of success. Neither do I discern any exceptional or unusual circumstances upon which I can conclude that it is in the interest of justice to grant the bail sought.
  14. In the case of **Dominic Karanja v Republic** (supra), the Court of Appeal stated that a solemn assertion by an applicant that they will not abscond if released, even if it is supported by sureties, is not sufficient ground for releasing a convicted person on bail pending appeal. The previous good character of the applicant, the health condition of any of them and the hardships, if any, facing their families were not exceptional or unusual factors either. The intended appeal must in itself be shown to have overwhelming chances of success.
  15. In exercising its discretion to grant bail pending appeal the court has to bear in mind that when the applicants were convicted by a competent court they lost the presumption of innocence conferred

on them by the Constitution and that during the hearing of the pending appeal, the burden will be upon them to show the appellate court that the conviction was wrong. - See the case of **Isaack Tulicha Guyo vs. Republic, Court of Appeal, Nairobi Criminal Appeal No. 16 of 2010.**

16. For those reasons and without appearing to determine the merits and demerits of the application, I dismiss it.

**SIGNED DATED and DELIVERED** in open court this **13<sup>th</sup>** day of **May 2014**.

**L. A. ACHODE**

**JUDGE**