IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.54 OF 2014

WAITHAKA MWANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The application is brought by way of Notice of Motion and the Appellant is seeking for Bail pending appeal.

The Appellant was charged with the offence of **Stealing a motor vehicle** contrary to **Section 278 (A)** of the **Penal Code.**

At the hearing of the application, counsel for the appellant relied on the grounds on the face of the application and on the supporting affidavit. Counsel submitted that the appeal had high chances of succeeding and that there were exceptional circumstances to warrant bail being granted to the appellant pending the determination the the Appeal.

On the ground of special and exceptional circumstances, counsel submitted that the appellant had TB of the lungs and had been attending clinic since 2009. Medical documents were annexed to the application to prove the illness. It was submitted that the appellant was suffering in jail as the prison conditions were not favourable and the disease being highly infectious, there was likelihood that it may spread and infect the other inmates.

The second ground, counsel sought to establish that the appeal had overwhelming chances of success. Counsel submitted that the conviction was not based on evidence but on theories. That the trial magistrate had posed questions and based on that, had reached a conclusion that the robbery had been stage managed.

Counsel further submitted that the appellant was likely to have served a substantial part of his sentence before his appeal was heard and disposed of. Counsel urged the court to grant the appellant bail pending appeal and that the appellant would obey and adhere to the terms issued by the court as he had abided previously with the terms that had been issued by the subordinate trial court.

The State was represented by Learned Prosecuting Counsel Mr. Chirchir who did not oppose the application. Counsel submitted that upon perusing the judgment and upon hearing opposing counsel's submissions, the appellant had demonstrated that the appeal had high chances of success and that the appellant be admitted to bail.

This court has taken into consideration the submissions of both counsel for the appellant and prosecuting counsel for the State.

On the issue of the ill health of the appellant, this court is not persuaded that this constitutes an exceptional and unusual circumstance, as the prison authorities provide adequate medical facilities for the prisoners. This court has judicial notice of TB sufferers who have been convicted so as to enforce treatment whilst in prison.

Having perused the judgment, this court is nevertheless, persuaded that the appeal has overwhelming chances of success on the premise that the trial magistrate appeared to have shifted the burden of proof to the appellant.

The appeal is found to have overwhelming chances of success and it is anticipated that there may be a delay in hearing of the appeal and that the appellant may have served the term of sentence.

This court makes reference to the case of **Chimambai** V. **Republic,** 1971 EA 343 where it was held:

> **"anticipated delay in hearing of the appeal together with other factors constitute good grounds for granting bail pending appeal."**

For the reasons stated above, this court finds no reason to deprive the appellant his freedom. The application is hereby allowed and the appellant is hereby admitted to bail pending appeal in the sum of Kshs.250,000/= and one surety of similar amount.

The appellant shall be of good conduct and shall ensure timely court attendance until determination of his appeal.

It is so ordered.

Dated, Signed and Delivered at Nakuru this 5th day of May, 2014.

A. MSHILA

JUDGE