



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISC CRIMINAL APPLICATION NO. 172 OF 2014**

GEORGE G. KAMATA ..... APPLICANT

VERSUS

REPUBLIC .....RESPONDENT

*(From original conviction and sentence in criminal case Number 2008 of 2012 in the Chief Magistrate's court at Kibera – Ondieki) on 28<sup>th</sup> May, 2014)*

**RULING**

The applicant George Gichuhi Kimata was charged with the offence of arson contrary to Section 332 (a) of the Penal Code. The particulars stated that on 18<sup>th</sup> April, 2012 at Riruta Nairobi jointly with others not before the court he willfully and unlawfully set fire to Tunaweza Millers and Saw Mill the property of John Kibera Njoroge valued at Kshs. 48,000,000/=. He denied the offence but after a full trial he was convicted and sentenced to two years imprisonment. Following that conviction he filed an appeal.

There is now before me an application by way of chamber summons under Section 357 (1) of the Criminal Procedure Code for a prayer that he be admitted to bail pending the hearing and final determination of the appeal. The grounds upon which that order is sought are, *inter alia*, that the appeal has overwhelming chances of success in that the only eye witness who led the investigating officer to arrest the applicant was not able to identify him in court. There is also fear that the applicant may serve sentence by the time the appeal is heard.

The applicant also has faulted the learned trial magistrate for relying on uncorroborated and inadmissible evidence to connect him to the charge and also shifted the burden of proof.

The application is opposed by the Republic on the grounds that the appeal does not have overwhelming chances of success and that sufficient evidence was adduced to justify the conviction. I have gone through the certified copies of the proceedings and judgment annexed to the application. I have also considered the submissions by both learned counsel for the applicant and the Republic.

At this stage the applicant must show that there exist exceptional circumstances to justify the submission that his appeal has overwhelming chances of success, and that being the case he should not continue to remain in prison awaiting the hearing of the appeal. There was a landlord and tenant relationship between the applicant and the complainant. The applicant owned the land upon which the complainant was running his business. There is evidence that the applicant had wanted to increase rent and that he had previously damaged the fence housing the complainant's business.

There is also evidence that the applicant had threatened to set the business on fire according to the testimony of some of the witnesses.

From the judgment of the learned trial magistrate it is clear that a lot of emphasis and reliance has been placed on the circumstantial evidence relating to that offence. Of course it is trite law that an accused

person may be convicted based on circumstantial evidence. The analysis of the learned trial magistrate in that regard cannot be faulted. However, P.W. 5 who was the watchman at the premises of the complainant on the night of the alleged offence and who said had identified the applicant was not able to point him out in court. In fact the court noted and questioned his credibility thereby putting into jeopardy the evidence of the only eye witness.

There is also a lot of hearsay, suspicion and speculation. I have also looked at the charge sheet and the particulars thereof. It was alleged in the particulars that the applicant may have committed the offence jointly with others not before the court. There was no evidence whatsoever that any other people could have been present apart from the suspicion directed at the applicant. The charge was never amended and therefore the evidence is not in tandem with the charge.

Be that as it may, in the absence of tangible direct evidence we are left with only suspicion. I am persuaded that the applicant's appeal has overwhelming chances of success. In the circumstances his application for bail pending appeal succeeds. He shall be released on executing a bond of Kshs. 500,000/= with one surety of equal sum or by posting cash bail of Kshs.100,000/= . He must attend the hearing of his appeal.

**SIGNED DATED and DELIVERED in court this 17<sup>th</sup> day of July, 2014.**

**A.MBOGHOLI MSAGHA**

**JUDGE**