



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**

**Criminal Appeal 7 of 2009**

**LINCON KERIRI KAMAU ALIAS MUREITHI ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(An application from original Conviction and Sentence in the Principal Magistrate's Court at Kerugoya in Criminal Case No. 117 of 2007 dated 19<sup>th</sup> January 2009 by S. N. Mbungi – Ag. P.M.)*

**RULING**

The applicant was charged before the principal magistrate's court, Kerugoya with the offence of conspiracy to defraud contrary to section 317 of the Penal Code. He pleaded not guilty to the charge and was subsequently tried. At the conclusion of the trial, the applicant was found guilty as charged, convicted and sentenced to 3 years imprisonment. This was early this year, to be precise on 19<sup>th</sup> January 2009.

Aggrieved by the conviction and sentence, the applicant has since filed an appeal being criminal appeal number 7 of 2009 which is pending in this court. He has now moved this court for bail pending appeal on the grounds that he was sentenced to a jail term without the option of a fine, secondly, that the appeal has high chances of success and finally that there is every likelihood that he shall be prejudiced and his appeal rendered nugatory unless the said sentence and conviction are stayed pending the hearing and determination of the appeal.

In support of the application, Mr. Kiguru Kahiga, learned advocate for the applicant has deponed that the applicant has since filed an appeal with high chances of success, that he was apprehensive that by the time the appeal comes up for hearing and determination, the applicant may have served a substantial portion of the sentence thus rendering the appeal nugatory. Previously the applicant had been out on a bond of Kshs.100,000/= with a surety of similar amount and there is no likelihood that he would abscond.

In his oral submissions in support of the application, Mr. Kahiga stated that the appeal was not frivolous, that the applicant did not execute the sale agreement, that the evidence in the trial court was insufficient to link the applicant to the crime. The applicant is a person of good character and had been in custody for more than 3 week before being charged in violation of his constitutional rights.

Mr. Makura, learned Senior State Counsel opposed the application. He submitted that the applicant had not demonstrated to the court that his appeal had overwhelming chances of success. Nor were there

special circumstances. The appeal cannot succeed going by the evidence on record. That the evidence of PW2 was well corroborated by PW3 which proved that the appellant conspired with the co-accused who absconded during the trial to defraud the complainant. The charge sheet does not show when the applicant was arrested. It is not therefore possible to tell whether the applicant's constitutional rights were violated. In any event the applicant ought to have raised the issue at the trial.

In the case of *Mundia v/s Republic* (1986) KLR 623 it was held that Section 356 of the criminal code grants jurisdiction to this court to admit a convicted person to bail pending appeal. Admission to bail pending appeal is however a discretionary power which the court must exercise judicially and in accordance with laid down principles. Once a person has been convicted and sentenced his application for bail pending appeal will be granted only in exceptional circumstances for there is a presumption that he was properly convicted. The appeal must have overwhelming chances of success and finally bail pending appeal may be granted where there is a risk that the sentence will have been served by the time the appeal will be heard. However there must exist the major issue of overwhelming chances of success of the appeal in the first instance. See also *Dominic Karanja v/s Republic* (1986) KLR 612.

Applying the above principles to the circumstances of this case, I am satisfied that there are no exceptional circumstances or combination of factors favouring the granting of the application. I have perused the proceedings, the judgment of the learned magistrate as well as the petition of appeal and I am persuaded that the appeal does not have any reasonable or indeed overwhelming chances of success either on conviction or sentence. The evidence on record that was well corroborated show that the applicant hatched a scheme together with the co-accused who absconded during the trial to defraud the complainant of a colossal sum of money to wit, Kshs.267,000/= on the pretext that the two had land to sell to the complainant. Indeed it was the applicant who went looking for the complainant with the offer. He is also the one who introduced him to the co-accused. It is the complainant who pretended to have initially purchased the land from the co-accused but had been unable to pay off the balance of the purchase price. He knew the co-accused's name as Bernard Kariu yet he allowed him to pass off to the complainant as Francis Gitari. Finally he also passed off to the complainant as Lincon Keriri Kamau whereas his true name was Francis Muriithi Kamau. All the foregoing irresistibly point to nothing else but conspiracy to defraud the complainant. It is for these reasons that I am not satisfied that the applicant's appeal has overwhelming chances of success.

As already stated Bail Pending appeal may be granted where there is a risk that the sentence imposed may well have been served by the time that the appeal comes up for hearing. This risk does not exist in the present case. As it is, this court is already hearing appeals filed early this year. I am certain that in the next 2 or 3 months, the applicant's appeal will be ripe for hearing.

All said and done I am far from being satisfied that there exists exceptional circumstances or combination of factors which in their totality amount thereto in the present case for the granting of the bail and consequently the application is refused.

*Dated and delivered at Nyeri this 3<sup>rd</sup> day of June 2009*

**M. S. A. MAKHANDIA**

**JUDGE**