REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURT

Criminal Application 323 of 2009

ASHFORD KOOME MBOGO…………………………..APPLICANT

VERSUS

REPUBLIC……………………………………………….RESPONDENT

R U L I N G

The applicant, Ashford Koome Mbogo, was arraigned in the Chief Magistrate's Court, Nairobi, on a charge of stealing by agent contrary to Section 283 of the Penal Code. He was found guilty as charged and sentenced to imprisonment for 2 years with effect from 21st July, 2009. He lodged High Court Criminal Appeal No. 323 of 2009 contesting both conviction and sentence, and then filed this application.

By this application, the applicant seeks to be granted bail pending appeal, or that the sentence slapped on him be suspended pending the hearing and determination of the appeal. He also applies for an order that the applicant be released on bail with or without a surety pending the hearing and determination of the appeal. The application is supported by the annexed affidavit of George Muthui Murugu, the Advocate having the conduct of this appeal on behalf of the applicant. It is based mainly on the grounds that the appeal filed has overwhelming chances of success, and that the appeal is not likely to be heard immediately.

During the hearing of the application, Mr. Murugu appeared for the applicant while Mr. Mulati appeared for the State. Mr. Murugu spent the better part of his argument on matters which should best be canvassed in the appeal, and it wont add any value to this ruling to discuss them. Referring, however, to the principles governing the grant of bail or stay of sentence pending appeal, he submitted that the applicant needs to establish that the appeal is not frivolous and has a probability of success, and this appeal is arguable and bears a probability of success. With regard to the time factor, he asked the court to take judicial notice of the fact that the courts are overwhelmed and it will take no less than a year before the appeal can be heard. The applicant was sentenced to a two year custodial sentence out of which he has already served 3 months. By the time the appeal is heard, the applicant will most likely have served the entire prison term. Thirdly, the applicant was out on bond during the trial in the lower court, and he attended all the proceedings to the end. That shows his character. He is not likely to abscond or leave the jurisdiction of the court. Counsel relied on **MERALI** v. **REPUBLIC** [1972] EA. 47 and **MOTICHAND** v. **REPUBLIC** [1972] EA. 359 and asked the court to apply the same terms as obtained in the lower court.

Opposing the appeal, Mr. Mulati for the State submitted that the appeal does not have overwhelming chances of success and that there were no exceptional circumstances for bail pending appeal. The applicant had served only three months and the State was ready to have the appeal heard on priority basis. He submitted that the application had no merit and it should be dismissed.

In a short reply, Mr. Murugu argued that in **MOTICHAND** v. **REPUBLIC** (supra) the court departed from the conditions as to overwhelming chances of success and held that it was sufficient to demonstrate a probability of success. The same view was expressed, he further submitted, in **MERALI** v. **REPUBLIC** (supra).

This application is brought under, inter alia, Section 357 (1) of the Criminal Procedure Code. That section confers upon the court some wide discretionary power. Wide, however, as that discretion may be, it must be exercised judiciously. In the case of **ABDI** v. **REPUBLIC** [1991] KLR 171, the court said at page 173 –

"**To admit the applicant on bail is a discretion of this court which … must be judicially exercised keeping in sight all the facts relating to the application, all the matters material to the trial at the lower court, grounds submitted in the Petition and the chances of success and of course, the nature of the trial."**

Even as the court exercises that discretion judiciously, the court would also do well to remember that one of the most fundamental considerations in determining whether or not to grant bail pending appeal is whether the appeal has overwhelming chances of success. Thus, in **DOMINIC KARANJA** v. **REPUBLIC** [1986] KLR 612, the Court of Appeal asserted at page 613 –

"**The most important issue is if the appeal has such overwhelming chances that there is no justification for depriving the applicant of his liberty. The minor relevant considerations would be whether there are exceptional or unusual circumstances."**

Mr. Murugu submitted that in both the authorities which he cited (i.e **Motichand** v. **Republic** and **Merali** v. **Republic)** the court departed from the conditions as to overwhelming chances of success and held that it was sufficient to demonstrate a probability of success. That might be so. However, it should also be remembered that whereas the cases relied upon by counsel were decided by the High Court in 1971 and 1972, respectively, the decision in **Dominic Karanja** v. **Republic** was made by the Court of Appeal in 1986. I need say no more of the weight and authority which the latter case bears.

Mr. Murugu further stated that "**the applicant in the lower court was out on bond and attended all the proceedings to the end**," and that this "**showed the character of the applicant. He is not likely to abscond or leave the jurisdiction of the court**." I have perused the proceedings in the lower court. They do not quite bear out Mr. Murugu's position on court attendance by the applicant. But be that as it may, in **Dominic Karanja's Case** (supra), the Court of Appeal further observed at page 613 –

"… **The previous good character of the applicant and the hardship … are not exceptional or unusual factors … A solemn assertion by an applicant that he will not abscond if he is released is not sufficient ground, even with support of sureties, for releasing a convicted person on bail pending appeal …"**

The above considerations leave us with the task of deciding whether the appeal in this matter has overwhelming chances of success. I have perused the proceedings and the judgment of the lower court, and weighed all that against the grounds set out in the petition of appeal, the affidavit in support of the

application, the applicant's counsel's submissions, and the response by learned state counsel. Having done so, I respectfully take the view that at this stage, there is not before this court an overwhelming chance of the appeal being successful. The application fails.

However, for what it is worth, I direct that High Court Criminal Appeal No. 353 of 2009 be given a hearing date on priority basis. It is so ordered.

Dated and delivered at Nairobi this 5th day of November 2009.

L. NJAGI

JUDGE