



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CORAM: TUNOI, GITHINJI & VISRAM, J.J.A**

**CRIMINAL APPLICATION NO. 14 OF 2010 (UR.10/2010)**

**BETWEEN**

- 1. JAYENDRA KHIMJI MALDE**
  - 2. RENJAN JAYENDRA MALDE**
  - 3. MILAN JAYENDRA MALDE.....APPLICANTS**
- AND**

**REPUBLIC.....RESPONDENT**

*(Application under rule 5 (2) (a) of the Court of Appeal Rules for stay of the ruling and all orders issued in Misc. Criminal Application No. 571 of 2010 pending the lodging, hearing and determination of an intended appeal from the ruling and orders of the High Court of Kenya at Nairobi (Warsame, J) dated 19<sup>th</sup> October, 2010 and 1<sup>st</sup> November, 2010*

**in**

**H. C. CR. APPL. NO. 571 OF 2010)**

**\*\*\*\*\***

**RULING OF TUNOI, J.A.**

I am in entire agreement with the reasoning and conclusion of Visram, J. A. and the order proposed by him.

The order of the Court, therefore, is that the 3<sup>rd</sup> applicant MILAN JAYENDRA MALDE be released on conditions imposed by the Chief Magistrate’s Court, Nairobi, in the Criminal Cases stipulated in prayer No. 3 of the motion.

**DATED and DELIVERED at NAIROBI this 18<sup>th</sup> day of FEBRUARY, 2011.**

**P. K. TUNOI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

## **DEPUTY REGISTRAR**

### **RULING OF GITHINJI, J.A.**

The three applicants seek an order under **Rule 5 (2) (a)** of the *Court of Appeal Rules* (Rules) that the orders of superior court (Mohamed Warsame, J.) given on 1<sup>st</sup> October, 2010 and on 19<sup>th</sup> October, 2010 regarding the applicants bail be stayed pending appeal, and, in the alternative, the applicants be released on reasonable bail terms/or on the conditions imposed by the Chief Magistrate pending appeal.

The 1<sup>st</sup> applicant **Dr. Jayendra Khimji Malde** and the 2<sup>nd</sup> applicant **Rajan Jayendra Malde** are jointly charged in *Criminal Case No. 1737 of 2010* of the Chief Magistrates Court, Nairobi with five counts of obtaining goods by false pretences contrary to *section 313* of the Penal Code. The total value of the goods allegedly obtained in the five counts is slightly over Kshs.212,000,000/=. They pleaded not guilty and were each released on a cash bail of Kshs.6,000,000/= The first two applicants are also jointly charged in *Criminal Case No. 1738 of 2010* with five counts of obtaining goods by false pretences under the same section of the Penal Code. The total value of the goods in the five counts is over Kshs.138,000,000/=. Each was released on a cash bail of Kshs.6,000,000/=

Lastly, the first two applicants are also charged in *Criminal Case No. 1743 of 2010* with one count of obtaining Kshs.241,337,942/= from Fina Bank by false pretences. Each was released on a cash bail of Kshs.10,000,000/=. Thus the 1<sup>st</sup> and 2<sup>nd</sup> applicants were required to pay a total Kshs.22,000,000/= as cash bail in the three criminal cases.

The 3<sup>rd</sup> applicant Milan Jayendra Malde is also facing three criminal cases before the same court. In *Criminal Case No. 1545 of 2010* he is charged with three counts of obtaining goods by false pretences the total value being about Kshs.89,000,000/=. He is also charged with a 4<sup>th</sup> count of issuing a bad cheque. He was ordered to be released on cash bail of Kshs.10,000,000/=. In *Criminal Case No. 1564 of 2010*, the 3<sup>rd</sup> applicant and another are jointly charged in count 1 with conspiracy to defraud Fina Bank of Kshs.241,337,942 and in count II the 3<sup>rd</sup> applicant is charged with obtaining credit i.e. (Kshs.241,337,942/=) from Fina Bank by false pretences. He was ordered to be released on cash bail of Kshs.5,000,000/=.

Lastly, in *Criminal Case No. 1568 of 2010* the 3<sup>rd</sup> applicant and another are charged with five counts of obtaining goods by false pretences. The value of the goods in the five counts being about Kshs.212,000,000/=. The 3<sup>rd</sup> applicant was released on a cash bail of Kshs.10,000,000/= in that case. Therefore the 3<sup>rd</sup> applicant was required to pay a total Kshs.25,000,000/= as cash bail in the three criminal cases. The prosecutor told the Principal Magistrate that he intended to consolidate the criminal cases against the 3<sup>rd</sup> applicant with the criminal cases against the 1<sup>st</sup> and 2<sup>nd</sup> applicants at the trial.

The 1<sup>st</sup> and 2<sup>nd</sup> applicants being dissatisfied with the bail terms imposed by the subordinate court filed an application i.e. *High Court Miscellaneous Application No. 571 of 2010* under **section 123 (3)** of the *Criminal Procedure Code (CPC)* seeking an order that they be admitted to reasonable bail terms and that the bail ordered by the court be reduced or reasonably varied. In addition, the three applicants filed *High Court Miscellaneous Application No. 308 of 2009* under **Order VIII Rule 1 (3)** of the *Civil Procedure Rules (CPR)* seeking leave to apply for Judicial Review Orders of Certiorari, Prohibition and Mandamus in respect of the criminal charges against them. Mr. Nyachoti, learned counsel who represented the applicants in the respective applications ultimately applied for leave to withdraw the two applications before Warsame, J. On 1<sup>st</sup> November, 2010 the superior court allowed the application for leave to apply

for Judicial Review to be withdrawn but in respect of *Miscellaneous Application No. 571 of 2010* said:

**“I have noted that the applicants were charged in three different criminal cases facing 10 counts. The amount allegedly stolen by the applicants is about Kshs550 million while they were released on aggregate cash bail of Kshs.22 million. I think that figure is not sufficient (sic) commensurate to the charge or amount involved.**

**I appreciate that in determining bond terms, the charge or figure contained in the charge sheet is not the only yardstick. However that is the starting point or foundation for the grant of bail pending trial. The primary concern of the court is to ensure that applicants will be in a position to avail themselves for trials. In my humble view persons charged with the figure mentioned in the 10 counts are likely to abscond or stay away from the trial unless stringent and strict conditions are imposed. In that regard and exercising my powers under section 362 and 364 C.P.C., I am inclined to enhance the bond terms imposed by the trial court. In order to do justice to all the issues and having regard to the rights of the applicants, it is in the interest of justice to enhance the bond terms granted to the applicant by the trial court.**

**Consequently I make an order for consolidation of the bond terms in all the three criminal cases in so far as bond/bail terms are concerned. I therefore set aside the bond/bail terms granted by the lower court to 3 accused persons and substitute with the following orders:**

- 1. THAT Milan Jayendra Malde shall be released on a cash bail of Kshs.50 million to be deposited in court by way of cash only. In case any sum has already been paid, it will be taken into consideration in so far as cash deposits are concerned. Any other security he may have deposited be returned to him or his agent.**
- 2. THAT Jayendra Khimji Malde be released on a cash bail of Kshs.30 million to be deposited in Court by way of cash only.**
- 3. THAT Mrs. Rajan Jayendra Malde be released on a cash bail of Kshs.24 million to be deposited in Court.**
- 4. THAT all the three accused persons to deposit their passports or travel documents in court before their release from prison custody.**
- 5. ....**
- 6. ....**
- 7. ....”.**

The applicants again being dissatisfied by those orders promptly lodged a notice of appeal and thereafter filed the present application.

The applicants state in the application that the intended appeal is arguable as the learned judge erred in law and in fact by, inter alia, suspending the bail terms when there was no application before him; by ignoring the fact that the applicants are entitled to reasonable bail terms under Article 49 of the Constitution; by failing to appreciate that he had no jurisdiction to suspend bail terms and by setting new and unreasonable terms.

The applicants further state that the appeal would be rendered nugatory if the application is not allowed because the applicants, particularly the 3<sup>rd</sup> applicant, would continue to be remanded in custody until the criminal case is determined as he cannot raise the bail.

The respondent (Republic) opposes the application and has filed an affidavit sworn by Paul Wachira, a

Superintendent of Police, who is one of the leading investigators in the criminal case giving the reasons why the application is opposed.

The application is also opposed by the various complainants in the criminal cases who are represented by Mr. Mwangi. They support the orders made by the superior court as just. They disclose that the 1<sup>st</sup> and 2<sup>nd</sup> applicants have already been released after paying the cash bail and express fear that the 3<sup>rd</sup> applicant would leave the jurisdiction in the event the application is allowed.

It has been conceded by Mr. Nyachoti, that the 1<sup>st</sup> and 2<sup>nd</sup> applicants have already raised and paid the enhanced cash bail and are therefore no longer in custody.

Thus, the application as it relates to them has been overtaken by events and indeed rendered ineffectual. However, the 3<sup>rd</sup> applicant could not raise the enhanced cash bail and is still in custody.

I must confess that when I was considering the application, I encountered one serious problem, namely, whether or not this Court has jurisdiction to entertain the application. Although the question was not raised before us. In my view, it is not a matter that the Court cannot ignore for we cannot confer jurisdiction on the Court if the law does not give it. It is trite law that this Court is a creature of statute with limited jurisdiction and can only exercise the jurisdiction conferred on it by the *Appellate Jurisdiction Act* (Act) and any other case.

**Section 3 (1)** of the Act provides:

**“The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court in cases which in an appeal lies to the Court of Appeal under any law”.** (emphasis ours).

The application filed in the superior court by 1<sup>st</sup> and 2<sup>nd</sup> applicants to vary the bail terms of bail was made under **Section 123 (3)** of the CPC which gives the High Court power to direct that any accused person be admitted to bail or that bail required by a subordinate court or police officer be reduced.

In enhancing the bail, the superior court specifically invoked the revisionary jurisdiction conferred on it by **Section 362** CPC which authorizes the High Court to call for, and examine, the record of any criminal proceedings before the Subordinate Court for purposes of satisfying itself as to correctness, legality or propriety of any finding, sentence or order, or, as to regularity of any proceedings. The High Court also invoked **Section 364** CPC which gives it jurisdiction to, among other things, alter or reverse any order made by the subordinate court. By **Section 361 (7)** CPC an order made by the High Court in its revisionary jurisdiction is deemed to be a decision of the High Court in its appellate jurisdiction.

It follows that an order made in exercise of revisionary jurisdiction by virtue of **Section 361 (1)** of CPC is in principle appealable as a second appeal on a point of law only.

The order, made by the superior court, however, related to variation of bail and not for instance an order for retrial, enhancement of sentence or altering the nature of the sentence. Indeed, the applicants have not been tried yet. By **Section 347** of CPC, it is only a person convicted on a trial by the subordinate court who is allowed to appeal to the High Court and, if the appeal of such a person is dismissed, he can, by virtue of **Section 361 (1)** CPC, file a second appeal to this Court on a point of law only. Similarly, by **Section 379 (1)** a person convicted on trial held by the High Court in exercise of its original jurisdiction and sentenced as specified may appeal to this Court and the Court has jurisdiction to grant bail in such a case (**Section 379 (4)**). Furthermore, **Rule 59 (2)** of the Rules stipulates that a notice of appeal should state the nature of the acquittal, conviction, sentence or finding against which it is desired to appeal.

By **Rule 59 (8)**, the notice of appeal should be in the prescribed form B of the First Schedule thereto and Form B clearly shows that, the appeal should relate to conviction and sentence. Lastly, **Rule 5 (2) (a)** under which the present application is made provide:

**“5. (2) subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution but the Court, may –**

**(a) In any criminal proceedings, where a notice of appeal has been given under rule 59, order that the appellant be released on bail or that the execution of any warrant of distress be suspended pending the determination of the appeal”.**

It is apparent from the wording of **Rule 5 (2) (a)** as read with **Rule 59** that the rule applies to cases where the applicant has already been convicted and sentenced either by the subordinate court, or by the High Court. The case of **Jivraj Shah v Republic** [1986] KLR 606 aptly illustrates the application of **Rule 5 (2) (a)**. There, this Court granted bail in the case of a second appeal against conviction and sentence.

In **Ademba v Republic** [1983] KLR 442, the appellant had been convicted by the subordinate court and sentenced to a term of imprisonment. He applied for bail in the High Court pending appeal to High Court but his application was rejected by the High Court. He filed an appeal to this Court against the refusal of the High Court to grant him bail and the Court of Appeal dismissed the appeal holding that it has no jurisdiction to entertain an appeal from a refusal of the High Court to grant bail to a convicted man pending an appeal to that Court (i.e. of the High Court).

In **Cholmondeley v Republic** – *Criminal Appeal No. 116 of 2007* (unreported) this Court, said:

**“In ordinary criminal trials, there is generally no interlocutory appeals allowed for Section 376 (1) of the Criminal Procedure Code allows only appeals by persons who have been convicted of some offence”.**

In that case however, the Court held that it had jurisdiction to entertain an appeal against an order of the High Court made in the course of a trial directing the defence to supply to the prosecution statements and particulars of defence witnesses and copies of any document or forensic reports, for the reason that the order violated the Constitutional right of the accused to the fair trial under **Section 77** of the repealed Constitution which breach was appealable as of right to this Court under **Section 84 (7)** thereof. In contrast, Article 23 of the new Constitution 2010 while giving jurisdiction to the High Court to enforce the *Bill of Rights* has no corresponding provision to **Section 84 (7)** of the repealed Constitution providing for appeals to this Court from determination by the High Court.

There is no uncertainty in civil proceedings regarding appeal from orders for **Order XLII** of *Civil Procedure Rules* provides for appeals from orders and specifies the orders which are appealable as of right and the orders which are appealable with leave of the court. The *Criminal Procedure Code* has no equivalent provisions. In my view, it would be wrong to assume, without the backing of the law that every order made by the High Court in criminal proceedings in its appellate or original jurisdiction is either with, or without leave, appealable to this Court.

From the foregoing observations, I entertain serious doubts as to whether the impugned order of Warsame, J. are appealable to this Court and also whether this Court has jurisdiction under **Rule 5 (2) (a)** to grant the orders sought. However, since we have not had the benefit of full arguments on this important issue it would be wrong and indeed presumptuous for me to finally pronounce on the issue. A final determination would have to await an appropriate occasion in future.

I can only say that for the purpose of this application, the applicants have not shown or endeavoured to show that the Court has jurisdiction to entertain an appeal from the orders of Warsame, J. and further that the Court has jurisdiction under **Rule 5 (2) (a)** to grant the orders sought in the application.

The court has not been called upon to decide, and, there is no material, on which I can decide, whether the jurisdiction of the Court could have been invoked in any other manner.

Lastly, the orders if granted are likely to lead to absurdity. The orders sought if granted, are final in nature in the sense that the applicants would in reality get the same relief though the application that they could,

if the appeal is ultimately filed and determined in their favour. In the event, the applicants may not file the appeal which in any case is likely to come for hearing long after the criminal cases pending in the subordinate court against them have long been finalized.

For those reasons, it is not necessary to consider the merits of the application.

In the result, I would dismiss the application with no orders as to costs. Orders accordingly.

**Dated and delivered at Nairobi this 18<sup>th</sup> day of February, 2011.**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**RULING OF VISRAM, J.A.**

I have had the benefit of reading in draft the ruling of my senior brother *Githinji, JA*. The facts are well set out in his ruling, and I see no reason to repeat the same. I also agree with his conclusion that an order made by the superior court in the exercise of its revisionary jurisdiction under **Section 361(1)** of the Criminal Procedure Code is appealable as a second appeal on a point of law. Clearly, here in this case before us, the third applicant has raised the issue of jurisdiction – whether the learned trial Judge had the jurisdiction to suspend the bail terms of the applicant when there was no such application before him; whether the learned Judge had the jurisdiction to substantially enhance the bail terms to render it almost impossible for the applicant to be set free on bail; whether the constitutional rights of the applicant to his liberty upon fair and just terms, were violated; and whether the learned Judge acted fairly and within his jurisdiction in applying the terms of bail in an attempt to “*coerce*” the applicant to settle his civil debts.

In my humble view these are substantial issues of law that cannot be wished away at the alter of technicality. I do not believe, for example, that **Rule 59(2)** of the Court of Appeal Rules, which stipulates that a notice of appeal to this Court should state the nature of the acquittal, conviction, sentence or finding against which an appeal is intended, can be used to bar an applicant from invoking his rights of appeal that do not necessarily arise from “acquittal” “conviction”, “sentence” or “finding”. I also do not believe that the simple wording of Form B of the First Schedule which states that the appeal should relate to conviction and sentence is sufficient to deny a citizen the right of appeal to this Court where he alleges breach of his constitutional rights. His right of appeal is derived from the Constitution of Kenya. **Article 23** of the new Constitution imposes upon the courts the duty to uphold and enforce the Bill of Rights. **Article 164(3)** of the Constitution states as follows:-

***“The Court of Appeal has jurisdiction to hear appeals from:-***

- a) The High Court; and***
- b) Any other court or tribunal as presented by an Act of Parliament.”***

**Article 159(2)(d)** of the Constitution states as follows:-

***“159(2): In exercising judicial authority, the courts and tribunals shall be guided by the following principles:-***

- (d) Justice shall be administered without undue regard to procedural technicalities.”***

**Article 165(7)** of the Constitution (which specifically incorporates the current **Section 362** of the Criminal Procedure Code) states:-

***“165(7) For the purpose of clause (6), the High Court may call for the record of any proceedings***

***before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice”***

As *Githinji, J.A.* noted, in enhancing the bail, the superior court specifically invoked the revisionary jurisdiction conferred on it by **Section 362** of the Criminal Procedure Code which, as I have observed, is fully incorporated in **Article 165(7)** of the Constitution. It should be emphasized that the said Article ends with the words,

***“to ensure the fair administration justice”.***

Whether the superior court acted within the letter and spirit of the Constitution, when it enhanced the bail terms, is an arguable point, as is the issue of jurisdiction. On those grounds, the applicant has a right of appeal, and to the determination of whether his constitutional rights were violated.

And, finally, **Article 49(1) (h)** of the Constitution stipulates that:-

***“An arrested person has the right to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.”*** (emphasis added).

Now, unlike in the past, even those persons charged with serious offences, such as murder, are entitled to bail ***on reasonable conditions***. The applicant herein is certainly entitled to question, on appeal, why he should not have been entitled to bail on reasonable conditions, for the offences that he is charged with.

In my view, he certainly has an arguable appeal, and the same will be rendered nugatory unless the orders, or one of the orders sought, is granted at this time.

Accordingly, I would grant prayer four of the application dated 1<sup>st</sup> December, 2010, and order that the 3<sup>rd</sup> applicant be released on conditions imposed by the Chief Magistrate’s Court in Nairobi in the criminal cases stipulated in that prayer. It is so ordered.

***DATED and DELIVERED at NAIROBI this 18<sup>th</sup> day of FEBRUARY, 2011.***

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**