IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, VISRAM & NYAMU, JJ.A)

CRIMINAL APPLICATION NO. NAI. 18 OF 2010

BETWEEN

JOSEPH MAINA KARIUKI.....APPLICANT

AND

REPUBLIC.....RESPONDENT

(An application for bond or bail in appeal from a judgment of the High Court of Kenya at Nairobi (Mbaluto & Onyancha, JJ) dated 29th July, 2003

in

H. C. Cr. A. Nos. 199 & 201 of 2002)

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RULING OF THE COURT

In this notice of motion filed under ***Rule 5 (2) (a)*** of the Rules of this Court, the applicant, whose appeal to the superior court against conviction and death sentence for the offence of robbery with violence was dismissed on 29th July, 2003, now seeks to be admitted to bail pending the hearing and determination of his appeal.

The main grounds of the application are that there is a likelihood of success in this appeal; likelihood of the applicant having served a substantial part of the sentence prior to the hearing and determination of the appeal; the applicant suffers from ill health and requires a special home-made diet; and that the new Constitution of Kenya now allows persons convicted of any offence to be admitted to bail. There is an affidavit sworn by the applicant in support of the application.

Mr. E. Wetangula, learned counsel for the applicant, in arguing the above grounds, referred us to the case of ***Jivraj Shah vs Republic*** ***(1986) KLR 605*** which sets out the principles upon which a person may be admitted to bail pending the hearing and determination of an appeal. Mr. O'Mirera, learned Senior Principal State Counsel, agrees with the same. Counsel agree that the principal consideration in an application for bail pending appeal is, the existence of exceptional or unusual circumstances upon which the Court of Appeal can fairly conclude that it is in the interest of justice to grant bail; secondly, if it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of some substantial point of law to be urged and that the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail will exist.

In the ***Jivraj case (supra)*** the Court found that there was a substantial issue of law to be argued on appeal as to whether there was a "taking" within the meaning of ***section 268*** of the Penal Code. That Court was satisfied that on the facts of that case, it was proper for the Court to exercise its discretion to grant bail.

The "exceptional or unusual circumstances" relied upon by the applicant before us is that the record of proceedings of the superior court have disappeared, preventing the applicant from filing his appeal. We do not accept that argument as being sufficiently strong to enable us exercise our discretion in granting bail in this case. It constitutes bad practice or example upon which this Court frowns. In addition it would be a dangerous precedent to set in the circumstances. Secondly, the applicant has not shown that he has a meritorious appeal. We have not had the benefit of perusing even a draft memorandum of appeal, and have no notion of what will be argued in this appeal.

Mr. Wetangula also referred to ***Article 49*** of the Constitution in urging that the applicant be admitted to bail pending appeal. We agree with Mr. O'Mirera that that Article gives the right of bail to persons "arrested" in respect of alleged crimes, and is not applicable to those "convicted" for offences because the convicted ones have lost the presumption of innocence. In the matter before us, two courts below have upheld the conviction.

Accordingly, we are of the view that there is no merit in this application and disallow the same.

Dated and delivered at Nairobi this 8th day of July, 2011.

R. S. C. OMOLO
.....
JUDGE OF APPEAL

ALNASHIR VISRAM
.....
JUDGE OF APPEAL

J. G. NYAMU
.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR