



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION**

Misc Crimi Appli 564 of 2005

**(Being intended appeal from conviction(s) and sentence(s) of the Senior Principal
Magistrates Court at Nairobi in Criminal Case No. 3015 of 2004)
FAI OMAR AMARIO.....APPLICANT**

VERSUS

THE HON. THE ATTORNEY GENERAL.....RESPONDENT

R U L I N G

FAI OMAR AMARIO seeks bail pending the full hearing and determination of his appeal **No. 495 of 2005**. Before counsel for the Applicant Mr. Ombeta, could argue the Application, Mr. Tobiko, the Director of Public Prosecution (DPP) who had come in person addressed the court. I do not intend to state in this appeal what he stated in that address except to say that he made it very clear that the State was not opposing neither the Application before me nor the appeal, which was not before me. The reasons he gave for not opposing the Application were somewhat personal to his office and I must say were irrelevant for purposes of consideration of the application for bail. The DPP submitted that his office had not been consulted nor had the investigation files relating to the matter before this court and others before the lower court, sent to him for perusal nor had his office been consulted. The DPP said that after perusing the Application before Court and proceedings of the Lower Court, he came to the conclusion that the convictions were unsafe.

MR. OMBETTA then addressed the Court albeit very briefly. Learned counsel submitted that the Applicant was relying on the affidavit by one **WANDUGI** advocate and especially paragraph seven. Learned counsel submitted that the grounds relied on were very clear as stated on the cited paragraph and therefore he said no more.

I must begin by stating that both the DPP and Mr. Ombetta, apart from making statements merely to show that they were convinced that the Application should be granted, did not substantiate why they were so convinced. The DPP may not have had much duty to demonstrate in detail why he was not opposing the Application. However, the learned counsel for the Applicant had a very important duty to demonstrate to this court why the Application should be granted. All the counsel did was refer to paragraph 7 of the affidavit by one **WANDUGI** advocate which he then stated spoke for itself, before "packing his bags" (literally) and leaving it to the Court to know what the cited paragraph said. That action is quite unfortunate and smacks of indifference to the noble albeit onerous duty of a counsel to represent his client.

I did peruse the Affidavit cited and also the annexed copy of the proceedings and Judgment of

the lower Court. Paragraph 7 of Wandugi's affidavit urges the Court to find that based on grounds deponed to in that paragraph, the learned trial magistrate erred. Sub paragraph (a) to (c) deal with circumstantial evidence in which deponent argues that the trial Courts findings on that evidence were erroneous. Sub-paragraph (d) to (h) and (j) to (k) and (o) deals with possession, handling and knowledge on the Applicant's part of existence of an exhibit before the trial court and deponent contends that the court's conclusion on all three issues was wrong. In sub-paragraph (i) the deponent challenges the court on the treatment of the evidence of PW4. In sub-paragraph (i) to (n), the deponent challenges the trial court's treatment of the Applicant's case, defence and the courts final judgment.

None of these grounds were argued by Mr. Ombetta before me. They are largely unsubstantiated and except going by the reading of them in the affidavit of Mr. Wandugi. My conclusions after considering Mr. Wandugi's affidavit herein and the proceedings and judgment of the trial court, are as follows: -

The issue of the circumstantial evidence deponed to goes to the weight of the evidence relied upon by the prosecution, its admissibility, its interpretation and whether the trial court's conclusion that, *inter alia*, the inculpatory facts were inconsistent with applicant's guilt are matters for the appeal. The issue before this court is not to go into the soundness of the conviction or the considerations the court delved into before arriving at its conclusions. The issue before this court is whether the appeal has overwhelming chances of success. As far as I see, on the issue of circumstantial evidence, these are issues that were considered by the trial court based on circumstantial evidence presented before it. Circumstantial evidence existed and was not a figment of the trial court's imagination as indeed did the evidence of possession and handling. The issue of whether or not the Applicant had knowledge of the existence of the exhibit, the subject matter of the case was both a question of law and fact. All these issues were live and deserved consideration. As to whether the trial court's finding were justified, and of whether they could be supported both in law and fact, are weighty issues which should be left to the appellate court to ventilate on appeal.

To be fair to the Applicant I have considered the other factors which need to be considered in an application such as this one. See **MERALI vs. REPUBLIC 1972 EA 47, SOMO vs. REPUBLIC 1972 EA 476**. The possibility of a substantial delay in the hearing of the appeal leading to the Applicant serving a substantial part of his sentence was also considered. The registry informs me that the Applicant's appeal is likely to be heard during the next two High Court sessions. There is absolutely no likelihood of the Applicant serving a substantial part of his sentence before the appeal is heard. The Applicant's case before the lower court from which he has now lodged his appeal has in the past generated great public interest and it is important that this Application needed to be given serious consideration. Looking at the general merits of this Application, and having regard to all the factors for consideration I find that the Application should be and is hereby dismissed.

Dated at Nairobi this 20th day of December 2005.

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LESIIIT, J.

JUDGE

Read, signed and delivered in the presence of;

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LESIT, J.

JUDGE



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