



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CRIMINAL APPEAL NO. 177 OF 2018**

**(From Original Conviction and Sentence in Criminal Case No. 3188 of 2014 by the Chief Magistrate's Court at Kakamega)**

**JOSEPH NDALE OMULI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

1. The appellant was convicted by Hon J.N Maragia, Senior Resident Magistrate, on 22<sup>nd</sup> November 2018 of stock theft contrary to section 278 of the Penal Code, Cap 63 of the Laws of Kenya, and was accordingly sentenced to three (3) years imprisonment. He subsequently filed the appeal herein against the conviction and sentence.

2. I am called upon to determine an interlocutory Motion dated 27<sup>th</sup> November 2018, seeking that the appellant to be admitted to bail pending appeal. He avers that his appeal has overwhelming chances of success, that he would abide by bail terms if the application is granted and that he feared that if the appeal was heard and determined while he was in custody he stood a chance of the appeal being determined after he has completed serving sentence.

3. The application was urged on 11<sup>th</sup> December 2018. Mr. Ondieki argued that the appellant feared that that he may have served the entire jail term if he was not admitted to bond pending the appeal. He pleaded that the appellant had been on bond during trial and that the appeal had high chances of success. Mr. Ng'etich, Senior Prosecution Counsel, stated that he had no specific instructions to oppose bail, adding that the state was ready to abide by the court's directions. He emphasized that the appellant was a convict, his circumstances had changed, meaning that the terms of bail ought to differ from those imposed at the trial court.

4. Bail pending appeal is provided for under section 357 of the Criminal Procedure Code, Cap 75, Laws of Kenya. It is undoubtedly a right that accrues to the appellant herein, and I need not reproduce the provision verbatim in this ruling.

5. I agree with Mr. Ng'etich, that the circumstances of the case have changed for as at this stage the appellant is now a convict. That was position stated by the Court of Appeal in *Mutua vs. R* (1988) KLR 497, where it said -

*'It must be remembered that an applicant for bail has been convicted by a properly constituted court and is undergoing punishment because of that conviction which stands until it is set aside on appeal. It is not wise to set the applicant at liberty either from the point of view of his welfare or of the state unless there is real reason why the court should do so.'*

6. A court faced with an application for bail pending appeal has to exercise discretion judicially upon taking into account various factors; which include: whether the appeal has overwhelming chances of success (see *Ademba vs. Republic* (1983) KLR 442, *Somo vs. R* (1972) EA 476 and *Mutua vs. R* (supra)), whether exceptional or unusual circumstances to warrant the court's exercise of its discretion exist (see *Raghubir Singh Lamba vs. R* (1958), and whether there is a high probability of sentence being served before the appeal is heard (see *Chimabhai vs. R* (1971) EA 343).

7. The appellant addressed me on only one of the factors cited above, the possibility that he would have served sentence before the appeal is heard and determined. He made no attempt to demonstrate whether his appeal had any chances of success or whether any exceptional or unusual circumstances existed to warrant his being admitted to bail pending appeal. I note that the state does not oppose the application. I note too that the sentence is fairly short, three years.

8. I shall accordingly exercise discretion in favour of the appellant, and admit him to bail pending appeal. He may be released upon his executing a bond of Kshs. 150, 000.00 with a surety of like amount, or deposit cash bail of Kshs. 100, 000.00. The bond is liable to cancellation upon his failure to attend court as and when required to, or upon his being convicted of any other offence during the pendency of the appeal. It is so ordered.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS....10<sup>th</sup>..... DAY OF....April....2019**

**W MUSYOKA**

**JUDGE**