



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL CASE NO. 33 OF 2019

FREDRICK MAINA WAGURA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The application before this court made under the provisions of Section 357 of the Criminal Procedure Code; the applicant seeks to be admitted to bail pending the hearing and determination of his appeal; the applicant relied on the grounds on the face of the application and on the Supporting Affidavit dated 5/07/2019 and made by **Fredrick Maina Wagura**;

2. At the hearing hereof the applicant was represented by Learned Counsel Mr.Gacheru whereas the State was represented by Prosecuting Counsel Mr. Magoma; hereunder are the submissions made by Counsel for the applicant; the State did not make any submissions in opposition to the application;

APPLICANTS SUBMISSIONS

3. The applicant was charged with two counts Count 1 was for the offence of Stealing contrary to Section 268(1) as read with Section 275 of the Penal Code; the particulars of the Charge was that on the 22nd day of January, 2017 at Giteri Village the applicant jointly with others not before the court stole 200 metres of alluminium conductor valued in the sum of Kshs.300,000/- the property of Kenya Power;

4. Count II was Improper use of Electrical Energy contrary to Section 64(4)(d) of the Energy Act; the particulars were that on the same date and place as set out in Count I the applicant jointly with others not before the court with intent to interfere illegally connected a conductor to the main supply line without consent of the licensee Kenya Power;

5. There was also an alternative charge of Handling stolen goods contrary to Section 322(2) of the Penal Code;

6. On the 21/05/2019 the applicant was acquitted on Count 1 but was found guilty on Count II; he was convicted and sentenced to a fine of Kshs.5,000,000/- in default to serve a term of ten (10) years imprisonment; being aggrieved and dissatisfied with the judgment of the Senior Resident Magistrate sitting in Nyeri he filed the instant appeal against the conviction and sentence;

7. Counsel for the applicant urged the court to admit the appellant to bail/bond pending appeal as the appeal has overwhelming chances of success as no documentary evidence was produced in the form of

acknowledgement nor any quotation; that crucial witnesses were not called to testify; that he would also stand to suffer irreparable loss and damage as the hearing and determination of the appeal may take time and the appellant may have served a substantial part of his term;

RESPONDENTS SUBMISSIONS

8. Prosecuting Counsel for the State Mr. Magoma did not oppose the application; and submitted that the applicant had been granted bail in the lower court and had never breached the terms.

ANALYSIS

9. The facts of the case are that the applicant was tried and convicted before the Nyeri Senoir Resident Magistrate Hon. R. Kefa on Count II for the offence of Improper use of Electrical Energy contrary to Section 64(4)(d) of the Energy Act; he was convicted and sentenced to a term of ten (10) years imprisonment or a fine of Kshs.5,000,000/- and being dissatisfied with this decision he filed the instant appeal; the appellant also filed the instant application for bail pending appeal;

10. The applicant contends that his appeal has overwhelming chances of succeeding; that he was acquitted of the allegations of stealing and handling; vital documentary evidence to prove that there was an exchange of money for appliances and material were never produced; no quotation was produced by the prosecution witnesses; vital witnesses were also not called to testify;

11. The principles upon which a court may grant applicant bail pending appeal is cited in the case of **JIVRAJ SHAH vs REPUBLIC [1986] KLR 605** where it was held as follows;

“ If it appears prima facie from the totality the circumstances that the appeal is likely to be successful on account of some substantial point of law to be urged or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail will exist”

12. The main consideration for bail pending appeal is whether the applicant has shown that his appeal has overwhelming chances of succeeding;

FINDINGS AND DETERMINATION

13. From the material placed before this court is satisfied that the applicant has made out a prima facie case that his appeal is likely to be successful on two grounds that is of lack of production of documentary evidence and failure to call crucial witnesses;

14. Another consideration is that there is a likelihood of there being a delay in the hearing of the appeal and that the applicant may end up having served a substantial part of his term;

15. This court finds that there is no good reason for depriving the applicant of his freedom; this court also finds that this is a suitable case for the exercise of its discretion in favor of the applicant.

16. The application is found to be meritorious and is hereby allowed.

17. The applicant may be released on bond pending the hearing of his appeal upon execution of a bond in the sum of Kshs.500,000/- together with one surety of a similar amount.

Orders Accordingly.

Dated, Signed and Delivered at Nyeri this 3rd day of October, 2019.

HON.A.MSHILA

JUDGE