REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

HCCRA NO. 44 OF 2018

ITWA KIOKO .....1ST APPLICANT

JUSTUS MWANIKI MWAVILI.....2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicants, **ITWA KIOKO** and **JUSTUS MWANIKI MWAVILI**, were convicted for the offence of **Stealing Goods on Transit** Contrary to **Section 279(c)** of the **Penal Code.**

2. Each of them was then sentenced to seven years imprisonment.

3. Being dissatisfied with both the convictions and the sentences, the Applicants have filed appeals at the High Court.

4. Whilst waiting for the hearing and determination of their appeals, the Applicants have asked the Court to grant them Bail or Bond.

5. It is the opinion of the Applicants that their appeals have high chances of success. That opinion is premised on the contention that the facts upon which the trial court convicted the Applicants were not investigated.

6. The fact that the learned trial magistrate pegged her decision on her opinion, was faulted by the Applicants.

7. In my considered view, the Applicants have mis-apprehended the use of the word "opinion", as applied in the judgment.

8. When a court expresses a "view" as I have just done or an "opinion" as the trial court did, does not imply that the court failed to take into account the evidence tendered.

9. An opinion is ordinarily based on the analysis of the evidence tendered. However, if the Appellant was able to demonstrate that the trial court failed to take into account some evidence or other relevant factor, or that the trial court took into account some extraneous or irrelevant factor, that would be a basis for attacking the court's decision.

10. A court can only be independent if it did not have first-hand information about the incident, through its own senses. In other words, the court would not have been an eye-witness to the incident giving rise to the case.

11. Therefore, after the court receives evidence and submissions from the prosecution and the defence, it can only form a considered opinion.

12. If the opinion was well-founded, the court's decision would be upheld by the appellate court.

13. The second issue which the Applicants raised was that their conviction was based on purely on circumstantial evidence.

14. Once again, it must be borne in mind that in many cases the only evidence available was circumstantial evidence. Therefore, just because a conviction was founded upon circumstantial evidence is not reason enough, of itself, to find that such conviction would probably be set aside.

15. The third issue that the Applicants canvassed was that there were glaring inconsistencies in the evidence tendered by the prosecution. The example which they gave was that whilst **PW2** testified that the maize was loaded onto a lorry registration **KCD 994D** and a Trailer registration **ZD 9320**, the trial court stated that the lorry was registration **KCD 994N.**

16. It is true that **PW2** testified about a lorry registration **KCD 994D**. But **PW3** talked about **KCD 994N.**

17. Therefore, whilst those two witnesses gave evidence, citing registration numbers which were not exactly the same, it can be seen that the trial court did not just pick from the air, the registration **KCD 994N.**

18. Whereas the Applicants took issue with the contention that **PW3** visited the scene of crime 2 years after the incident, the record of proceedings does not contain any such testimony.

19. As regards the evidence tendered by the Applicants, they submitted that the trial court ought to have taken judicial notice of the fact that a reputable newspaper had reported that the maize was looted by villagers, after the lorry which was transporting the maize was involved in an accident.

20. I find that the appeals filed by the applicants are arguable.

21. I have consciously refrained from more detailed analysis of the grounds of appeal because that is the function to be entrusted solely to the appellate court.

22. If I were to express any definitive opinion regarding the appeals' chances of success, I would have pre-empted the hearing of the appeal.

23. Nonetheless, I note that both applicants did fail to attend court, on some occasions during their trial.

24. Although they were both re-admitted to bond pending further trial, this court holds the view that the applicants do not appear to be reliable, in terms of their commitment to come to court whenever required.

25. Originally, the trial court granted to each of the applicants, a bond of Kshs 100,000/=, with one surety.

26. However, the court later enhanced the terms, so that the bond was for Kshs 200,000/=, with a surety of similar sum.

27. Considering that the applicants had now been convicted, I hold the considered view that because they had now lost the legal presumption of innocence, it was necessary to further enhance the bond terms, so as to strike the correct balance between their right to bond and the need to ensure that they attend court for their appeals.

28. In the result, I now order that the applicants shall be released pending the hearing and determination of their appeals, on Condition that each of them executes a Personal Bond of Kshs

29. 250,000/=. Each of the applicants shall also make available one Surety for the same amount.

DATED AND SIGNED AT KISUMU THIS 30TH DAY OF JULY 2018

FRED A. OCHIENG

JUDGE

DATED, SIGNED AND DELIVERED AT KISUMU

THIS 30TH DAY OF JULY 2018

T.W. CHERERE

JUDGE