



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 104 'B' OF 2016

AGGREY NGURET.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An application for bail pending appeal from the decision of Kesse Cheron, Senior Resident Magistrate, in Criminal Case No. 3127 of 2013 at Kapsabet dated 16th September 2016]

RULING

1. The appellant was adjudged guilty on two counts of *stealing* contrary to section 268 (1) of the Penal Code; and, *conspiracy to effect an unlawful purpose* contrary to section 395 (f) of the Penal Code. He was sentenced to *two years* imprisonment on the first count; and, *six months* imprisonment on the other count. The sentences were to run *concurrently*.
2. The offence under the first count was committed on 25th October 2013 at Kamasai Trading Centre, Nandi County. The items stolen were 86 iron sheets valued at Kshs 97,470.50; the property of Butali Sugar Mills Limited. The conspiracy to steal was on diverse dates between 1st August 2013 and 25th October 2013 at Kamasai Trading Centre.
3. The appellant has preferred an appeal against the conviction and sentence. The petition of appeal was filed on 15th September 2016. It raises *eleven* grounds. Pending the hearing and determination of the appeal, the appellant has presented a notice of motion dated 31st October 2016 praying for bail. It is supported by a deposition sworn by the appellant's counsel, *Moses Sang*, on even date.
4. The appellant contends that the appeal has overwhelming chances of success. The appellant's learned counsel submitted that the appellant was not positively identified; that there was no proof that the company owned the goods that were stolen; and, that the conspirators were never identified. Counsel argued that it was selective to charge the appellant when there were other persons who had access to the stores. He also cast doubt on the registration particulars of a motor vehicle KAA 422. Lastly, it was submitted that unless bail is granted, the appellant will have served the whole or a substantial part of the sentence. In a synopsis, the appellant's case is that there are exceptional circumstances that warrant grant of bail.
5. The application is contested by the Republic.
6. The legal parameters in an application of this nature were well stated by the Court of Appeal in *Jivraj Shah v Republic* [1986] KLR 605-

"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 a substantial part of it, will have been served by the time the appeal is heard, conditions for granting bail will exist. The decision is Somo v Republic [1972] EA 476 which was referred to by this court with approval in Criminal Application No. NAI 14 of 1986, Daniel Dominic Karanja v Republic where the main criteria was stated to be the existence of overwhelming chances of success does not differ from a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed."
7. It would be prejudicial to comment about the merits of the appeal or the veracity of the evidence presented at the trial. I would be preempting the hearing of the appeal. However, I note from the annexed proceedings that the appellant was *identified* at the *locus in quo* by PW2 on 25th October 2013. It was between 4:00 a.m. and 5:00 a.m. That would seem to be the *single* identifying witness. He said they *exchanged* greetings. He did *not* identify any of the other four people. It will now be the duty of the first appellate court to re-evaluate the evidence of identification; and, determine whether it was *reliable*.
8. From the evidence of PW6, the appellant was a *store keeper*; and, had *access* to the stolen iron sheets at the construction site at Kamasai Hospital. I have considered the unsworn statement of *defence* by the appellant. I have also studied the final judgment. In her final analysis, the learned trial magistrate found that the defence did not cast *doubt* on the case for the Republic. It will again be the duty of the first

appellate court to re-evaluate the entire corpus of evidence and draw its independent conclusions. The less I comment about the matter, the better.

9. I agree that the points raised in the petition of appeal are *arguable*. Like I have stated, it will be the true province of the appellate court to re-evaluate all the evidence. But I am not persuaded that there are *exceptional grounds* or that a *substantial point of law or evidence* has been urged to sway the court to grant bail pending appeal.

10. The appellant was sentenced to a total of *two and a half years* imprisonment. It will be for the appellate court to determine whether the sentences were lawful considering all the circumstances of this case; and, the fact that the appellant was a first offender. On the face of it, the sentence handed down is not *illegal*. It is true that a *substantial part* of the sentence *will* be served *before* the appeal is heard and determined. But from what I have stated, I am *not* persuaded that the appeal has an *overwhelming* chance of success. See *Somo v Republic* [1972] EA 476, *Jivraj Shah v Republic* [1986] KLR 605.

11. It is true that the appellant was admitted to bail during his trial. But the *presumption* of innocence no longer holds *pure*. The appellant has been *convicted*. The considerations for grant of bail at this stage are thus markedly different.

12. In the end, there are no *exceptional* circumstances to warrant grant of bail pending appeal. It follows that the notice of motion dated 31st October 2016 is devoid of merit. It is hereby *dismissed*.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET this 26th day of January 2017.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of-

Appellant.

No appearance by counsel for the appellant.

Ms. B. Oduor for the Republic.

Mr. J. Kemboi, Court Clerk.