



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 29 OF 2017

PETERSON KAMUNGE KAGAI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence of the Principal Magistrate's Court (A. N. Makau) at Gichugu, Criminal

Case No. 259 of 2016 delivered on 12th April, 2017)

RULING

1. The appellant **Peterson Kamunge Kagai** was charged with the offence of stealing contrary to **Section 275** of the **Penal Code** before **Principal Magistrate's Court Gichugu Criminal Case No. 259 of 2016**. The particulars of the charge alleged that the Appellant Peterson Kamunge Kagai on 23rd March, 2016 at Kiamutugu shopping centre Ngati location in Kirinyaga East Sub-County within Kirinyaga County he stole one window valued at Ksh.800/- the property of Wilson Njagi Muthiru.

2. The Appellant denied the charge. After a full trial the Appellant was found guilty, convicted and sentenced to serve two years imprisonment. The Appellant was aggrieved with the conviction and sentence and filed this appeal. He also filed an application by way of Notice of Motion under **Section 356** of the **Criminal Procedure Code Cap. 75 Laws of Kenya** seeking orders that he be released on bail pending hearing and determination of this appeal.

The application is based on the ground that the Appellant was convicted on 7th April, 2016 and sentenced on 12th April, 2017 (sic) to serve a custodial sentence of three (3) years vide **Senior Resident Magistrate Criminal Case No.259 of 2016, Gichugu Court** without an option of fine. That the appeal has high chances of success. The application is supported by the affidavit of D. G. Ngari sworn on 20th May, 2017.

3. The Respondent was served but did not file a reply. Mr. Sitati, learned State Counsel submitted that he did not oppose the application. He conceded that the Appellant has an arguable appeal and there is a likelihood of an acquittal.

4. The Appellant through his learned counsel M/S Waithera raised two grounds. The first ground is that the Appellant has an arguable case. Secondly that the circumstances warrant the granting of bail pending appeal.

5. On the first ground counsel submits that the appeal has overwhelming chances of success based on the

facts before the trial Court. It is argued that the issue of ownership of the stolen property was not settled. The applicant is alleged to have stolen a window from a building which is standing on a property which is the subject of an ongoing succession cause. The complainant did not own the property and that it was a case of inter-meddling with the estate of the deceased. That the case was an attempt to silence the Applicant who is a beneficiary.

6. On circumstances, it was submitted that the appeal has chances of success. That the Appellant suffers from high blood pressure. That his health status calls for his release. That by the time the appeal is heard and determined, he will have served the entire sentence.

7. I have considered the application. It is brought under **Section 356 of the Criminal Procedure Code.** I wish to point out that the correct provision under which the application should be brought is **Section 357 (1) of the Criminal Procedure Code** which provides:

“After the entering of an appeal by a person entitled to appeal, the High Court, or subordinate court which convicted or sentenced that person, may order that he be released on bail with or without sureties, or, if that person is not released on bail, shall at his request order that the execution of the sentence or order appealed against shall be suspended pending the hearing of the appeal.”

I will nevertheless determine the issue at hand as this is a technicality.

8. On the issue of arguable appeal, I find that it is not in dispute. The state counsel has conceded that the appeal is arguable. I need not comment on the merits of the appeal at this stage.

9. There are circumstances to warrant the Court grant bail pending appeal. The Appellant is said to be sickly and he may serve substantial part of the sentence before the appeal is finalized. The above quoted provision gives court discretion to admit a convicted person to bail pending appeal. It is a discretion which can only be exercised in exceptional circumstances as the Appellant has lost the presumption of innocence. The Appellant bears the burden to prove that there are exceptional circumstances.

10. The principles which the Court has to consider in granting bail pending appeal were considered in the case of **Simon Mwangi Kirika -V- R (2006) eKLR** by the Court of Appeal which quoted the case of **Jivray -V- R 1986 KLR 605** where it was observed:

“ i) The principal consideration in an application for bail pending appeal is, the existence of exceptional or unusual circumstances upon which the Court of Appeal can fairly conclude that it is in the interest of justice to grant bail.

ii) 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 substantial part of it have been served by the time the appeal is heard, conditions for granting bail will exist.

iii) The main criteria is that there is no difference between overwhelming chances of success and set of circumstances which disclose substantial merit in the appeal which could result in appeal being allowed and the proper approach is the consideration of the particular circumstances, weight and relevance of the points to be urged.”

11. I am of the view that considering the above principles the Applicant has cited exceptional circumstances. The Appellant has annexed treatment notes, annexture 4 which proved that he has been ailing. He is likely to serve substantial part of the sentence before the appeal is heard and determined. Counsel has raised considerable points of law which are cited in the appeal which shows that the appeal is likely to succeed. The State has not opposed the appeal based on the fact that the Appellant has an arguable appeal. I am of the view that the Appellant has shown that there exists exceptional circumstances to warrant this Court to grant him bail pending appeal.

12. There are substantial points of law and facts that '*prima facie*' points to the appeal being successful. In the circumstances I find that the application has merits. The Appellant will be released on bail pending the hearing and determination of the appeal. I order that he be released on a bond of Ksh.500,000/- plus two like sureties to appear in Court for this hearing and determination of appeal. The record of the lower Court shows that the Appellant is a repeat offender. The pre-sentence report does not portray the Appellant in very good light. I will therefore impose a condition that the Appellant should not commit an offence during the pendency of the appeal. If he commits an offence, the bail shall be cancelled.

Dated and delivered at Kerugoya this 25th day of May, 2017.

L. W. GITARI

JUDGE