



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 15 OF 2015

SAMUEL MBUGUA MWANGI..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an application for bail pending appeal from the original conviction and sentence in Criminal Case No. 5900 of 2013 Republic v Samuel Mbugua Mwangi in the Principal Magistrates' Court at Eldoret by S. Mokuu, Principal Magistrate dated 30th January 2015)

RULING

1. The appellant was convicted for *vandalism* contrary to section 64 (4) of the Energy Act 2012; and, *sabotage* contrary to section 343 of the Penal Code. He was sentenced to *ten years* imprisonment on the first count; and, to *two years* on the second count. The sentences were to run concurrently.
2. The particulars of the first count were that on 22nd and 23rd December 2013 at Sango Sub-location, Likuyani District, Kakamega County, he vandalized two transformers, the property of Kenya Power Company. Regarding the second count, it was alleged that on 26th December 2013, at the same place, he willfully damaged Kenya Power electric expansion fuses with the intention of impairing the company's ability to transmit power.
3. The appellant has preferred an appeal. Pending the hearing and determination of the appeal, the appellant has presented a notice of motion dated 11th February 2015 praying for bail. It is supported by a deposition sworn by his counsel on even date.
4. The appellant contends that the appeal has overwhelming chances of success; that he is sickly; that the offence was not proved beyond reasonable doubt; and, that he shall abide by any conditions that may be set by the court. In a synopsis, the appellant contends that there are exceptional circumstances to warrant grant of bail.
5. The motion is contested by the Republic. Learned State Counsel submitted that all the elements of the charges were proved beyond reasonable doubt; that the sentences or a substantial part thereof are unlikely to have been served before hearing and determination of this appeal; and, that the medical condition of the appellant is not an exceptional circumstance to warrant bail pending appeal.
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 in 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 inappropriate at this stage to comment about the veracity or otherwise of the evidence presented at the trial. I note however that the evidence was largely *circumstantial*. The trial court was alive to that fact and averted to the decision in *R v Kipkering arap Koske & another* 16 EACA 135 (1949) where the court held-

“In order to justify the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt”

8. The trial court found that the two transformers were vandalized; that circumstantial evidence pointed to the fact that the appellant was at the scene where the Lugulu-Brigadier-Nzoia power line was vandalized; and, that the 1st accused (the appellant’s co-accused) was found in possession of the expansion fuses or transformers. The court also found that the appellant’s motor cycle or pliers were used to commit the offence. I note that the appellant and his co-accused were arrested by members of the public. PW3 identified the appellant at the scene.
9. I would be pre-empting the hearing of the appeal if I commented further on those matters now. I have noted however that the trial court considered the defence of the appellant. The general defence was that he was an innocent *boda boda* operator who had transported his customers to the scene. The trial court did not believe him. It will now be the duty of the appellate court to re-evaluate that corpus of evidence and reach its independent conclusions. The less I comment about the matter, the better.
10. As to whether the points raised in the petition are *arguable*, I would say *yes*. Like I have stated, it will be the true province of the appellate court to re-evaluate all the evidence and draw its own conclusions. 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.
11. The appellant was sentenced to *ten years and two years* respectively. It will be for the appellate court to determine whether the sentence was lawful considering all the circumstances of this case; the fact that the appellant was a first offender; and, the mitigation proffered by the appellant. On the face of it, the sentence handed down is not *illegal*. Fundamentally, I cannot say that a *substantial part* or the *whole* of the sentence will be served *before* the appeal is heard and determined. See *Somo v Republic* [1972] EA 476, *Jivraj Shah v Republic* [1986] KLR 605.
12. I appreciate that the appellant suffers from a medical condition; and, that his health may deteriorate in prison. But that is not an *exceptional* circumstance that would entitle him to bail. The *presumption* of innocence no longer holds true. The considerations for grant of bail at this stage are thus markedly different.
13. In the result, the notice of motion dated 11th February 2015 is devoid of merit. It is hereby dismissed.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 19th day of April 2016.

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of-

The appellant.

Ms. Karuga for Mr. Ngige for the appellant.

Ms. Oduor for the Republic.

Mr. Kemboi, Court Clerk.