



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CRIMINAL APPEAL NO. 33 OF 2016

MATHEW KIPCHUMBA KOSGEI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an application for bail pending appeal from the original conviction and sentence

in Criminal Case No. 1105 of 2012 Republic v Mathew Kipchumba Kosgei

in the Senior Resident Magistrates' Court at Eldama Ravine by R. Yator,

Senior Resident Magistrate, dated 16th February 2016)

RULING

1. The appellant was found guilty of two counts of *stealing by servant* contrary to section 281 of the Penal Code; and, a further count of *fraudulent false accounting* contrary to section 330 of the Penal Code. He was sentenced to *three years* imprisonment on each count; the sentences to run *concurrently*.
2. The offences were committed between 1st October 2010 and 3rd September 2011 at Boresha Sacco Society Limited, Mogotio District, Baringo County. The amounts stolen or unaccounted for were Kshs 434,800 and Kshs 12,000 respectively.
3. The appellant has preferred an appeal against the conviction and sentence. The petition of appeal was filed on 29th February 2016. It raises *nine* grounds. Pending the hearing and determination of the appeal, the appellant has presented a notice of motion dated 17th March 2016 praying for bail. It is supported by a deposition sworn by the appellant's wife, Gladys Changwony, on even date.
4. The appellant contends that the appeal has overwhelming chances of success. The appellant's learned counsel submitted that the appellant had been admitted to bail in the lower court; and, that he will abide by any conditions set by this court. Lastly, it was submitted that unless bail is granted, the appellant will have served the whole or a substantial part of the sentence. Reliance was placed on a list of authorities dated 20th April 2016. 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 pre-empting the hearing of the appeal. However, I note from the annexed proceedings that the appellant was a *teller* at the complainant Sacco. I have in particular noted the evidence of PW3, PW4, PW5, and PW8 (*the document examiner*). I have also considered the *defence* proffered 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 now be the duty of the first appellate court to re-evaluate the corpus of evidence and draw its independent conclusions. The less I comment about the matter, the better.

8. 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. 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.

9. The appellant was sentenced to *three years* imprisonment on each count; the sentences to run *concurrently*. It will be for the appellate court to determine whether the sentences were lawful considering all the circumstances of this case; the fact that the appellant was a first offender; and, the mitigation tendered by the appellant. 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.

10. 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.

11. In the end, there are no *exceptional* circumstances to warrant grant of bail pending appeal. It follows that the notice of motion dated 17th March 2016 is devoid of merit. It is hereby dismissed.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 30th day of June 2016.

GEORGE 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.