



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 17 OF 2015

JOHN KINYUA GITHINJI.....APPELLANT/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The applicant was charged with one count of being in possession of wildlife trophies contrary to **section 95** of the **Wildlife Conservation & Management Act, 2013** the particulars being that on 24th July, 2014 at around 1230 hours at Subuiga centre within Meru County, the applicant was found in possession of wildlife trophies namely one piece of Rhino horn weighing approximately 500 grams and three pieces of elephant tusks weighing about 250 grams all with a street value of Kshs 1.5 million without a permit.

He faced a second count of being in possession of ammunitions without a firearms certificate contrary to **section 4(2)** as read with **section 4(3)** of the **Firearms Act, Cap. 114**. The particulars were that on 24th July, 2014 at around 1230 hours at Subuiga shopping centre within Meru County, the applicant was found in possession of five rounds of .303 ammunition without a certificate.

The applicant was convicted of both counts and fined Kshs 1,000,000.00 in default to serve five months imprisonment on the first count and on the second count, he was sentenced to five years imprisonment.

He has filed an appeal against both the conviction and sentence and by a chamber summons dated 2nd June, 2015 he sought to be admitted to bail pending the hearing and determination of his appeal. The application was supported by the affidavit of his own counsel who briefly deposed that the applicant's appeal has overwhelming chances of success and that if the application is not allowed, the applicant is likely to suffer injustice and hardship.

The principles upon which bail pending appeal can be granted have been outlined in several court decisions and the oft-cited ones are **Somo vs. Republic 1972 EA 476**, **Jivraj Shah versus Republic (1986) KLR 605** and **Dominic Karanja v. Republic [1986] KLR 612**.

In **Somo vs. Republic (supra)** at **page 480** the court (Trevelyan, J), speaking of the grounds to be considered in an application for bail pending appeal said:-

“The most important of them is that the appeal will succeed. There is little, if any, point in granting the application if the appeal is not thought to have an overwhelming chance of being successful, at least to the extent that the sentence will be interfered with so that the applicant will be granted his liberty by the appeal court. I have used the word “overwhelming” deliberately and for what I believe to be good reason. It seems to me

that when these applications are considered it must never be forgotten that the presumption that when the applicant was convicted, he was properly convicted.”

In **Jivraj Shah versus Republic (supra)** at page 606, the Court of Appeal (Nyarangi, Gachuhi & Apaloo JJA) held that:-

“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 learned judges cited with approval their decision in **Daniel Dominic Karanja versus Republic (supra)** where it was stated at page 613:-

“The most important issue here is if the appeal has such overwhelming chances of success then there is no justification for depriving the applicant of his liberty. The minor relevant considerations would be whether there are exceptional or unusual circumstances. The previous good character of the appellant and the hardship, if any, facing the wife and the children of the applicant are not exceptional or unusual factors...a solemn assertion by an applicant that he will not abscond if he is released is not sufficient ground, even with the support of the sureties, for releasing a convicted person on bail pending appeal. The applicant was certified to be fit by a doctor ...and so no issue of health arises. We are not to be taken to mean that ill-health per se would constitute an exceptional or unusual circumstance in every case. There exist medical facilities for prisoners in the country.”

The emphasis in an application such as this is on whether the appeal has overwhelming chances of success.

As far as it is necessary for the determination of this application, the evidence at trial was that the appellant was caught red handed, so to speak, with wildlife trophies and live ammunitions. The officers who arrested him were Kenya Wildlife Service officers who, according to their evidence had been tipped by an informer that the appellant was in possession of these items and was ferrying them from Isiolo to Suboiga centre.

Armed with this information the officers lay some sort of an ambush and waited for the applicant at the centre. As soon as he disembarked from a matatu these officers pounced and arrested him; upon frisking his pockets they found in one of his pockets a black paper bag in which had been wrapped three pieces of ivory and five rounds of .303 ammunition. When he was taken to the police station, the officers made a further recovery of a rhino horn tucked in his trouser.

In her judgment the learned magistrate held that the evidence on the applicant's possession of the ammunitions and pieces of ivory was corroborated; however, she held that the evidence on the recovery of the rhino horn was contradictory and opined that either some or all of the four of the prosecution witnesses were lying and she thought that the appellant ought to be given the benefit of doubt.

Despite her reservations, the learned magistrate proceeded to hold the appellant liable for the same count of being in possession of the of the rhino horn and the ivory tusk's pieces and convicted him accordingly.

It could be that the learned magistrate convicted the appellant for possession of ivory in spite of her misgivings about the witnesses' evidence because both the ivory and the other trophies were lumped together in the same particulars but one of the questions that is bound to arise and perhaps urged at the appeal is whether the learned magistrate was correct to doubt the credibility of the prosecution witnesses on the one hand and on the other hand rely on their evidence to convict the appellant, irrespective of the form the charge, the substance and elements thereof took; in my view this is what I would regard as some substantial point of law to be urged at the appeal and without pretending to preempt its outcome at this stage, this is a question that may very well be resolved in the appellant's favour.

Going by the authorities I have cited, whenever such question arises and there is therefore the possibility that the appellant's appeal will succeed, justice demands, as much as common sense and logic would do, that the appellant be accorded his liberty as he awaits the determination of his appeal

For the foregoing reason, I am inclined to hold that the applicant's application has some merit and it ought to be granted. The applicant will be admitted to bail on condition that he executes a bond of Kenya Shillings Two Million (Kshs.2, 000,000/=) with two sureties of a similar amount.

Meanwhile, I note that the judgment appealed against arose from the magistrates' court at Nanyuki; since that station now has High Court, I hereby direct that this file be transferred to the High Court at Nanyuki forthwith. It is so ordered.

Dated, signed and delivered in open court this 17th day of June, 2016

Ngaah Jairus

JUDGE