



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CRIMINAL APPEAL NO. 129 OF 2010**

**JOSEPH GARANG KORIR.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The applicant *Joseph Garang Korir* has approached this court vide a Notice of Motion dated 29<sup>th</sup> September, 2016 praying that he be admitted to bond pending the hearing and determination of his intended appeal to the Court of Appeal. The application is premised on grounds stated on its face. It is supported by an affidavit sworn by the applicant to which he annexed his notice of appeal and the draft petition of appeal to the Court of Appeal.
2. A perusal of the court record reveals that the applicant was convicted in Eldoret Chief Magistrate's criminal case No. 1661 of 2010 with the offence of stock theft contrary to *Section 278* of the *Penal Code*. He was sentenced to three years imprisonment.
3. Aggrieved by his conviction and sentence, the applicant lodged an appeal to the High Court through his petition of appeal dated 10<sup>th</sup> September 2010. This court, differently constituted, heard and dismissed the appeal on 13<sup>th</sup> September, 2016. The applicant was dissatisfied with the decision of the first appellate court. He has now filed a notice of appeal to the Court of Appeal.
4. Pending the determination of his second appeal, the applicant now implores this court to grant him bond on grounds that he has a constitutional right to be granted bail pending the appeal; that his appeal has high chances of success; and that he is a sick elderly man aged 74 years with a wife and children who depend on him.
5. At the hearing, learned counsel *Mr. Awi* urged the application on behalf of the applicant while the state was represented by learned prosecuting counsel *Ms Oduor*.
6. In his submissions, *Mr. Awi* expounded on the grounds supporting the application. He in addition contended that the High Court erred in law by dismissing the appellant's first appeal because in his view, the elements of the offence of stock theft were not proved beyond any reasonable doubt during the trial; and that therefore his second appeal has high chances of success; that if the application was not allowed, he was likely to serve a substantial part of his sentence before his appeal was heard.
7. The application is contested by the state. In opposing the application, *Ms Oduor* submitted that every element of the offence in respect of which the applicant was convicted was proved beyond any reasonable doubt and that consequently, the applicants second appeal did not have any chance of success. She also

submitted that age and illness are not unusual circumstances as the appellant could be treated in the prison's health facility. She disputed the applicant's claim that if the orders sought were not granted, he was likely to serve a substantial term of his sentence before his appeal was determined.

8. Under *Section 361 (6)* of the *Criminal Procedure Code*, this court has discretion to determine whether or not to grant bail to an appellant pending the hearing of a second appeal to the Court of Appeal. That discretion however being a judicial one must be exercised judiciously in accordance with the law.

9. There are two main principles which guides the court in determining applications of this nature but before discussing those principles, I wish to first deal with the applicant's contention that he had a constitutional right to be admitted to bond or bail pending the hearing and determination of his second appeal. I am unable to agree with this assertion by the applicant because in my understanding, there is no provision in our constitution that guarantees an appellant a right to bond pending an appeal either to the High Court or the Court of Appeal. *Article 49 (1) (h)* which is the only provision in the constitution which provides for the right to bond or bail is only concerned with the right of arrested persons who are either waiting to be charged with a criminal offence or those that are already charged and are awaiting trial. This Article does not apply to convicted persons. In my opinion, it only safeguards the right of accused persons pending trial and does not grant appellants the right to bond pending the hearing and determination of an appeal.

Consequently, the applicants claim that he has a constitutional right to bond pending his intended appeal to the Court of Appeal is misplaced.

10. Turning now to the principles that guide the court in deciding whether or not to grant bond pending appeal, the main consideration is whether the applicant has demonstrated that his appeal has high chances of success because if this is established, there would be no justification for depriving him his liberty while awaiting the outcome of the appeal. The other secondary consideration would be whether the applicant has demonstrated that there are unusual or exceptional circumstances that entitles him to the grant of bail pending appeal – See: ***Somo V Republic (1972) EA 476; Dominic Karanja V Republic (1986) KLR 612; Jivraj Shah V Republic (1986) KLR 605.***

11. I have considered the application and the rival submissions made on behalf of the appellant and the state in light of the principles mentioned above. I am alive to the fact that the applicant was convicted and sentenced by the trial court and that his appeal to this court was dismissed in its entirety. His intended appeal to the Court of Appeal is a second appeal which by virtue of *Section 361 (1)* of the *Criminal Procedure Code* shall be canvassed on points of law only.

12. Counsel has urged this court to allow the application on grounds that his intended appeal has high chances of success. Having dismissed the appellant's first appeal, it would be ridiculous for this court to sit and start evaluating its own decision in order to make a finding whether or not the appeal against its decision has overwhelming chances of success. Doing so in my view will be akin to sitting on appeal against its own judgment. The argument that the intended appeal has high chances of success should be advanced before the Court of Appeal because it is the court that is mandated to determine the applicant's second appeal on its merits. I say so because I am aware that the applicant has a right to make a similar application to the Court of Appeal.

13. The other ground advanced by the applicant in support of his application is that he was an elderly man aged 74 years old and that he suffers from Asthma. He attached a medical report to his supporting affidavit to substantiate that claim. The appellant's age is not disputed so is the claim regarding his ill health. It is common knowledge that there are health facilities in prison which cater for the health of prisoners. It is not being claimed or suggested in this case that the applicant's health condition cannot be adequately managed in those facilities.

14. Lastly, though the applicant was convicted and sentenced on 6<sup>th</sup> September, 2010, the record shows that he was on bond pending his first appeal to the High Court. He was released on a cash bail of Kshs. 15,000 on 27<sup>th</sup> September, 2010 a few days after his conviction and sentence. His appeal to the High

Court was dismissed on 13th September, 2016 when he was supposed to be returned to prison to continue serving his prison term. Given these facts, I am not persuaded that he is likely to serve a substantial term of his sentence before his second appeal is determined.

15. For the foregoing reasons, I find that the Notice of Motion dated 29<sup>th</sup> September, 2016 is not merited and it is hereby dismissed.

**C. W GITHUA**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 16<sup>th</sup> day of November, 2016**

In the presence of:

Appellant

Ms Kiplagat holding brief for Mr. Awi for the appellant

Ms Oduor for the state

Naomi Chonde court clerk