



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 213 OF 2014

PAUL THUKU GACHORA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 401 of 2012

Republic vs Henry Langat Cheruiyot and 3 others in the Principal Magistrates' Court

at Eldoret by M. W. Njagi, Principal Magistrate dated 19th December 2014)

RULING

1. The appellant was convicted on a charge of stealing by servant contrary to section 281 of the Penal Code. The criminal proceedings were in Eldoret Principal Magistrates Court case 401 of 2012 in *Republic vs Henry Langat Cheruiyot and 3 others*. He was sentenced to six years imprisonment.
2. The particulars of the charge were that on diverse dates between 1st August 2011 and 21st January 2012 at Naivas Sokoni Branch within Eldoret town, the accused jointly stole 57,075 units of assorted flour products valued at Kshs 6,064,428; 52,456 units of assorted rice products valued at Kshs 21,059,103; 47,776 units of assorted Bidco Oil products valued at Kshs 2,823,292; 217 units of assorted sugar valued at Kshs 3,979,302 and 1023 units of cooking gas products and accessories valued at Kshs 2, 719, 036 all valued at Kshs 36, 645,161 the property of Naivas Limited which came into their possession by virtue of their employment.
3. The appellant has preferred an appeal. The petition of appeal was filed on 31st December 2014 and raises eleven grounds. Pending the hearing and determination of the appeal, the appellant has presented a notice of motion dated 29th January 2015 praying for bail. It is supported by a deposition sworn by the appellant on even date.
4. In a synopsis, the appellant contends that the appeal has overwhelming chances of success. The appellant submitted that there was double jeopardy. In that regard, he challenges an invoice of Kshs 613,200 produced in evidence and which was the subject of other proceedings in Eldoret Criminal Case 402 of 2012. It is pleaded further that the offence was not proved beyond reasonable doubt; that the appellant's defence was not taken into account; that there are exceptional circumstances to warrant grant of bail; that the appellant had been granted bail in the lower court and attended to his trial faithfully; and, finally, that he will abide by any conditions that may be set by the Court.

5. 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.”

6. The learned State Counsel did not contest the motion. I am satisfied that the appellant was charged in Eldoret Criminal Case 402 of 2012 Republic v. Paul Thuku Gachora and others. He was convicted and sentenced to five years imprisonment. The charge there was also theft by servant. The invoice that I referred to of Kshs 613,200 was the centerpiece of the prosecution’s case. The appellant lodged an appeal to the conviction and sentence in Eldoret High Court criminal appeal 156 of 2014. That appeal is pending. It would be inappropriate in the circumstances for me to comment further on the matter.

7. In the present appeal, the appellant is challenging his conviction and sentence in another case: Eldoret Principal Magistrates Court case number 401 of 2012 in Republic v Henry Langat Cheruiyot and 3 others. He was facing yet another charge of theft by servant, the particulars of which I set out at the beginning. The impugned invoice was again produced in the latter case. The appellant was sentenced to six years imprisonment. The timelines in both prosecutions seem to overlap and concern the same employment. I say so without making a finding; those being matters within the true province of the appellate court. But that is why the appellant contends that there has been *double jeopardy*.

8. It would be prejudicial to comment about the merits of the present appeal or the veracity of the evidence presented at the trial. I would be pre-empting the hearing of the appeal. I have noted however that the question of double jeopardy is a *substantial point of law to be urged*. On the face of it, it is an arguable point with *substantial merit*. This is not to say the appeal will succeed; only that it has a good chance of success. The State concedes as much.

9. The appellant was sentenced to six years jail term. It will be for the appellate court to determine whether the sentence was lawful considering the earlier sentence in the other case; and, whether the convictions and sentences amount to *double jeopardy*. Although the whole or a substantial part of the sentence will *not* have been served by the time this appeal is heard and determined, the substantial point of law urged sways me to grant bail pending appeal. I have also taken into account that bail is a constitutional right; and that the appellant had been admitted to bail in the lower court and faithfully attended his trial.

10. The upshot is that the application for admission to bail is allowed. The accused shall be released upon execution of a bond in the sum of Kshs 5,000,000 together with *one* surety of a similar amount; or, a cash bail of Kshs 1,000,000. The surety shall be approved by the Deputy Registrar of this Court.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET this 26th day of February 2015.

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of

Appellant.

Mr. Mathai for the appellant.

Ms. K. Mwaniki for the State.

Mr. Kemboi, Court Clerk.