

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO.15 OF 2014

LUKE WEKESA JUMA.....1ST APPELLANT

ANDREW JUMA KEBERENGE.....2ND APPELLANT

VRS

REPUBLIC.....RESPONDENT

(Appeal from the Conviction and Sentence by Principal Magistrate Hon. P. N. Areri

In

Bungoma CM Court CR. C. NO.985 of 2012)

RULING

1. Luke Wekesa Juma and Andrew Juma Kiberenge (hereinafter “*the Applicants*”) are son and father, respectively. On 27/04/12, they were charged with the offence of stealing contrary to Section 275 of the Penal Code. It was alleged that on the night between 4th and 5th April, 2012 at New Nyanza wholesalers, Bungoma Township in Bungoma South District within Bungoma County, jointly with others not before court stole cash Kshs.2,668,892/= the property of New Nyanza Wholesalers Limited.

2. After hearing five (5) prosecution witnesses and the defences offered by the Applicants, the trial Court found the two guilty, convicted them and sentenced them to three (3) years imprisonment and further directed that under Section 178 of the Criminal Procedure Code, they refund the said sum of Kshs.2,668,892/= or the same be recovered from them summarily.

3. By a Summons in chambers dated 25/2/14 brought under Section 357 (1) of the Criminal Procedure Code, the Applicants applied for bail pending Appeal. They contended that, the Appeal has overwhelming chances of success, that the application is made in good faith and that the Appeal will be rendered nugatory if the application is not allowed. They annexed a Petition of Appeal filed in this Court on 25/2/14.

4. At the hearing of the application, Mr. Makokha, Learned Counsel for the Applicants submitted that the intended Appeal has overwhelming chances of success; that the trial Court shifted the burden of proof to the Applicants; that the only link between the 1st Applicant and the theft was that he had previously worked with the complainant and for having shopped in the subject supermarket on the morning after the theft had been committed. Mr. Makokha also submitted that the 2nd Applicant was charged and convicted for having been a father of the 1st Applicant. He urged that the application be allowed.

5. Mr. Kibellion, Learned State Counsel appeared for the State Conceding to the application, Mr. Kibellion submitted that the cardinal rule in applications for bail pending Appeal is that the Applicant must show that the Appeal has overwhelming chances of succeeding. That in this case, the Judgment showed that the trial Court wholly shifted the burden of proof to the Applicants yet such a burden always lies with the prosecution. Mr. Kibellion urged that the application be allowed.

6. I have carefully considered the proceedings of the trial Court; the evidence as well as the Judgment. I have also considered the submission of counsel. In Somo -vs- Republic [1972] EA 476, it was held that:-

“But generally speaking, whatever grounds may properly be taken into account in favour of the grant of the application ... the most important of them is that the appeal will succeed. There is little, if any, point granting the application if the appeal is not thought to have an overwhelming chance of being successful... I have used the word “overwhelming” deliberately and for what I believe to be good reason. It seems that when these applications are considered it must never be forgotten that the presumption is that when the Applicant was convicted, he was properly convicted. That is why, where he is undergoing a custodial sentence, he must demonstrate, if he wishes to anticipate the result of this appeal and secure his liberty forthwith, that there are exceptional or unusual circumstances in the case. That is why, when he relies on the ground that his appeal will prove successful, he must show that there is an overwhelming probability that it will succeed.” (emphasis mine).

7. It is clear from the foregoing that bail pending Appeal is not a matter of course. This is so because as at the time of making such an application, an Appellant would have been already tried and convicted, it is assumed that both the conviction and trial are proper. In this regard, the Appellants' continued imprisonment is considered lawful. For that reason, he must give compelling reason as to why such sentence should be disrupted pending Appeal. It is for this reason, that he must show that his appeal has overwhelming chances of success or some other exceptional circumstance such as extreme personal ill health that the prison authorities can not handle for him to be released on bail.

8. In the case before me, I have evaluated the evidence. The prosecution case was that the Complainant's safe was broken into at the night of 4th April, 2012 and a sum of Kshs.2,668,892/= stolen therefrom; that the 1st Applicant was suspected to have been involved because he was a former employee (a driver) of the Complainant and was amongst the very first customers to shop at the supermarket on 5th April, 2012, the morning after the theft. The 2nd Applicant on his part was suspected to have been the one who received from the 1st Applicant and kept the loot stolen from the Complainant supermarket. Save the foregoing, there was no other evidence that connected the two with the said theft. There was no recovery from the Applicants' of any of the stolen monies.

9. On the foregoing evidence; the judgment shows that the trial Court required the 1st Applicant to establish that he actually did sleep at his rented house at Webuye on the night of the theft; that there was a burial of the 1st Applicant's grandfather on 05/04/12 to disapprove that he did not spend the night at the subject supermarket and steal therefrom. The trial Court also required the 2nd Applicant to prove that the items purchased by the 1st Applicant from the complainant's supermarket on the morning of 05/04/10 were not from the proceeds of the monies allegedly stolen from the complainant supermarket.

10. I have seen the grounds set out in the Petition of Appeal. Looking at the evidence tendered and the judgment of the trial Court as stated above, I can but only agree with the learned State counsel that the Appeal has high and overwhelming chances of success. Without making any firm findings at this stage, it is clear that in the Appeal it would be debatable whether with no direct evidence, the circumstantial evidence relied on was corroborated enough to return a conviction against the Applicants; whether it was for the Applicants' to prove their innocence and many other issues.

11. In this regard, I am satisfied that the Applicants have satisfied the criteria set out in the Case of Somo -vs- Republic (Supra) and the application should be allowed as I hereby allow the same.

12. Since Mr. Makokha indicated that the Applicants were out on bond during trial in the lower Court and that their bonds in that Court are still intact, I order that, they be released on the same bond terms as in the lower Court. If those bonds have not been withdrawn, the same to continue to be in force until the

Appeal is heard and determined.

DATED and **Delivered** at Bungoma this 7th day of April, 2014.

A. MABEYA

JUDGE