



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISII**  
**CRIMINAL APPEAL NO.56 AND 57 OF 2014**  
**(CONSOLIDATED)**

**BETWEEN**

**DENNIS YOBESH OMBOGO.....1ST APPELLANT/APPLICANT**

**EVANS MAKOYO BOGECHO.....2ND APPELLANT/APPLICANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(Being an appeal from original conviction and sentence in Kilgoris PM's Court Cr.**

**Case No.801 of 2012 delivered on 16<sup>th</sup> July 2014 by Hon. Monica Munyendo, Rm)**

**RULING**

1. The two applicants herein were tried, found guilty and convicted of the offence of stealing by servant contrary to **Section 281** of the **Penal Code, Cap 63 Laws of Kenya**. The particulars were that on the 16<sup>th</sup> day of October 2012 at Transmara Sugar Company in Transmara District within Narok County, jointly being servants to Transmara Sugar Company stole from Transmara Sugar Company one injection pump valued at Kshs.1.2 million.
2. They had been charged in the alternative with handling stolen goods contrary to **Section 322 (2)** of the **Penal Code, Cap 63 Laws of Kenya**, the particulars whereof were that on the 16<sup>th</sup> day of October 2012 at Transmara Sugar Company in Transmara District within Narok County otherwise than in the course of stealing dishonestly received or retained an injector pump knowing or having reason to believe it to be stolen goods.
3. Upon conviction, the applicants were sentenced to serve three (3) years imprisonment. They are both aggrieved by both conviction and sentence and are now before this court on appeal. In the meantime, by their respective applications dated 1<sup>st</sup> August 2014, they seek to be admitted to bail/bond and the suspension of the sentence pending the hearing and determination of the appeal.
4. The case for the 1<sup>st</sup> applicant is that he has become sickly since his conviction and incarceration; that the determination of his appeal is likely to delay because the High Court is currently on vacation and that if he is not released on bail/bond now, he is likely to serve the full term in prison before the appeal is

heard and determined. The 1<sup>st</sup> applicant also says that the conditions in prison are too harsh for him.

5. The 2<sup>nd</sup> applicant avers that being asthmatic, he is undergoing serious health problems in prison and that if not released therefrom now, the asthma might develop into a more devastating health condition. He also says that because of the length of his sentence, he is likely to serve the entire sentence before the appeal is heard and determined as the High Court is currently on summer vacation.

6. Both applicants have stated on oath that they are ready and willing to abide by any reasonable bail/bond terms that this honourable court shall be pleased to impose.

7. The applications are not opposed. Mr. Majale, Prosecution Counsel, told the court at the hearing that the court may release the applicants on bail/bond on such terms as would ensure their attendance until their appeals are heard and determined. He also submitted that the applicants, who were on bond during the trial, had observed the bond terms until the trial ended in their conviction and subsequent confinement.

8. Although the state has not given any compelling reasons why the applicants herein may not be released on bail/bond, the final word on whether or not bail/bond should be granted rests with the court. The court is aware that as convicts, the applicants are no longer presumed innocent as was the case during the trial.

**9. Section 357 of the Criminal Procedure Code**, being one of the sections of the law under which the applicants have mounted their applications provides as follows:-

**“357(1) After the entering of an appeal by a person entitled to appeal, the High Court, or the subordinate court which convicted or sentenced that person, may order that he be released on bail with or without sureties, or, if that person is not released on bail, shall at his request order that the execution of the sentence or order appealed against shall be suspended pending the hearing of his appeal;**

**Provided that, where an application for bail is made to the subordinate court and is refused by that court, no further application for bail shall lie to the High Court, but a person so refused bail by a subordinate court may appeal against refusal to the High Court and, notwithstanding anything to the contrary in Section 352 and 359, the appeal shall not be summarily rejected and shall be heard, in accordance with such procedure as may be prescribed, before one judge of the High Court sitting in chambers.**

**(2) If the appeal is ultimately dismissed and the original sentence confirmed, or some other sentence of imprisonment substituted therefor, the time during which the appellant has been released on bail or during which the sentence has been suspended shall be excluded in computing the term of imprisonment to which he is finally sentenced.**

**(3) The Chief Justice may make rules of court to regulate the procedure in cases under this section.”**

10. This court is thus clothed with the power to grant bail/bond with or without sureties, or to suspend execution of any sentence imposed by the subordinate court pending the hearing of the appeal. In granting bail pending appeal, the court is obliged to consider the circumstances of each case so that the discretion is exercised judiciously and not capriciously. In the case of **Jivraj Shah -vs- Republic [1980] KLR 605**, the Court of Appeal set out the parameters to be considered by an appellate court in applications for bail pending appeal:-

*a. The principal consideration in an application for bail pending appeal is the existence of exceptional or unusual circumstances upon which the Court of Appeal can fairly conclude that it is in the interests of justice to grant bail*

*b. 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 substantial part of it will have been served by the time the appeal is heard, conditions for granting bail will exist.

c. The main criteria is that there is no difference between overwhelming chances of success and a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed and the proper approach is the consideration of the particular circumstances and weight and relevance of the points to be argued.

11. In the case of **Ademba -vs- Republic [1983] KLR 442**, the Court of Appeal held, *inter alia*, that:-

1. Bail pending appeal may only be granted if there are exceptional or unusual circumstances;
2. The likelihood of success in the appeal is a factor to be taken into consideration in granting bail pending appeal. Even though the appellant showed serious family and personal difficulties in view of the unlikelihood of success in this appeal, the application could not succeed.

12. It is thus the burden of the applicants herein to demonstrate to the court, through the grounds of appeal set out in their respective petitions of appeal that the appeals have overwhelming chances of success, and therefore that factor, taken together with their contention that due to unavailability of adequate time, they are likely to serve a substantial part of their sentence before the appeals are heard and determined. Matters of ill-health and hard prison conditions would not normally be the reason for granting bail pending appeal, nor is the previous good characters of the applicant nor do the applicants' solemn assertion that they will abide by whatever bond terms this court may impose sufficient ground for releasing them on bail/bond pending appeal. See **Dominic Karanja -vs- Republic [1986] KLR 612**.

13. I have carefully considered the respective petitions of appeal and the grounds set out therein by the appellants. I have also read through the proceedings and judgment of the trial court. With regard to both applicants, there is an issue as to whether they were employees of the complainant. There is also the question of whether the principle of the burden of proof was properly applied during the trial. In my considered view these are serious matters of law which, when considered along the evidence tendered by the prosecution are likely to swing the scales in favour of the applicants. This being the case, and considering the workload at the station, it would not be far fetched to say that the applicants might serve a substantial part of their prison term before the appeal is heard and determined.

14. For the above reasons, I am satisfied that this is a proper case in which to exercise this court's discretion in favour of the applicants. Accordingly, I allow the application on the following terms:-

1. Each applicant may be released on his own bond of Kshs.500,000/= (Kenya Shillings Five Hundred Thousand) with 2 sureties of a like amount;
2. The sureties shall be approved by the DR of this Honourable Court;
3. In the alternative, each applicant may be released on cash bail of Kshs.200,000/= (Kenya Shillings Two Hundred Thousand) with one surety for a similar amount;
4. Once they are released, the applicants shall attend court once every 30 days for mention of their case until the appeal is heard and determined or until further orders of this Honourable Court;
5. In default of 4 above, the bond shall be cancelled immediately and sureties called to account or cash bail shall be forfeited to the State.
6. Mention on 29/09/2014.

1. Orders accordingly.

**Delivered, dated and signed in open court at Kisii this 29<sup>th</sup> day of August, 2014**

**R.N. SITATI**

**JUDGE.**

In the presence of:-

Mr. Ondari (present) for Applicants

Mr. Otieno Edwin for Respondent

Mr. Bibu - Court Assistant