



REPUBLIC OF KENYA

High Court of Kisii

Criminal Appeal 100 of 2012

JOSEPH NYANCHIRI ONDARA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from original conviction and sentence of Hon. Were, SRM,

dated on 17th April 2012 in Kehancha SRM's Court criminal Case No.366 of 2009)

RULING

1. The appellant herein, Joseph Nyanchiri Ondara, was the 1st accused in Kehancha SRMCR Case No.366 of 2009 in which he was jointly charged with Edward Kipngeno Yegon Maina. In Count I, they were charged with stealing by servant contrary to **section 281** of the **Penal Code**, being alleged that on diverse dates between 10th and 19th February 2009 at Kehancha Post Office, in Kuria District within the Nyanza Province, jointly with others not before the court, being servants of Kenya Postal Corporation, they stole from the said Kenya Postal Corporation cash Kshs.871,593/=.

2. In Count II, they were jointly charged with uttering a false document with intent to defraud contrary to **section 357 (b)** of the **Penal Code**, the particulars being that on diverse dates between 10th and 19th February 2009 at Kehancha Post Office in Kuria West District within Nyanza Province, jointly with intent to defraud or deceive knowingly uttered a certain document namely payment Schedule and TBR Slips of Master Mind Company, which had been made without lawful authority to one CHRISTINE BOKE GIKARO.

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3. After a full trial, the appellant's co-accused was acquitted. The appellant was found guilty as charged on both counts and convicted under **section 215** of the **Criminal Procedure Code**. He was sentenced to 2¹/₂ years (30 months) on each count, both sentences to run concurrently.

4. The appellant has appealed to this court against both conviction and sentence vide the Petition of Appeal filed in court on 19th April 2012. The appeal is yet to be heard.

5. In the meantime, the appellant has moved this court vide the notice of motion dated 30th October 2012 seeking to be released on bail/bond pending hearing and determination of his appeal. The application is premised on grounds set out on the face thereof and is also supported by grounds set out in the appellant's sworn affidavit dated 30th October 2012. The appellant avers that he was granted bond during the pendency of his case before the trial court and that he religiously and obediently attended court; that his appeal has overwhelming chances of success; that he is the sole breadwinner of his family and that his continued incarceration in jail means great suffering to his family. The appellant also says that he suffers from acute chest pains whose cause is yet to be established; that his school going children are now destitute and finally that if he is granted bail/bond, chances are that he will get back his job pending the hearing and determination of the appeal.

6. The respondent did not oppose the application for bond, but urged the court to impose such bond terms as would force the appellant to attend court as and when he is required until his appeal is heard and

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determined.

7. **Article 49 (1) (h)** of the **Constitution of Kenya** provides that an arrested person has the right to be released on bond or bail on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released. It is upon the state to demonstrate to the court that there are compelling reasons to warrant refusal of the order sought by the appellant. The prosecution has no such reasons, but it is not lost to the court that the appellant is now a convict and not a mere suspect as he was during the trial in the subordinate court. He might very well be a flight risk, but the state has not said that he poses such a risk.

8. I note from the record that on the 4th March 2009, the appellant was released on bond of Kshs.200,000/= with a surety of a like amount. Thus during the trial, the appellant was out on bond.

9. Taking all the circumstance of this case into account, I hereby allow the appellant's notice of motion dated 30th October 2012 and make the following orders:-

1) Appellant may be released on his own bond of Kshs.500,000/= (Kenya Shillings Five Hundred Thousand only) plus two (2) sureties of a like amount.

2) The sureties shall be approved by the Deputy Registrar of this honourable court.

3) Once out on bond, the appellant shall attend court once every thirty (30) days for the mention of the appeal until the appeal is heard and determined or until further orders of this honourable court.

4) In default of any one appearance without justifiable reason, the bond shall stand cancelled and the sureties made to account for the default.

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5) Meantime, counsel for the appellant shall compile and file the Record of Appeal within the next thirty (30) days to facilitate the admission of the appeal for hearing.

6) Mention on 28th June 2013 to confirm compliance with 5 above.

10. Orders accordingly.

Dated and delivered at Kisii this 30th day of May, 2013

RUTH NEKOYE SITATI

JUDGE

In the presence of:

Mr. Maroro J.E. for Appellant/Applicant

Mr. Majale for Respondent

Mr. Bibu - Court Clerk

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