REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

MISC. CRIMINAL APPLICATION NO. 12 OF 2013

PAUL KASAU SIMBA…..APPELLANT

Versus

REPUBLIC…..RESPONDENT

R U L I N G

By a motion filed on 18th June 2013 the applicant seeks to be admitted to bail pending the admission, hearing and final determination of his appeal against conviction and sentence in Karatina Criminal case number 1235 of 2012.

The applicant was tried and convicted on 24th April,2013 of the offence of handling stolen property and sentenced to serve 7 years imprisonment without hard labour by the Ag. Karatina Senior Resident Magistrate.

When the motion came up for mention on 2nd July, 2013, Mr Gachuba for the applicant and Ms. Kitoto for the DPP agreed by consent that the application for leave to file the appeal out of time be allowed and that the draft petition of appeal dated 3rd June, 2013 attached to the application be deemed as duly filed and admitted to hearing.

In the petition of appeal, the appellant attacks the decision of the lower court on the following main grounds:

1. ***The learned trial Magistrate erred in law by convincing the Appellant on a defective charge.***

2. ***The learned trial Magistrate erred in law by convicting the Appellant on an equivocal plea.***

3. ***The learned trial Magistrate erred in law and fact by convicting the Appellant on a count not proved beyond reasonable doubt as motor vehicle registration number KAW 936H was not produced and or identified in court.***

4. ***The learned trial Magistrate grossly misdirected herself when she convicted the Appellant for handling KAW 936H whose stealing had not been proven.***

5. ***The learned trial Magistrate erred in law and fact by convicting the Appellant on a rebutted presumption of fact.***

6. ***The learned trial Magistrate erred in law and fact by failing to record in the judgment any sufficient reasons why the trial Court disbelieved the explanation or rebuttal offered by the Appellant.***

7. ***The learned trial Magistrate erred in law by sentencing the Appellant to seven years which sentence is the maximum the sentence under the primary charge of theft of motor vehicle.***

8. ***The learned trial Magistrate erred in law and fact by failing to find that the Prosecution evidence presented before the trial Court was incapable of sustaining a conviction.***

9. ***The learned trial Magistrate failed to give the benefit of doubt generated by the flaws in the investigations, the generality of the circumstances of the case and presentation of the evidence by the prosecution as required by law.***

10.The conviction in the circumstances of the case was such that a manifest travesty of of justice occurred therein.

At the hearing of the application Mr. Gachuba for the appellant submitted that the appeal had an overwhelming chance of success and cited the landmark case of **Somo v R** which states that the most important consideration in an application for bail pending appeal is that the applicant must demonstrate that the appleal has an overwhelming chance of success. In support of this requirement, Mr. Gachuba submitted that the plea by the appellant was equivocal as the plea of NOT GUILTY was in Kiswahili yet was recorded in English. For this reason Mr. Gachuba submitted the conviction could not be sustained. To support this ground he drew the court's attention to the case of **Musa kwa Maji Marefu vs R Criminal Appeal No. 11 of 2004 (Busia)** where it was held:

"...This Court dealt with such a situation in the case of **Waithaka s/o Kabera v. R [1962] EA 38** in which it was stated that the word guilty should not be used in recording a plea unless it is used by the accused in which case the record should show that the accused spoke English. I think I am of the opinion that the plea in respect of the charges was equivocal hence the same could not have sustained a conviction."

He further submitted that the appeal had an overwhelming chance of success since the prosecution failed to produce as exhibit, the vehicle purported to have been stolen and or handled by the appellant. To this he drew the Courts attention to the case of **Kechel vs. R [1985] KLR 513.** Counsel further submitted that the charge of handling stolen property is a rebuttable presumption of fact and that motor vehicle in issue was allegedly stolen on 25th October, 2012 while the appellant was said to have handled the said motor vehicle on 18th November, 2012 almost a month later. This, counsel submitted could not be said to be recent past. According to him, for a charge handling stolen property to succeed it must be shown that the goods were stolen in the recent past. Further once the accused explains how he came to the possession of the goods then the presumption is rebutted. According to Mr. Gachuba, the appellant explained to court under what circumstances he was found in possession of the allegedly stolen vehicle. That is, the appellant had been hired by the 1st accused as a conductor and the learned magistrate out to have found that the appellant had discharged the legal duty and acquitted him. In support of this submission Counsel referred the court to the case of D**avid Langat Kipkoech v R [2006] eKLR**

To demonstrate further the success of the appeal, Mr. Gachuba submitted that there cannot be the offence of handling stolen goods without stealing and relied on the case of **John Bosco Karuiki v. R [2006] eKLR.**

Mr. Cheboi who appeared for the DPP opposed the application contending that the issue of plea does not arise since the case relied on by the appellant in questioning the plea was in respect of a plea of GUILTY which did not apply in this case as the appellant pleaded not guilty. Regarding production of the exhibits, Mr. Cheboi submitted that photographs of the vehicle were produced and the accused had a chance to cross-examine the officer who produced them. Regarding the issue handling stolen property, Mr. Cheboi submitted that the submission by Mr. Gachuba was not the correct position in law. According to him the vehicle eas reported stolen and the appellant was found in possession of it and charged accordingly. The appellant's explanation of the circumstances in which he came into possession of the vehicle was not believable to the court hence his conviction. Mr. Cheboi submitted that the appellant ought to have produced a licence to show he was either a driver or a conductor of the vehicle.

The court has recently observed in the case of ***Jeremiah Mwangi Ngatia -vs- Republic Criminal Appeal No. 110 of 2011*** that the court in considering whether or not to grant bail pending appeal, ought to bear in mind that it involves the proposition that a person who has been found guilty and convicted by a court of competent jurisdiction and whose sentence of imprisonment has not been set aside, must nevertheless be let loose on the community instead of staying in prison to serve sentence which is prima facie deserved.

The appellant/applicant is prima facie a convict and his constitutional freedoms and rights are thus significantly circumscribed by his conviction. He no longer enjoys the absolute presumption of innocence available to persons facing trial at the first instance. In admitting such a person to bail the court ought to, in addition to principles governing admission to bail pending appeal, bear in mind the possible dilemma of resending such a person to prison in event that his or her appeal fails.

The principles for admission to bail pending appeal in Kenya have for a long time revolved around the decision in ***Somo -vs- Republic [1972] E.A 476.*** According to this case the applicant must demonstrate the existence of overwhelming chances of success. The applicant ought to be in a position to persuade the court that his or her appeal is so strong, so meritorious, that at the end, the probabilities will favour acquittal. To discharge this burden, the applicant will need to raise some critical issue of law or an issue as to the mode of application of evidence.

The court has reviewed the grounds of appeal as well as the evidence and the findings of the trial Magistrate. The Court has also had a chance to listen to counsel and his urging on the authorities relied on and is of the opinion that the appeal has some reasonable prospects of success.

The applicant at the trial stage was admitted to bail in the sum of Kshs.200,000 with a surety of a similar amount. As stated earlier in this ruling the applicant is no longer a free person but a convict. His conviction is prima facie valid until set aside. The bail terms therefore ought to be more stringent than at the trial stage to ensure his presence during the pendency and disposal of his appeal.

The court in the circumstances admits the applicant to bail in the sum of Kshs.300,000 with surety of similar amount to be executed before the Deputy Registrar of this court. The applicant is further directed to report to the said Registrar once every 30 days upon his release until the hearing and determination of this appeal or further orders of this court.

Dated at Nyeri this 20th day of September, 2013.

NELSON ABUODHA J.

JUDGE

Delivered in open Court in the presence of Gachuba Advocate for the Appellant and Maundu for the Republic.

NELSON ABUODHA J.

JUDGE