



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 20 OF 2013

(CONSOLIDATED WITH CRIMINAL APPEAL NO. 19 OF 2013)

MARTIN MUGENDI NJERU1ST APPELLANT/APPLICANT

MICHAEL MUGENDI NJERU 2ND APPELLANT/APPLICANT

VERSUS

REPUBLICPROSECUTOR

From original conviction and sentence in Criminal Case No. 1555 OF 2012 at the Chief Magistrate's Court at Embu by Hon. D.A OCHARO– Ag PM on 18/8/2010

R U L I N G

Both Appellants have filed this application under the Provisions of Articles 49(h) and 51 (1) of the Constitution of Kenya and section 356 and 357 Criminal Procedure Code for an order for bond/bail pending appeal. The grounds are on the face of the application. There is a supporting affidavit of M/s Beth Ndorongo acting for both of them.

I have carefully read the grounds and the supporting affidavit. The Appellants were charged and convicted of the offence of stealing stock (viz two goats) contrary to section 278 of the Penal Code. The brief facts of the case are that PW1 woke up on 14/12/2012 at 5am and found her two goats missing. She reported the matter to PW2 and PW3. None of them knew the thieves. PW5 a police officer received a report on 14/12/2012 at 12 noon of some young men who had been spotted with two goats. With other officers he rushed to Gakwegori Trading Centre where they found the Appellants at a butchery with two goats negotiating with prospective buyers. The Appellants told them they hailed from Mutunduri. The assistant chief Mutunduri was called and he informed them of a report of missing goats from one of his residents. PW1 later came and identified the goats.

In their defence the 2nd Appellant stated that the 1st accused sold him the two goats while the 1st Appellant said each of them bought a goat from one Njiru at a restaurant. They were then convicted. The State through M/s Ingahizu did not oppose the application for release on bond, pending appeal.

In determining the issue of bond pending appeal the Court will look at two broad issues;

1. ***Whether the appeal has high chances of success***
2. ***Whether there exist any exceptional circumstances that would make the Court exercise its discretion in favour of the Appellants.***

In the case of **DOMINIC KARANJA –V- REPUBLIC [1986] KLR 612** the Court of Appeal held thus;

1. ***The Most important issue was that if the appeal had such overwhelming chances of success, there was no justification for depriving the Applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances.***
2. ***The previous good character of the Applicant and the hardships, if any, facing his family were not exceptional or unusual factors. Ill health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners.***
3. ***A solemn assertion by an Applicant that he will not abscond if released, even if it is supported by sureties, is not sufficient ground for releasing a convicted person on bail pending appeal.***

The same was followed in **JIVRAJ SHAH –V- REPUBLIC [1986] KLR 605** where the same Court held as follows;

1. ***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.***
2. ***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 of substantial part of it will have been served by the time the appeal is heard, conditions for granting bail will exist.***
3. ***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.***

A totality of the evidence herein confirms the following;

- i. PW1 woke up to find her two goats missing and she immediately made a report to the administration.
- ii. The Appellants were found in actual possession of the two goats which possession they don't deny.
- iii. PW1 positively identified the goats as her missing goats.
- iv. The learned trial Magistrate considered their defence and found it to be contradictory.

Considering this evidence in its totality, I am unable find that the appeal has overwhelming chances of success. Secondly no special circumstances have been raised by any of the Applicants that would make me exercise my discretion in their favour at this stage. Once the record is ready the appeal will be admitted and heard and determined on its merits as soon as possible.

The result is that the application lacks merit and is dismissed.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 11TH DAY OF SEPTEMBER 2013.

H.I. ONG'UDI

J U D G E

In the presence of;

M/s Ingahizu for State

M/s Ndorongo for Appellants/Applicants

Appellants/Applicants

