

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 491 OF 2013

MOSES MUTUA MATINGI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

The appellant was jointly charged with three others in the Murang'a Chief Magistrates Court Criminal Case No. 502 of 2010 with the offence of godown breaking and stealing contrary to **section 306 (a)** of the **Penal Code**. It was alleged that on the 20th day of February, 2010 at Murang'a township in Murang'a North District within Central Province, the appellants broke and entered the godown of Rakesh Harshard Shah and stole 34 bags of bran cattle feeds valued at Kshs 13, 600/=.

The second count, was directed at the 3rd and 4th appellant's co-accused; they were charged with giving false information to a person employed in the public service contrary to **section 129 (A)** of the **Penal Code**. The particulars of the offence are that on the 20th day of February, 2010 at Maragua Police Station in Murang'a South District within Central province, informed No. 79632 Police Constable Kipkemoi Rono, a person employed in the public service namely Kenya Police, that they were robbed of motor vehicle registration number KBG 574 Isuzu Canter, Mobile phones and cash of Kshs. 4900/=which information they knew or believed to be false, intending thereby to cause the said No. 79632 Police Constable Kipkemoi Rono to circulate the information through the police radio communication to all police officers on the ground to arrest the occupants and detain the said motor vehicle which the said No. 79632 Police Constable Kipkemoi Rono ought to have done if the true state of facts respecting which such information was given had been known to him.

When the appellant together with his co-accused were arraigned in court on the 22nd day of February, 2013, they all pleaded not guilty to the charges against them. The subsequent trial culminated in their conviction; the 1st and 2nd co-accused were convicted of godown breaking and stealing contrary to **section 306 (a)** of the **Penal Code** while the 3rd and 4th appellant's co-accused were convicted of a lesser offence of conspiracy to commit a felony contrary to **section 393** of the Penal Code. The Appellant and the 2nd co-accused were sentenced to three years imprisonment while the appellant's 3rd and 4th co-accused were sentenced to 18 months imprisonment.

The four accused persons including the appellant herein have filed separate appeals in which they have raised more or less similar grounds against the conviction and sentence meted out against them by the trial court. They have also filed separate motions under **section 357** of the **Criminal Procedure Code** seeking to be admitted to bail pending the hearing and determination of their respective appeals. When the appellants' applications came up for hearing on the 1st October 2013, only the motion of the appellant herein was argued; counsel for the appellants asked me to adopt, and indeed the state counsel agreed that, the submissions made in prosecution and opposition to the motion herein in the motions filed by the appellant's co-accused in **Appeal Case Nos. 492 of 2013, 493 of 2013 and 494 of 2013**. The submissions by both counsel in this motion will therefore be adopted as submissions made in the applications in the appeals aforesaid and consequently the outcome of the motion herein will apply in equal measure to those applications.

The appellant's counsel argued that the appeal filed herein is arguable and has overwhelming chances of

success and therefore there is no justification for depriving the appellant of his liberty. In support of this contention counsel relied on the grounds in the petition of appeal which I will only refer to the extent that they are necessary in determination of the application herein.

Counsel for the appellant has taken issue with what he thinks to be the learned magistrate's non-compliance with **section 169(2)** of the Criminal Procedure Code which requires that in case of a conviction the judgment must specify the offence of which the accused person is charged and the section of the penal code or other law under which the accused person is convicted. He relied on the court of appeal decision of **Nyanamba versus Republic (1986) KLR 599** in which the same issue was raised and resolved in favour of the appellant.

The appellant's counsel also complained that the learned magistrate never considered in his judgment the answers given by prosecution witnesses during their cross-examination. He also argued that there was no evidence to support the charges, against the accused person, for instance there was no evidence of breaking and neither the appellant nor his co-accused were in possession of the alleged stolen bags of cattle feed. He has therefore urged that the appellant be released on bail pending the determination of his appeal because, in his view, the appeal will certainly succeed.

The state opposed the appellant's motion; its counsel argued that the learned magistrate cannot be faulted on any of the grounds raised by the appellant in support of the motion or the appeal itself. According to the its counsel, the judgment in question complied with **section 169(2)** of the Criminal Procedure Code and that it is clear from the learned magistrate's judgment that he specified the offence and the section in Penal Code under which the accused persons including the applicant herein were charged, convicted and sentenced. In the learned state counsel's view, as I understood him, while the Court of Appeal decision in **Nyanamba versus Republic** is good law, the circumstances under which the appeal was allowed in that case do not obtain in this case.

As far as the question of inconsistency between the evidence and the charges as framed by the prosecution is concerned, the state counsel was of the opinion that no such inconsistency exists; for example, he says that although the appellants were not found in physical possession of the stolen cattle feed, they had nevertheless loaded this feed into a lorry which, unfortunately for them, was arrested before they drove away. There is no doubt, according to the state counsel, it was cattle feed that was stolen and even if it was saw dust or wood waste as counsel for the appellants suggested, that in itself does not make the appellants less culpable as long as whatever they stole is capable of being stolen.

My assessment of the submissions made by both counsel for the appellant and the state counsel is that the appellant's appeal is short of an appeal that could be said to have overwhelming chances of success. Without going into the merits of the appeal and this stage, it appears to me that the appellant's counsel's submissions in support of this motion may be inconsistent with the learned magistrate's record.

If on the face of it, there is no appeal with overwhelming chances of success, this court does not have any reason to admit the appellant to bail pending the hearing and determination of his appeal. As the Court of Appeal has stated in the case of **Dominic Karanja versus Republic (1986) KLR** the most important issue in an application such as this is to consider whether the appeal has overwhelming chances of success; where such an appeal exists, there would be no reason for depriving the applicant of his liberty. Conversely, where there is no clear indication that the appeal has such a chance then the applicant's liberty must be curtailed until such time that his appeal has been heard and determined. There are of course other lesser considerations like whether there are exceptional or unusual circumstances. Such circumstances have not been demonstrated in this application and to be fair to the applicant's counsel, I did not hear him suggest that the appellant or any of his co-accused should be granted bail on this ground.

For the reason I have given I disallow the appellant's application dated 18th September, 2013. This order shall apply in equal measure to the applications filed by the appellant's co-accused in **High Court Criminal Appeal Cases Nos. 492 of 2013, 493 of 2013 and 494 of 2013**. It is so ordered.

Signed, dated and delivered in open court on this 25th day of October, 2013

Ngaah Jairus

JUDGE