

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO 21 OF 2013

STEPHEN GITONGA DOMIANOAPPELLANT

Versus

REPUBLICRESPONDENT

RULING

1. By a notice of motion under section 357 of the CPC the applicant moved the court for an order that he be released on bail pending the hearing and determination of the appeal on the grounds that the appeal has overwhelming chances of success both against the conviction and sentence and that the appeal will be rendered nugatory as the applicant will have served the full term and or substantial part thereof by the time the appeal is heard.
2. Mr. Gitibi appeared for the appellant while Mr. Njue appeared for the state and opposed the application.

SUBMISSIONS

3. It was submitted by the applicant that the appeal has overwhelming chances of success since the language used was not indicated and that in finding the applicant guilty the trial court relied upon section 24(a) of the evidence Act whereas the admission used was made to other witnesses and not to a judge, magistrate or police officer of the rank of an inspector.
4. It was further submitted that the court handed a sentence which was excessive taking into account the fact that the accused was a first offender and further because the stolen stock was recovered, and should therefore have been given an option of a fine.
5. Mr. Njue for the State submitted that the appeal had no chances of success since the appellant took part in the trial and cross examined all the witnesses and that whereas it is vital that the language used be recorded that the fact that it was not indicated can not invalidate the trial and in support thereof relied upon the case of DAVID NJUGUNA WAIRIMU V REPUBLIC KISUMU CRIMINAL APPEAL NO. 28 OF 2009 where the court stated

“the record clearly reflect that the appellant fully participated in the proceedings and asked questions in cross examination, himself gave evidence in his defence and in any case he did not raise the issue in his written submission on first appeal. This ground is without merit.”

6. I have looked at the proceedings before the trial court and is of the considered opinion that the application before the court has merit more so on the issue that the appellant was a first offender and that the alleged stolen stock was recovered together with the money paid to the appellant.
7. I have also noted that the applicant was sentenced to serve (7) years and there is a real likelihood of the same serving substantial part of the sentence before the appeal is heard and determined which to my mind is an exceptional circumstances.
8. I would therefore allow the application herein and admit the applicant to bond of Kshs. 100,000/- with one surety of like amount or to cash bail of Ksh. 50,000/- pending trial. The applicant will also attend mention before the Deputy Registrar of this court once after every 60 days until the final determination of the appeal with first mention being 24th December 2013 and thereafter at dates to be set by the Deputy Registrar.

Dated at Nyeri this 24th day of October 2013.

J. WAKIAGA

JUDGE