



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**HCCR.APP NO.150 OF 2010**

**GEORGE MUISYO MULAE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. George Muisyo Mulae (“the Appellant”) filed his Petition of Appeal dated the 1<sup>st</sup> July, 2010 on the 14<sup>th</sup> July, 2010. He appeals against the judgment of Obulutsa, Principal Magistrate, delivered at Kangundo on the 2<sup>nd</sup> July, 2010 in Criminal Case No.163 of 2010 whereby the Appellant was convicted of contravening sections 304(1) (b), 299 (b) and 322(1) (2) of the Penal Code and sentenced to serve five (5) years on each count with the sentence running concurrently.

2. The appeal is premised on the following main grounds:

*i. The Learned Trial Magistrate erred in law and fact by convicting the Appellant on evidence that was pure hearsay and which is inadmissible.*

*ii. The Learned Trial Magistrate erred in law by failing to find and hold that the prosecution had failed to prove their case beyond reasonable doubt as required by law.*

3. On the 9<sup>th</sup> November, 2010 the Appellant took out a Notice of Motion under section 357 of the Criminal Procedure Code seeking the following main order:

***“2.THAT the Appellant/Applicant be granted bail pending the outcome of his appeal.”***

The application is brought on the grounds that the Appellant has lodged an appeal against his conviction and sentence; that he will abide by any bond/bail conditions imposed by the court; and that it will be argued in the Appeal that the Appellant was convicted and sentenced before the court finding that he had a case to answer. The Appellant reiterates these and the other grounds stated in his Petition of Appeal in his affidavit in support of the Motion sworn on the 8<sup>th</sup> November, 2010.

4. In his submissions before me on the 6<sup>th</sup> February, 2011, Mr. L. N. Ngolya, learned counsel for the Appellant, contended that the appeal raises substantial points of law and is likely to succeed; that the particulars of the charge are not supported by the evidence; that the learned trial magistrate shifted the burden of proof to the Appellant and that the Appellant was not allowed to make any submissions and was accordingly prejudiced.

5. The learned State Counsel, Mrs. Gakobo, opposed the application stating that the Appellant had not demonstrated how his appeal has any chance of success; that he was convicted on the evidence of PW.1, 2 and 3 and that the Appellant had not demonstrated in what respect their evidence was hearsay and that no exceptional circumstances have been established to warrant the exercise of the court's discretion.

6. In evaluating the evidence before him, the learned trial Magistrate stated that though the Appellant, who was the complainant's neighbor, had not been seen breaking into the house and taking the items, the Appellant's own mother had confirmed some clothes were removed from her son's house while others were found where the Appellant was and that he was wearing a pair of shorts identified and belonging to Derick Anunda (PW.2). The learned trial Magistrate made a finding that the exhibits were with the accused and this was not disputed.

7. In his unsworn testimony, all that the Appellant said was that the clothes which were brought to the court were his and that he did not steal from the complainant. The learned Magistrate considered this and the other evidence adduced by the prosecution and found that the prosecutions had proved its case beyond reasonable doubt.

8. In **Dominic Karanja –vs- Republic** (1986) KLR 612 the court observed –

***“(i) 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.”***

9. Upon considering the evidence on record, but without pre-determining the Appeal, in conjunction with the submissions of both learned counsel, I am not persuaded that this Appeal has **overwhelmingly chances** of success. Accordingly, and for the reasons I have stated, the application dated the 8<sup>th</sup> November, 2010 fails and is hereby dismissed. The Appellant may fix his Appeal for hearing upon filing his record of Appeal.

Orders accordingly.

**Dated and delivered** in open court at Machakos this **28<sup>th</sup>** day of **February** 2011.

**P. KIHARA KARIUKI**

**JUDGE**

In the presence of Mrs. Gakobo for the State and in the absence of learned counsel for the Appellant/Applicant.