



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISC. CRIMINAL APPL. 96 OF 2011

MOSETI ONGAGA THOMAS..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

R U L I N G

The appellant, **MOSETI ONGAGA THOMAS**, was convicted for the offence of Stealing goods in transit contrary to **section 279 (C) of the Penal Code**. He was then sentenced to 2 years imprisonment.

Being dissatisfied with both the conviction and sentence, the applicant has lodged an appeal at the High Court.

And whilst awaiting the hearing and determination of his appeal, the applicant now asks this court to grant him bail.

He believes that his appeal has overwhelming chances of success. His said belief stems, first, from the evidence tendered by **PW 2**, who testified that the applicant arrived at the scene of crime after the incident had taken place.

In my reading of the evidence on record, **PW 3** corroborated the evidence of **PW 2**, by saying that it is he who called the applicant to help him pursue the thieves.

Another issue that the applicant raises is that the goods allegedly stolen cannot have been in transit because by the time of the incident, they had already been at the depot for over a week.

Thirdly, the applicant points out that he was already on leave by 4th December 2006, when the offence is said to have been committed. Therefore, as the theft is said to have been undertaken when the applicant was on duty, he cannot have done so when he was away, on leave.

The fourth issue raised by the applicant is that the trial court was wrong to have assumed that the offence occurred on 3rd December 2006, when the prosecution never sought nor got leave to amend the charge sheet, so as to reflect the 3rd of December 2006.

Finally, the applicant pointed out that during the trial, he was out on bond, but he always attended court faithfully. He says that if he was granted bail even at this stage, he will comply with any conditions which the court may impose.

The respondent conceded the application.

If, as Mr. Murithi, learned state counsel, pointed out, the containers were inspected and found to be intact on 3rd December 2006, it is interesting to note that the trial court held that the theft took place on that same date.

I say that it is interesting because, it does not appear that the prosecution held that same view. Had the prosecution held the view that the offence was committed on 3rd December 2006, nothing would have been easier than to so specify in the charge sheet.

On the other hand, if, as the learned trial magistrate held, the offence was committed on 3rd December 2006, then the evidence would appear not to support the charge sheet, which stipulates that the offence was committed on 4th December 2006.

On the basis of the foregoing, I find that the appeal lodged by the applicant has a reasonable chance of success. That being so, I find that it would be unjust to have the applicant continue to stay in prison whilst awaiting the hearing and determination of an appeal that is likely to be successful. If the appeal were to be allowed after he had served either the whole or a substantial portion of the sentence, the applicant would have been seriously prejudiced.

The applicant is hereby granted bond pending appeal. He will be required to execute his own personal bond of KShs.400,000/-.He will also be required to present two sureties for KShs.400,000/- each. As soon as he executes his said bond and his two sureties are approved by the learned Deputy Registrar, the applicant shall be permitted to walk out of the prison gates, to pursue his appeal whilst enjoying some measure of freedom.

Dated, Signed and Delivered at Nairobi, this 12th day of May, 2011.

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FRED A. OCHIENG
JUDGE