



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
CRIMINAL APPEAL NO. 75 OF 2011

ANTHONY NJUGUNA MWANGI.....APPLICANT/APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

The Applicant was on 11th May 2011 convicted by the Senior Principal Magistrate in Kerugoya on 2 counts of breaking into a building and committing a felony contrary to Section 306 (a) of the Penal Code and sentenced to serve 12 months in jail on each. The terms were ordered to run concurrently. The particulars were that on 1st December 2009 at Kerugoya town in Kirinyaga District of the Central Province he broke into the office belonging to Full Gospel Churches of Kenya and therein stole a Nokia 2600 mobile phone worth KShs.5,300/= belonging to Lucy Karuana Kinyua PW1 (Count 1) and a Motorola C118 mobile phone worth KShs.2,000/= belonging to Martha Kariuki Wambui PW2 (Count 2). The Applicant was aggrieved by the conviction and sentence and has preferred an appeal to this court. In the present application he seeks to be released on bail pending the appeal.

The person who has been convicted and sentenced is not entitled to bail. This is because of the presumption that he has been properly convicted and sentenced. If he wants to be released on bail pending appeal he has to demonstrate that his appeal has overwhelming chances of success and therefore that there is no justification of depriving him of his liberty. (**DOMINIC KARANJA VS REPUBLIC [1986] KLR 612**). The minor relevant consideration would be whether there exists exceptional or unusual circumstances that would warrant his being released on bail at this stage.

The grounds upon which this application is based are that:

- (a) the Applicant was not given an option of a fine;
- (b) the appeal has high chances of success; and
- (c) the appeal may be rendered nugatory and therefore he will suffer prejudice because he may suffer the entire sentence before the appeal is heard and finalized.

The application was prosecuted for him by Mr. Kahigah whereas Ms. Matiru appeared for the State. She opposed the application. Her contention was that the appeal did not have overwhelming chances of

success.

I do not want to say that there is a difference between an appeal having overwhelming chances of success and an appeal having high chances of success. What is required is the demonstration that the appeal has overwhelming chances of success. High chances of success may not be enough.

Where it is shown that the appeal is likely to be successful in the sense that at least the sentence may be interfered with and the Applicant given a non custodial sentence, he should be released on bail pending appeal.

I have considered the evidence on which the Applicant was convicted. Whereas nothing should be said that may prejudice the hearing of the appeal, at least it should be noted that the Applicant was a first offender and the total value of the mobile phones stolen was only KShs.7,300/=. One of the principles of sentencing is that the court will not usually order the imprisonment of a first offender, especially now that the value of the property stolen was not much. It is also not clear why the trial court did not consider the provisions of Section 3 (1)(b) of the Community Service Orders Act 1998.

In short, I consider that the appeal has overwhelming chances of success. The Applicant is admitted to bail pending the hearing and determination of his appeal. He is ordered to deposit a cash bail of KShs.30,000/= and to be appearing for mention before the Deputy Registrar until the appeal is heard and determined.

DATED, DELIVERED AND SIGNED AT EMBU THIS 30th DAY OF JUNE 2011.

A. O. MUCHELULE
JUDGE