



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL NO. 102 OF 2011

KENNEDY OMONDI ONYANGO1ST APPELLANT
DANIEL AMOLLO OYIER2ND APPELLANT

VERSUS

THE STATERESPONDENT

RULING

A perusal of the record reveals that the two appellants were arraigned before the lower court vide Criminal PMCCR NO. 599 of 2011 with the offence of stealing things forming part of a Railway contrary to Section 279 (d) of the Penal Code “**in that on the 25th day of June 2011 at CXR yard in Kisumu District within Nyanza Province about 2130 hours jointly stole one tie rod, one control rod, one push rod, two pieces of rail bars all valued at Kshs. 24,600/= which form part of a railway and the property of Kenya Railways Corporation**”.

The record of the lower court reveals Accused 1 is indicated: Will Swahili “**There is no similar indication for the 2nd accused and yet the charge is alleged to have read to the accused in English / Luo / Kiswahili and then both are stated to have replied “ its true plea of guilty was entered, facts were narrated in a language not indicated and are indicated to have been accepted by the appellants, who were then convicted. Exhibits have released, mitigation given with first accused stating that he was sorry, while accused 2 indicated to have stated that it was not his desire that it is the hard life which had pushed them. The court is indicated to have considered the mitigation and then each was sentenced to serve twelve (12) months in prison, Right of appeal within fourteen (14) days was granted**”

The conviction and sentence was on 27/6/2011. Appellants filed an appeal on 11/7/2011 with six (6) grounds of appeal. On the said appeal they have anchored an application by way of Notice of Motion dated 11/7/2011 and filed on the 12th day of July 2011 seeking bail pending appeal. The points in support are set out in the body of the application, supporting affidavits and oral highlights and the major one are that

- (1) The plea was not properly taken and for this reason there was a miscarriage of justice.**
- (2) The area where the properties were allegedly stolen from has not been properly described.**
- (3) That the sentence is short and if not released on bond pending appeal and then the prison term is left to run its full term , then it means that by the time the appeal comes up for hearing the sentence would have been fully served and the appellants aspirations of being released on bond,**

pending appeal would then have been rendered nugatory.

The state opposed the application because according to them the plea was properly taken and the conviction is proper.

This court has given due consideration to the rival arguments above and the same considered in the light of the provisions of law on which the application has been premised as well as the provisions of the bill of rights in the current Kenyan Constitution namely Article 46, 49, 50 and 51. The court proceeds to make the following findings on the same:-

- (1) There is both statutory and constitutional jurisdiction to grant bail pending appeal.**
- (2) Right of appeal is a fundamental human right and irrespective of the seriousness of the offence an appellant seeking to exercise this right is entitled to exercise the same.**
- (3) The last thing that a court of law can do to a litigant even in a criminal process is to impede unreasonably his course of justice.**
- (4) Issue of the proceduralty and or non proceduralty of the lower court proceedings is a matter for the appellate court to determine at the appropriate time when the hearing comes up**
- (5) Considering the slow progression of time taken from initiation of appeal to its disposal that this court has judicial notice of, on the one hand, and considering the length of the imprisonment term that the appellant /applicants are currently serving, there is a likelihood of the imprisonment term becoming spent before the disposal of the appeal and thereby rendering the appellant / applicants aspiration of benefiting from bail pending appeal being rendered nugatory. There is therefore justification for the appellants/applicants apprehension.**

For the reasons given above, the court is satisfied that the appellant / applicant has justification in seeking bail pending appeal. The court is inclined to admit them to the same. The terms being that each will be released on bail pending appeal on the following terms:-

- (1) Cash bail of Kshs. 5,000.00 each**
- (2) Alternatively bail / bond of Kshs. 20,000.00 with one surety of like amount each.**
- (3) If option 2 is taken then the sureties will be approved by the Deputy Registrar of this court in the usual manner.**

Delivered, dated and Signed at Kisumu this 28^h day of September 2011

**R. N. NAMBUYE
J U D G E**

RNN/aao