REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 21 of 2010

KENNEDY MMBAYA LITORO……. …….APPELLANT

Versus

REPUBLIC……...… ……..RESPONDENT

RULING

Kennedy Mmbaya Litoro, the applicant herein, took out the notice of motion dated 28th January 2010, pursuant to section 357 of the Criminal Procedure code, in which he prayed to be admitted to bail pending appeal. The motion is supported by the affidavit of Susan Kanini Keli sworn on the same date.

When the motion came up for interpartes hearing, Mr. Makura, learned Senior State Counsel indicated that the state did not wish to oppose the application. Miss Keli, put forward three main grounds in support of the motion. First, it is her argument that the appeal has high chances of success. Secondly, it is averred that the appellant is likely to have served the substantial part of the sentence at the time of hearing the appeal.

Thirdly, that the offence the appellant was convicted of was bailable and that the appellant is ready and willing to abide by any conditions that may be imposed by this court.

I have considered the grounds set out on the face of the motion and the facts deponed in the supporting affidavit. I have also considered the oral arguments tendered by the appellant's learned counsel and the recorded proceedings filed before this court. The records shows that the appellant was convicted on his own plea of guilty to the offence of stealing by agent contrary to section 283 of the Penal Code. The particulars of the offence are that on divers dates between 29th December 2009 and 7th January 2010 at Summer Ltd in Nyeri South District, within CentralProvince, stole goods namely Manji biscuits worth Kshs. 1,465,330/- which had been entrusted to him by Summer Ltd for the said Kennedy Mmbaya Litoro to distribute to customers. The appellant was then sentenced to three (3) years imprisonment. Being dissatisfied, he preferred this appeal. He is now before this court seeking to be admitted to bail pending appeal. When determining an application for bail pending appeal, the court will take into the well settled principles. The court of

Appeal restated those principles in the case of Dominic Karanja =VS= Republic [1986] K.L.R. 6 12 when it held interalia:

> ***"That 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 consideration would be whether there were exceptional or unusual circumstances."***

In Jivraj Shah =Vs= R [1986] K.L.R. 605 held interalia:

> ***"1. The Principal consideration in an application for bail pending appeal is the, existence of exceptional on unusual circumstances upon which the court of Appeal can fairly conclude that it is in the interest of justice to grant bail.***
>
> ***2. if it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of some substantial point of law how to be urged and that the sentence or substantial part of it will have been served by the time the appeal is herd, conditions for granting bail will exist.***
>
> ***3. The Maina criteria is that there is no difference between overwhelming chances of success and a set of circumstances which discloses substantial merit in the appeal which could result in the appeal being allowed and the proper approach is the consideration of the particular circumstances and weight and relevance of the points to be argued.***

I will apply the aforesaid principles to the motion now before me. It is argued that the appeal has overwhelming chances of success. Miss Keli, pointed out that when the appeal comes up for hearing the appellant is likely to show that he was convicted on a fatally defective charge. It is said that the charge does not indicate which of the subsections in section 283 the appellant was tried on. It is also argued that the appellant is likely to show that the plea was equivocal since the facts outlined by the court prosecutor were at variance with the charge. I have carefully considered the aforesaid arguments vis-avis the record. It would appear from the charge that section 283 was slated. That section has five sections. I have noted the defects. A court is called upon at this stage to making a finding whether the defect will result to an acquittal so that it can be said that the appeal has overwhelming chances of success. I find the issue to be arguable. However I do not think the ground will make the appeal to be with overwhelming chances of success if the provisions of sections 179 and 382 of the Criminal procedure Code. In a nutshell the defect is curable but not fatal. The other issue which was ably argued is that the conviction may turn out to be equivocal because the court did not record that the language the accused (appellant) understood or spoke. I have perused the recorded proceedings. It would appear from the record that both English and Kiswahili languages were used at the trial. The record does not show what language the accused used in answering the charge and in commenting on the facts outlined by the court prosecutor. The record does not have any indications as to whether or not the accused had complained of any language barrier. I am satisfied that the question as to

whether or not the plea was equivocal is an arguable ground. In my view the same is not a point which makes the appeal to have high chances of success.

The last ground put forward by Miss Keli, is to the effect that at the hearing of the appeal, the appellant will prove that the facts outlined by the court prosecutor did not establish the offence stated in the charge. I have looked at the facts outlined by the court prosecutor and I do not want to express conclusive finding over the same because I do not want to trespass into the arena of the judge who will finally hear the appeal. It suffices to state that the aforesaid ground may result to the appeal being allowed. In the end I am convicted that the appellant has not shown that he has an appeal which has overwhelming chances of success.

Miss Keli has also urged this court to find that if the appellant is denied bail, he is likely to have served a substantial part of the sentence at the time of appeal. There is no doubt that the appellant was sentenced to 3 years imprisonment on 13th January 2010. The proceedings have been typed and supplied to the parties. What remains is for the record of appeal to be prepared and for the file to be minuted to the judge in chambers to admit the appeal to hearing or in the alternative to summarily reject the same. In the circumstances of this case I do not think the appeal will delay.

In the final analysis I am satisfied that the motion lacks merit since the appellant has not shown that the application satisfies the principles of hereinabove stated. The same is dismissed.

Dated and delivered this 31st day of March 2010.

J.K. SERGON

JUDGE

In open court in the presence of Miss Keli for the Appellant and Mr. Makura for the state.

J.K. SERGON

JUDGE