



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET

Criminal Appeal 78 of 2006

JACOB KIPKORIR BIWOTT APPELLANT

VERSUS

REPUBLIC RESPONDENT

RULING

The Applicant/Appellant was on 19th September, 2006 charged in the Chief Magistrate's Court at Eldoret in Criminal Case No. 6313 of 2006 with the offence of house-breaking contrary to Section 304 (1) and stealing contrary to Section 279 (b) of the Penal Code.

The Applicant on 19th September, 2006 was convicted on his own plea of guilty and sentenced to serve two (2) years imprisonment for the first limb and another two (2) years on the second limb of the charge. The sentences were to run consecutively making the period a total of four (4) years.

Being aggrieved with the conviction and sentence the Applicant lodged this Appeal on 3rd October, 2006. The Appeal was admitted to hearing on 4th June, 2007 and is now fixed for hearing on 27th September, 2007.

On 16th July, 2007, the Applicant filed the present application to be admitted to bail/bond pending the hearing and determination of the Appeal. The application is supported by an affidavit sworn by the Applicant on 16th July, 2007. The Applicant gives the following reasons for his application:-

1. That the appeal has overwhelming chances of success.
2. That there are exceptional circumstances in respect of the appeal.
3. That he may serve the sentence to completion before the appeal is heard and determined.

The application is opposed by the Attorney General for the Respondent. In the case of JIVRAJ SHAH -V- REPUBLIC (1986) KLR 605 the Court of Appeal laid down the principles to be applied where an Appellate Court is considering an application for bail pending appeal. These are that:-

1. The principal consideration in an application for bail pending appeal is the existence of exceptional or 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 to be urged and that the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for bail will exist.
3. The main criteria is that there is no difference between overwhelming chances of success and a set of circumstances which disclose 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 have considered the said principles against the facts and circumstances in the present application. I have also considered the submissions by Counsel.

In this case the Applicant pleaded guilty after the charge was read to him. It will be an issue in the appeal whether the said plea was unequivocal or not. The Applicant's Counsel submitted that there was no breaking in of the house as the door was found wide open in the morning. It is noted that the Applicant was arrested due to suspicion by the Complainant. The stolen item was a Chloride Exide battery. It was never recovered. It was valued for Kshs. 4,700/=.

In the Charge, the Applicant was charged with two offences i.e.

- (i) House breaking
- (ii) Stealing

They were both contained in the same charge as one count. It was not in the alternative but the effect is that there were two offences in one count. The question is whether the same together with the manner in which the facts were framed did embarrass or prejudice the Applicant when he pleaded guilty and in respect of the final sentence. The trial Court treated the first charge/offence as a limb and the other count as a second limb. It would appear that the trial Court was suggesting a new kind of offence of house-breaking/stealing which had two limbs.

I have considered the ratio decidendi in MWANIKI –V- REPUBLIC (2001) 1 EA decided by the Court of Appeal and which elaborately dealt with the question of duplicity in charges and the circumstances when the same will be deemed to amount to a failure of justice.

On a prima facie basis from the totality of all the facts and circumstances, I am of the opinion that the appeal is likely to be successful in respect of the point the charge being duplex and which appears to have had some adverse implications with regard to the plea of guilt and the severity of the sentence.

I therefore, do hereby allow the application on the said ground. I do hereby grant bond to the Applicant in the sum of Kshs. 25,000/= (twenty five thousand) with one surety for the same amount.

DATED AND DELIVERED AT ELDORET ON THIS 26TH DAY OF JULY, 2007.

M. K. IBRAHIM

JUDGE