

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Criminal Appeal 23 of 2006

YUSUF KIYO **APPELLANT**

VERSUS

REPUBLIC **RESPONDENT**

R U L I N G

1. The Appellant, Yusuf Kiho is the Applicant herein and by his Notice of Motion under s.349 and s.356 of the Criminal Procedure Code, Cap 75 he seeks an order that pending the hearing and determination of his Appeal he should be released on bail.
2. It is his case that his Appeal has high chances of success; that the offence for which he was convicted is bailable; that he is also sickly and requires medical attention which only a local medicine man can provide and without which his health would deteriorate in harsh prison conditions.
3. The Republic opposes the Application and learned State Counsel argues that the nature of the offence in the trial court is irrelevant in considering whether the Appellant should be granted bail pending Appeal. That no reason has been advanced at all for saying that the Appeal has overwhelming chances of success and the claim of deteriorating health is unsupported by any evidence whatsoever.
4. I agree that the Application is completely misguided and is also incompetent. The submission that the offence is bailable is a matter only for the trial court and has no logic in an appellate court where the Appellant has already been convicted. Secondly, ordinarily where the Appellant says that he is sickly and needs specialized medical care, the court may look at the evidence tendered and exercise discretion in his favour in only appropriate cases. In the instant case, the Applicant merely depones at paragraph 6 and 7 of his supporting Affidavit that he is sickly and requires medical attention from a herbalist or “**local medicine man.**” The nature of illness is not disclosed and not even an iota of evidence about it has been presented for the court’s discretion. How can a court confronted with nothing exercise discretion fairly?
5. Thirdly, a person seeking bail pending appeal must show the court that the appeal in fact has overwhelming chances of success. Not one word has been uttered in any submission about how the appeal fits this expectation. To merely say so is not enough. I have in any event looked at the evidence on record and as regards the stolen cows subjects of the charge that faced the Appellant in the lower court, the evidence of P.W.1, P.W.2 and more so that of P.W.3 to whom the Appellant sold one of the cows clearly show that the Appellant was the person who stole them and went on to sell them to two different people. When he was arrested, he led the police to the recovery of both cows. The totality of the evidence does not favour the Applicant.
6. It cannot be said in such circumstances that the Appellant’s appeal has overwhelming chances of success. As I said, not even one reason has been advanced for his making such a statement and his counsel steered clear of the most important aspect of an Application of this kind.
7. On the whole, the Application is lacking in seriousness merit.
8. Let the Appellant argue his Appeal, hopefully on more convincing grounds. As for his Application dated 3.3.2006 it is now and is hereby dismissed.

9. Orders accordingly.

Dated, signed and delivered in open court at Meru this 4th day of May 2006

ISAAC LENAOLA

JUDGE

In the Presence of

N/A Advocate for the Appellant/ Applicant

Mr. Muteti State Counsel for the State

ISAAC LENAOLA

JUDGE