

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
MISCELLANEOUS CRIMINAL APPLICATION NO.52 of 2001

(From Original Conviction and Sentence in Criminal Case No.1386 of 1997 of the
Resident Magistrate's Court at Kwale – J.Nyaga, Esq., R.M.)

KALUS GUYO alias HASSAN.....APPLICANT

= V E R S U S =

REPUBLIC.....RESPONDENT

R U L I N G

The Applicant seeks an order for Bail pending Appeal in his Notice of Motion dated 19.6.01. He was convicted on 7.2.01 for the offence of Housebreaking and Stealing contrary to Section 304(1) and 279(b) of the Penal Code and was sentenced to serve 15 months imprisonment on each limb of the charge, the sentences to run concurrently. It had been alleged that the Applicant had broken and entered into the house of the complainant and stolen therein a video machine valued at Kshs.23,500/-.

He was convicted on the basis of the evidence of the complainant and the Police Officer who arrested the Applicant. It was the complainant's evidence that she had left the key to her house with a neighbour before going upcountry only to return and find her video machine missing. One week later the video machine was found in possession of another person who was said to be the friend of the Applicant. Neither the neighbour who had been left with the key nor the friend in whose possession the video machine was found were called as witnesses. The Learned Trial Magistrate nevertheless admitted in evidence and acted on information that those two persons are supposed to have given which was incriminating to the Applicant.

The main Ground of Appeal, as submitted by learned counsel for the Applicant Mr. Magolo, will be that the evidence of such witnesses was inadmissible and hearsay. The failure to call the witnesses was also fatal to the prosecution case. There are also other grounds relied on in the Petition of Appeal

. It is conceded by Learned State Counsel Mr. Ogoti that the Ground of Appeal is validly raised and he did not therefore oppose the application.

I have perused the Lower Court proceedings and have confirmed that the two witnesses were not called although the prosecution intended to call them. No sufficient grounds were laid for failure to do so except to say that they were not traced. Whatever evidence they harboured therefore was of no probative value in the case and ought not to have been accepted from other sources and believed. Indeed the failure to call those two witnesses may well have been fatal to the prosecution case but that is for the Appellate Court to decide..

The sentence imposed is 15 months and the Applicant has so far served about 4 months of it. The Appeal has yet to be admitted and he would have served a substantial part of the sentence before the hearing.

I am satisfied that all these are exceptional circumstances to warrant the grant of Bail pending the hearing of the Appeal.

Accordingly I allow the application and order that the Applicant shall be released from prison upon execution of a personal bond of Kshs.20,000/- with one surety of like sum. He will attend the Mention of

the Appeal once every month until it is heard.

Dated this 3rd day of July, 2001.

P.N. WAKI

J U D G E