



REPUBLIC OF KENYA

AT THE HIGH COURT IN NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL 176 OF 2019

CALVINS OWINO OCHIENG.....APPELLANT/APPLICANT.

VERSUS

REPUBLIC.....RESPONDENT.

RULING

**Background**

1. By a Notice of Motion filed on 2<sup>nd</sup> December, 2019, the Appellant seeks a release on bail pending the hearing and determination of the appeal. He was charged with the offence of stealing a motor vehicle contrary to Section 278A of the Penal Code. The particulars of the offence were that on the 7<sup>th</sup> June, 2012 at Rabai Road in Makadara sub-County within Nairobi County jointly with others not before court stole a motor vehicle registration number KBH 755Z make Toyota Premio valued at Kshs. 659 000/- the property of Maurice Obewa Hezekiel.
2. At the conclusion of trial, he was convicted and sentenced to pay Kshs. 100,000/- fine and additionally compensate the complainant the value of the motor vehicle in default serve three (3) years imprisonment.
3. He raised the ground that the appeal stood high chances of success. He pointed that he had been denied a right to a fair hearing. It was the submission of Mr. Mulinge, his counsel, that throughout the trial he was not supplied with witness statements that he would use as a tool to mount a defence against the prosecution case. This therefore violated his right to be supplied with the evidence to be used against him.
4. He further raised the ground that he was serving an illegal sentence. He had been in remand since 2014 when he took plea. He had therefore been in custody for six (6) years which was longer than the three (3) years default sentence imposed in lieu of the fine. As regards to the Respondent assertion that the Applicant had a previous conviction, counsel submitted that no record of proof was availed. Hence, the court could not deny the Appellant bail based on unsubstantiated assertions.
5. Miss Kimaru for the Respondent contended that the appeal did not have high chances of success. It was her submission that the Applicant was duly convicted as the case was proved beyond a reasonable doubt. Further, that there were also no exceptional circumstances that would warrant the grant of bail pending the hearing and determination of the appeal. Lastly, she submitted that owing a previous conviction in criminal case number 989/201, the Applicant was not a suitable candidate for bail.
6. The brief facts of the case are that the prosecution brought four (4) witnesses in support of their case. The Appellant appeared as the only witness in his defence. The gist of the case was that the complainant had just bought the subject motor vehicle. He took it to a mechanic called Otieno for repairs. He later went to pick it up and found that the mechanic hired it out to a motor vehicle hiring company. This was done without the consent of the complainant. The vehicle was never recovered. It was the testimony of the mechanic that the complainant failed to pick it up and it was therefore hired out to a car hire company and in turn hired to the Appellant.

**Determination**

7. It is trite law that an Applicant seeking bail pending appeal must demonstrate that his/her appeal has high chances of success or that there exists unusual or exceptional circumstances to warrant the grant of bail or that if bail is not granted, he/she is likely to serve the sentence or a substantial part of the sentence before the appeal is heard. See: **Jivraj Shah V R [1986] eKLR** and **Dominic Karanja v. Republic [1986] KLR 612**.
8. In the present case, the Applicant has raised reasonable grounds to warrant the grant of bail pending the hearing and determination of the appeal. The failure to be furnished with witness statements is a violation of the right to fair hearing. A look at the record attests that there is

*prima facie* evidence that he was indeed unable to receive prosecution witness statements. However, a proper determination on this ground will be arrived at in the hearing of the appeal.

9. On the ground that he is serving an illegal sentence, it is clear from the record that he was sentenced to pay Kshs. 100 000/- fine and additionally compensate the complainant the value of the motor vehicle in default serve three (3) years imprisonment. He took plea on 9<sup>th</sup> June, 2014 and has since then been in custody. This translates into five (5) years and nine (9) months period in custody as at the 24<sup>th</sup> March, 2020. It implies that he has been in custody for a period in excess of the sentence imposed. He deserves no more single day in custody.

10. On the above grounds, it is my view that the appeal has high chances of success. I find the application meritorious. I accordingly release the Appellant on a cash bail of Ksh. 50,000/ pending the hearing and determination of the appeal. It is so ordered.

**Dated and Delivered at Nairobi This 9<sup>th</sup> Day of April, 2020.**

**G.W.NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

- 1. Mr. Mulinge for the Appellant/Applicant**
- 2. Miss Chege for the Respondent.**