



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

HCCRA NO 24 OF 2018

GITONGA NKOU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against the decision of Hon. S.M. NYAGA (SRM) in Marimanti

Principal Magistrate's Court Criminal Case No.58 of 2017 dated on 2/8/2018.)

RULING

1. **GITONGA NKOU**, the appellant/applicant herein was charged with the offence of maliciously damaged to property contrary to **Section 339(1)** of the **Penal Code** vide **Marimanti Principal Magistrate's Court Criminal Case No. 59 /2017**. The appellant denied committing the offence but after trial, the trial court found him guilty, convicted him and sentenced him to serve 7 years imprisonment.

2. The appellant/applicant felt aggrieved and filed this appeal which is pending for determination. He has now orally moved this court for bond/bail pending appeal. The basis for his oral application is that he is illiterate and now unrepresented as the advocate representing him appears to have abandoned him. This court granted the appellant's request in the interest of justice and also in deference to his right to access justice as stipulated under **Article 48** of the **Constitution of Kenya**.

3. The Appellant/Applicant's main ground for his oral application is that he suffered under the hands of the complainant which saw him lose two goats and a dwelling house which was burnt down when he was put in custody for the offence from which he was convicted and now the subject of this appeal. He further says that he has children who are suffering as a result of his conviction.

4. The Respondent through the Office of Director of Public Prosecution represented by learned counsel Mr. Momanyi opposed this application. The Respondent holds that the applicant has not met the threshold for a grant of bond pending appeal which the assets includes establishing an exceptional circumstance that would entitle him bond. Mr. Momanyi further pointed out that the applicant has raised the issue of children suffering but failed to show proof. It is further contended that this appeal has no chances of success as the appeal according to the State is not based on any substantial error that can show that the appellant has a meritable appeal. The State further pointed out that the applicant has lost his presumption of innocence and should be treated as a convict.

5. This court has carefully considered this application despite the same having been made orally in court. I have also considered the response made. I have looked at the petition of appeal herein. This court has further considered the decision in **JIVRAS SHAH -VS- REPUBLIC [1986] KLR 605** where it was held that an appellant can succeed in an application for bond pending appeal if the following circumstances exist or pointed out:-

(i) Existence of exceptional or unusual circumstances which an appellate court can fairly conclude that it is in the best interest of justice to grant bail.

(ii) Where 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 in addition the sentence or substantial part of it will have been served by the time the appeal is heard.

6. The provisions of **Section 357(1)** of the **Criminal Procedure Code** gives power to this court the discretion to grant bail pending appeal. The above cited authority provides guiding principles to be applied. In exercise of that discretion.

7. To begin with chances of success of this appeal, this court has relooked at the section under which the applicant/appellant was charged

and convicted (**Section 339 (1) of Penal Code**). It is abundantly clear that the penalty provided for anyone found guilty is a maximum of 5 years imprisonment. The appellant herein was sentenced to serve 7 years imprisonment which clearly, even without entertaining arguments, shows that the appellant's sentence in the first place is not supported by law. This court, whenever its attention is drawn to such an illegality can even move on its motion under its revisionary powers under **Section 364 Criminal Procedure Code** to correct the illegality. However because the Appellant chose to appeal this court will cross that bridge when it is called upon to determine the appeal but for now what cannot be ignored is the overwhelming chances of success of this appeal at the very least on the sentence meted out against the appellant.

8. Secondly this court is persuaded that there exists in this appeal an exceptional or unusual circumstance which came out clearly when the appellant made a passionate appeal to this court to summon OCS Gatunga Police Station with a view to looking at additional evidence. The additional evidence is the fact that he lost his two goats/sheep after the complainant in the lower court detained them apparently for grazing on a disputed plot. The applicant told this court that when he went to ask for his goats, he was shot with an arrow as a result of which he lost a finger. This court upon seeing the missing finger issued summons to OCS Gatunga,. The OCS from Gatunga Police Station came to court and confirmed all the allegations made by the appellant and when asked why no action was taken against culprits, the OCS stated that the Office of the Director of Public Prosecution recommended that the file regarding grievous regarding the complaint be closed with a view to proceeding with the case on malicious property. Well though this is not the right forum to question the wisdom (or lack of the same) informing the Director of Public Prosecution's decision to drop a case of serious grievous arm (where a person has lost a finger and instead concentrate on a case involving goats jumping over the fence to graze on a land which in itself disputed) it is something which for purposes of this application is an exceptional/unusual circumstance which on a prima facie basis shows that the appellant has an arguable appeal with high chances of success. This court do notes that a court in Meru (**Meru HCC NO. 235/95**) made a decision which the applicant states favoured him in so far as the place where his goats were grazing is concern. That however is not a matter before this court.

9. This court is persuaded as held in the case of ***SOMO-VS- REPUBLIC (1972) EA*** that where an appeal has high chances of succeeding, there is no justification to deprive an applicant of his freedom. I am persuaded that looking at this appeal and what has been tabled before me the appeal stands high chances of success.

In the light of this I do find that there is sufficient justification for the interest of justice to have the appellant released on bond. He can be released on a bond of Kshs.20,000/- (twenty thousand) with a surety of a similar amount.

The parties in this appeal are also directed to expedite the hearing of the appeal as already directions have been taken on how this appeal shall be canvassed. I therefore direct the parties to take a hearing date upon delivery of this ruling.

Dated, signed and delivered at Chuka this 5th day of February, 2019.

R.K. LIMO

JUDGE

5/6/2019

Ruling signed, dated and delivered in the open court in presence of appellant in person and Momanyi for State.

R.K. LIMO

JUDGE

5/2/2019