



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL 12 OF 2019

KELVIN FUNDI NJUKI.....APPELLANT/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

A. Introduction

1. The applicant was charged and convicted with the offence of stealing stock contrary to **Section 278 of the Penal Code** and sentenced to four (4) years imprisonment. Being dissatisfied with the conviction and sentence, the applicant filed this petition of appeal on the 1st April 2019.
2. On the 5th April 2019, the applicant filed an application seeking orders that he be released on reasonable bail terms and conditions as the court may deem fit and just pending the hearing of this determination as well as costs for the application.
3. Both parties agreed that the court do use their pleadings in determining this application.

B. Applicant's Case

4. In the Supporting affidavit dated 5th April 2019, the applicant states that having been convicted and sentenced to four (4) years imprisonment, having filed an appeal, the appeal will be rendered nugatory unless he is released on bond. He further states that his appeal has a high chance of success.
5. It is the applicant's case that he has never committed any other offence in his lifetime and further that he undertakes to present himself voluntarily and willingly before the court when required.
6. The applicant further states that he is the bread winner of his family consisting of his wife and a 2 year-old child and further that his private business is likely to go down thus rendering his family destitute.

C. Respondent's Case

7. In their reply to the application, the prosecution opposed the application on the grounds that the applicant had been convicted rightly as there were no inconsistencies in the evidence on record.
8. The prosecution further deposed the fact that the applicant was the sole breadwinner was not a justifiable reason or special circumstance to warrant release of the applicant on bail pending appeal and that the retributive purpose for which the sentence was meted out would not be served if the applicant was released on bail pending the hearing of the appeal.

D. Analysis of the Law

9. It is trite law that a person is presumed innocent until proven guilty in a criminal trial. The burden is on the prosecution to prove that he is not innocent during the trial. Every person is entitled to bail or bond pending trial as provided for by **Article 49 (1) (h) of the Constitution** states that: -

“(1) An arrested person has the right—

(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.”

10. Once a trial court has made a determination and found an accused guilty of the offence, he is no longer considered innocent for his guilt has already been established. In this regard, if such a convict dissatisfied with the outcome, his recourse is to appeal against the decision.

11. The conditions applicable for bail pending trial and bail pending appeal are different. After trial and conviction, an accused can no longer be presumed as innocent and bail is no longer an automatic right. In this the applicant must demonstrate that his appeal has overwhelming chances of success to be entitled to bail pending appeal. Of course, there may be other considerations

12. **Section 357 (1) of the Criminal Procedure Code** provides admission to bail pending appeal, it states that:

“After the entering of an appeal by a person entitled to appeal, the High Court, or the subordinate court which convicted or sentenced that person, may order that he be released on bail with or without sureties, or, if that person is not released on bail, shall at his request order that the execution of the sentence or order appealed against shall be suspended pending the hearing of his appeal.”

13. In the case of **Jivraj Shah versus Republic [1986] KLR 605** the principles for grant of bail pending appeal were established as:

i) The existence of exceptional or unusual circumstances upon which the Court or

ii) 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 argued and that the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail exists.

iii) 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 the weight and relevance of the points to be argued.

14. These grounds can be narrowed down such as to whether the appeal has overwhelming chances of success and whether there are exceptional circumstances warranting the release of the Appellant on bail pending appeal.

15. The burden is therefore on the applicant to prove that he should be granted bail pending the hearing of his appeal. He should demonstrate that the appeal has overwhelming chances of success.

16. I have considered the application and the submissions of Learned Counsel. I have also considered the judgment of the trial court and the grounds set out in the petition of appeal. The Petition of Appeal is grounded on nine (9) grounds which I have perused.

17. The applicant has argued that his defence was not considered and further that the prosecution did not prove its case beyond reasonable doubt. From the judgment of the trial court I note that the court considered the defence and found it not plausible. The issue as to the merit of the appeal and the sentence will be subjected to further arguments during hearing of the appeal.

18. I wish to state that I do not find any exceptional or unusual circumstances that exist to warrant the release of the appellant who, as a convict, has now lost the presumption of innocence. The fact that he is the breadwinner of his family is not an exceptional circumstance in my view. The applicant has not demonstrated that the appeal will take long to be heard though has so alleged.

19. Accordingly, for the reasons set out above, the appellant’s application for bail pending appeal is declined.

20. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 20TH DAY OF MAY, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Muriuki for R. Njeru for Applicant/Appellant

Ms. Mati for the Respondent

Appellant present in person