

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL 136 OF 2019

PETER NGANG'A MUIRURI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. This is an application for the bail pending appeal. The Applicant was charged with stealing by servant contrary to **Section 281 of the Penal Code**. He was however convicted of the lesser offence of stealing. It was the evidence of the prosecution that pharmaceutical products that were sent to the Applicant who would in turn distribute the same. He did this in his capacity of an employee. It was also the evidence of the prosecution that the Applicant would tender payments in cash, cheques and in credit terms. It was therefore on the strength of the invoices and the testimonies of the witnesses that the Applicant was charged and convicted.

2. In a charge for stealing by servant the prosecution is tasked with proving two (2) things. First, that the Applicant was an employee of the complainant. Secondly, that he intentionally and unlawfully stole the said pharmaceutical products. From the record, the trial court established that there was no proof that the Applicant was an employee of the complainant. However, it established that he indeed had stolen the pharmaceutical products.

3. In an application for bail pending appeal, the Applicant has to demonstrate that the appeal has high chances of success. Further, an application of this nature would succeed if the Applicant demonstrates that he is likely to serve the whole or a substantial part of the sentence by the time the appeal is heard and determined. An Applicant is also enjoined to demonstrate that there exist unusual or exceptional circumstances to warrant the grant of bail. (see **JIVRAJ SHAH -VS- REPUBLIC [1986] eKLR**)

4. In the present case, the Applicant was convicted of the offence of stealing. The elements of the offence of stealing are set out at Section 268(1) Penal Code as follows:

“(1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.”

5. It is clear that there needs to be proof that the Applicant fraudulently converted the use of the property or thing. I will not delve much into this point to avoid prejudicing the appeal in any way. I however find that the only evidence is that there were unpaid invoices but they were not directly linked to the Applicant as the person responsible for the culpability. There was also no evidence that the Applicant paid in any monies or that he took out the said products for delivery.

6. It is therefore my finding that, *prima facie*, the appeal has chances of success. However, a full reevaluation of the evidence will be done at trial. I therefore admit the Applicant to bail pending Appeal. He shall execute a bond of Ksh. 200,000/ or pay a cash bail of Ksh. 100,000/.

Dated and Delivered at Nairobi This 16th October, 2019.

G.W.NGENYE-MACHARIA

JUDGE.

In the presence of:

1. Mr. Masaviru h/b for Mr. Mungania for the Appellant/Applicant.

2. Mr. Momanyi for the Respondent.