



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 92 OF 2016

VITALIS OKUMU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An application for bail pending appeal from the decision of D. Alego, Principal

Magistrate, in Criminal Case No. 1750 of 2015 at Kapsabet dated 3rd August 2016]

RULING

1. The appellant pleaded *guilty* to two offences: being in possession of alcoholic drinks without a licence contrary to section 27 (1) (b) as read with section 27 (4) of the Alcoholic Drinks Control Act (No. 4 of 2010); and, secondly, failing to stop as ordered by a uniformed police officer contrary to section 52 (1) of the Traffic (Amendment) Act, No. 2 of 2012.
2. The offences were committed on 10th July 2015 at Lessos along Chebarbar-Nabkoi road in Nandi County. The drinks in question were 1,480 litres of *chang'aa*. They were being transported in a motor vehicle registration number KBY 322M which was being driven by the 2nd accused (not the appellant).
3. It is instructive that the *appellant* was *not* charged under the *second* count. The record however shows that he pleaded guilty on *both* counts. The appellant was ordered to pay a fine of Kshs 1,000,000 on the first count; in default, to serve two years imprisonment. His co-accused was to pay a fine of Kshs 200,000 or serve one year imprisonment in default. On the second count, the 2nd accused was ordered to pay a fine of Kshs 1,000 or serve one month imprisonment in default.
4. The appellant has preferred an appeal against his conviction and sentence. There would seem to be *two* separate appeals. The first was filed *in person* on 10th August 2016 and is registered as *Criminal Appeal 90 of 2016*. It challenged only the sentence; and, its essence is a plea for clemency. The second petition of appeal was filed by *Seneti & Oburu Advocates* on 11th August 2016. The latter challenges both conviction and sentence. That is the matter now before the court. The appellant will have to *elect* to proceed with *one* of the appeals.
5. Pending the hearing and determination of the appeal, the appellant has presented a notice of motion dated 19th September 2016 praying for bail. It is supported by a deposition sworn on 14th September 2016.
6. The appellant contends that the appeal has overwhelming chances of success. The appellant's learned counsel submitted that the plea of guilt was entered in the absence of counsel; and, that it was equivocal.

He submitted, that the court did not record the language used; and, it failed to warn the appellant of the consequences of *changing* his plea.

7. The application is contested by the Republic.

8. The legal parameters in an application of this nature were well stated by the Court of Appeal in Jivraj Shah v Republic [1986] KLR 605-

“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 urged, and that the sentence or a substantial part of it, will have been served by the time the appeal is heard, conditions for granting bail will exist. The decision is Somo v Republic [1972] EA 476 which was referred to by this court with approval in Criminal Application No. NAI 14 of 1986, Daniel Dominic Karanja v Republic where the main criteria was stated to be the existence of overwhelming chances of success does not differ from a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed.”

9. It would be prejudicial to make a finding whether the plea of guilt was unequivocal. I would be preempting the hearing of the appeal. However, I note from the annexed proceedings that the appellant pleaded guilty to *both* counts. The appellant was only facing *one* count. Although the language of the court was not indicated, the answers by the appellant were in *Kiswahili*. He answered “*ni kweli*” to the charge; and, to the *facts* that were read to him.

10. On the face of it, the appellant pleaded guilty to an offence he was not charged with. However, the trial court correctly sentenced him *only* on the *first* count. It will be the duty of the first appellate court to determine whether the sentence was harsh in the circumstances of this case. The less I comment about the matter, the better.

11. I find the appeal is *arguable*. There are *exceptional grounds* revolving around the *procedure* adopted in *changing* the plea of *not guilty* to one of *guilt*. The appellant was fined Kshs 1,000,000. In default, he was to serve *two years* imprisonment. On the face of it, the sentence handed down is not *illegal*. But I find that a *substantial part* of the sentence *will* be served *before* the appeal is heard and determined. I have also taken into account that the appellant was admitted to bail during his trial.

12. In the end, I am inclined to grant bail pending appeal. The appellant may be released upon execution of a bond in the sum of Kshs 1,000,000 with one surety of a similar amount. The surety shall be approved by the Deputy Registrar of this Court.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET this 7th day of March 2017.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of-

Appellant.

Ms. Torosi for Mr. Oburu for the appellant.

Ms. Chelashaw for Ms. Oduor for the Republic.

Mr. J. Kemboi, Court Clerk.