



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO. 41 OF 2014

JOHN MUMO NDIRITU.....APPELLANT/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The applicant was charged with the offence of sabotage contrary to **section 343 (b)** of the **Penal Code (Cap. 63)**; according to the particulars of the offence, on the 11th day of December, 2013, at Kagere area in Nyeri South District, the appellant, jointly with others not before court, wilfully and unlawfully destroyed an electric power line of substation 27903 with intent to impair the supply of electricity to the community of Kagere area the property of Kenya Power and Lighting Company Ltd.

He was also charged with the offence of stealing contrary to **section 275** of the **Penal Code** the particulars being that on the 11th day of December, 2013 at Kagere area in Nyeri South District, Nyeri County, the appellant, jointly with others not before court, stole 1000 metres of aluminium conductors valued at Kshs 150,000/= the property of Kenya Power and Lighting Company Ltd. The appellant faced an alternative charge of handling stolen property contrary to section 322(1) (2) of the Penal Code the particulars being that on the 11th day of December, 2013 at Kagere area in Nyeri South District of Nyeri County, otherwise than in the course of stealing, the appellant dishonestly retained 250 metres of aluminium electric conductors knowing or having reasons to believe it to be stolen goods or unlawfully obtained.

In the third count, the appellant was charged with the offence of unauthorised disconnection of apparatus from electric supply line contrary to **section 64(1)(d)** of the **Energy Act of 2006** and the particulars here were that on the 11th day of December, 2013 at Kagere area in Nyeri South District of Nyeri County, jointly with others not before court, the appellant unlawfully disconnected the transformer of substation 27903 from an electric line belonging to Kenya Power without the consent of the said Kenya Power.

The final count against the appellant was the offence of damaging any works under control of a licensee contrary to **section 64(4) (b)** of the **Energy Act, 2006** as read with **Miscellaneous Amendment Act No. 12 of 2012**. Here it was alleged that on the 11th day of December, 2013 at Kagere area in Nyeri South District of Nyeri County jointly with others not before court, the appellant wilfully and unlawfully damaged a Kenya power electrical supply line by cutting the conductors of Othaya feeder electric line without the authority of Kenya power.

The appellant was convicted of all the four counts; on each of the first three counts, he was fined Kshs 50,000/= and in default to serve 12 months imprisonment. He was fined Kshs 5,000,000/= and in default to serve 10 years imprisonment on the fourth count. All the sentences were to run concurrently.

He appealed against the convictions and sentences meted out against him; in the meantime, the appellant filed a summons in which he seeks to be admitted to bail pending the hearing and determination of his appeal; it is this application that is the subject of this ruling.

When the application came up for hearing the applicant argued that he was the last born in his family and that he does not have parents. He submitted that he has three children and that his wife has no job. His neighbours, so he urged, have taken advantage of his absence invaded his land and that he was having problems staying in prison. In the affidavit he swore in support of the application, he deposed that he was the sole breadwinner of his family and that his only sister is epileptic; he also said that he was ready to abide by the conditions which this court may impose if he was released on bond.

Counsel for the state opposed the application and argued that there is nothing in the application to show that the appellant's appeal had overwhelming chances of success. According to counsel, the appellant was properly convicted and sentenced and considering that he was sentenced to serve ten years in prison in one of the counts, it was quite unlikely that he will have served the sentence by the time the appeal is heard and determined.

The principles upon which bail pending appeal can be granted have been outlined in several court decisions; these include **Somo vs. Republic 1972 EA 476**, **Jivraj Shah versus Republic (1986) KLR 605** and **Dominic Karanja v. Republic [1986] KLR 612**.

In **Somo vs. Republic (supra)** at page 480 the court (Trevelyan, J), speaking of the grounds to be considered in an application for bail pending appeal said:-

“The most important of them is that the appeal will succeed. There is little, if any, point in granting the application if the appeal is not thought to have an overwhelming chance of being successful, at least to the extent that the sentence will be interfered with so that the applicant will be granted his liberty by the appeal court. I have used the word “overwhelming” deliberately and for what I believe to be good reason. It seems to me that when these applications are considered it must never be forgotten that the presumption that when the applicant was convicted, he was properly convicted.”

In **Jivraj Shah versus Republic (supra)** at page 606, the Court of Appeal (Nyarangi, Gachuhi & Apaloo JJA) held that:-

“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 learned judges cited with approval their decision in **Daniel Dominic Karanja versus Republic (supra)** where it was stated at page 613:-

“The most important issue here is if the appeal has such overwhelming chances of success then there is no justification for depriving the applicant of his liberty. The minor relevant considerations would be whether there are exceptional or unusual circumstances. The previous good character of the appellant and the hardship, if any, facing the wife and the children of the applicant are not exceptional or unusual factors...a solemn assertion by an applicant that he will not abscond if he is released is not sufficient ground, even with the support of the sureties, for releasing a convicted person on bail pending appeal. The applicant was certified to be fit by a doctor ...and so no issue of health arises. We are not to be taken to mean that ill-health per se would constitute an exceptional or unusual circumstance in every case. There exist medical

facilities for prisoners in the country.”

Looked at from the perspective of these pronouncements, none of the grounds raised by the applicant is relevant to an application for bail pending appeal; the appellant has not demonstrated in any of the grounds that his appeal has overwhelming chances of success. Grounds such as being the sole bread winner of his family or that he cannot survive prison conditions or that his wife has no job and that his sister is epileptic or that he is even ready and willing to abide by the bond terms if he is released on bail have been discounted and held to be insufficient to support an application for bail pending the hearing and determination of an appeal.

I have perused the record and there is nothing spectacular either in evidence or in the proceedings that would lead this court to come to the conclusion that the appellant's appeal has overwhelming chances of success and that it would therefore be improper to keep him in jail as he awaits his appeal.

As far as it is necessary for purposes of determination of this appeal, the record shows that the appellant was amongst a group of strangers who purported to be repairing a transformer at Kagere area on 11th December, 2013. After sometime the transformer exploded and these strangers fled. At night fall the same strangers came back and started removing the electricity cables.

The villagers suspected that these may not be workers for the power company; they arrested the appellant who was then on one of the electricity poles; his colleagues managed to escape.

At the time of his arrest, several power cables had been removed; the appellant was found with climbing hooks and a safety belt. All these items were produced in court.

In his evidence, the appellant testified that he came from Nanyuki and that he was in Kagere village to source for trees for timber; according to his evidence, he was in the process of looking for timber when he was arrested by the Kagere villagers.

With this kind of evidence, I am not able to see any hint of overwhelming chances of success of the appellant's appeal; I also cannot see any substantial point of law whose resolution will be in favour of or is likely to be in favour of the appellant. I am persuaded that the appellant's application has no basis and thus is not merited; I hereby dismissed it.

Signed, dated and delivered in open court this 3rd June, 2016

Ngaah Jairus

JUDGE