



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO. 43 OF 2013

ROBERT NDEGWA MUROKO.....APPELLANT/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The applicant and one Joseph Wanjohi Komu were jointly charged with the offence of stealing stock contrary to **section 278** of the **Penal Code (Cap. 63)**; according to the particulars in the charge sheet, between the night of 12th and 13 the day of May, 2012, at Karogoto village in Mathira West District within Nyeri County, the applicant and his co-accused stole one she-goat, valued at Kshs 12,000/= the property of Joseph Kalimoni Ndani.

The applicant's co-accused was acquitted under **section 210** of the **Criminal Procedure Code (Cap.75)** as the court held that no prima facie case had been made out against him. The applicant was, on the other hand, convicted as charged and sentenced to serve seven years imprisonment upon the conclusion of his trial. He appealed against the conviction and sentence but in the meantime 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.

As always in an application such as this, all that that the concerned with is whether the applicant's appeal has, on the face of it, such overwhelming chances of success that it will not serve the ends of justice to retain the appellant in prison until his appeal has been heard and determined. In **Somo vs. Republic 1972 EA 476, 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.”

Again in **Jivraj Shah versus Republic (1986) KLR 605 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 has been heard, conditions

for granting bail will exist.”

To the extent that it is relevant to determination of this application, it is necessary to look at the evidence at the trial in order to tell whether the appeal raises a substantial point of law to be urged and whose determination is likely to be in the appellant's favour and thus whether the appeal has overwhelming chances of success.

According to this evidence, the complainant lost a she-goat either on the night of 12th May, 2012 or in the early hours of 13th May, 2012; his worker informed him on the morning of this latter date that the goat pen had been broken into and one of his goats stolen. The complainant reported the matter to the assistant chief who promised to take it up.

At about 2.00 pm on the same day, the assistant chief informed him that one James Gitonga had been arrested with goat meat; while he was at his home two police officers came with the meat that formed part of the goat's hind legs. From the photographs taken of this part of the goat and which were admitted in evidence, about a foot or so of these hind legs were not skinned and therefore it was possible to tell the colour of the goat's skin. According to the complainant, the police officers informed him that the meat had been recovered from Gitonga and Ndegwa, apparently the appellant herein.

How did the officers come across the meat? According to their evidence, they set out to look for the appellant on 13th May, 2012 in connection with a series of robberies at Karogoto. While on the way they met the assistant chief of the area; when they enquired from him whether he knew the appellant's home, he undertook to take them there. The officers did not find the appellant in the house but they recovered the meat from that house. The house was said to be the appellant's family house in which he had a separate room for himself.

The assistant chief informed the officers that he had, earlier in the day, received a report that the complainant's goat had been stolen; he therefore asked the police officers to take the meat to the complainant to check it out and confirm whether it could possibly be the remains of his goat.

As the officers and assistant chief drove towards the complainant's home, they met and arrested James Gitonga who upon interrogation informed them that he, together with the appellant and one Joseph Wanjohi, had stolen the complainant's goat; indeed when they searched his house, they also recovered some fresh meat. It was the evidence of one of the officers that Gitonga told them that they slaughtered the goat and disposed of the head, the skin and the intestines in a river. The appellant was later arrested on 19th May, 2012.

In his unsworn testimony, the appellant denied the charge against him; it was his evidence that the assistant chief who led the officers to his home and testified against him had a grudge against him. He said that the scenes of crime officer who testified against him took the photographs of a cow and not a goat, in any event.

I cannot say with any conviction that it is apparent on the face of the evidence on record that the appellant's appeal has overwhelming chances of success. Neither can it be said with any sense of certainty that there is a substantial point of law to be urged at the hearing whose determination is likely to be in favour of the appellant. In these circumstances I am not convinced that the appellant's application is merited and is therefore hereby dismissed.

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

Ngaah Jairus

JUDGE