REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 78 OF 2013

RODGERS ODHIAMBO……APPELLANT/APPLICANT

VERSUS

REPUBLIC…….....…RESPONDENT

RULING

The appellant was charged with two counts of stealing from a locked vehicle contrary to **section 279(c)** of the **Penal Code**. In the first count it was alleged that on the 7th day of May, 2012 at Nyeri Town in Nyeri County with others not before court, the appellant stole a laptop make IBM THINK PAD R61 serial number L3-C5943 valued at Kshs 72,480/= the property of Safaricom company Ltd from a locked motor vehicle registration number KBD 763G Toyota Hilux double cab belonging to the said Safaricom Ltd.

According to the second count, it was alleged that on the 7th day of May, 2012 at Nyeri town in Nyeri county with others not before court the appellant stole a Safaricom modem serial number 861976009902478 valued at Kshs 1999/= the property of Henry Kareigi Irungu from a locked motor vehicle registration number KBD 763 G make Toyota Hilux double cab belonging to Safaricom Limited.

The appellant also faced the alternative count of handling stolen property contrary to **section 322(2)** of the **Penal Code** the particulars thereof being that on the 17th day of July 2012 at Nakuru Town in Nakuru County otherwise in the course of stealing dishonestly retained a Safaricom modem serial number 861976009902478 knowing or having reason to believe it to be stolen property.

At the conclusion of the trial the learned magistrate found the accused person guilty and held:-

> *"The accused person is convicted under section 215 of the criminal procedure code of stealing from a locked vehicle contrary to section 279 c of the penal code"*. The learned magistrate proceeded to sentence the accused to nine years imprisonment.

The appellant has appealed against this decision on several grounds which, in my humble view, it would be premature to venture into at this stage of the proceedings.

In his brief submissions at the hearing of his application, the applicant urged that he wanted to be released on bond so that he could continue with his studies. He also said that his parents are sick and there is nobody to take care of them.

The appellant who represented himself also submitted that the vehicle he is alleged to have broken into was not exhibited in court and, in any event, no dusting for finger prints was ever done meaning that the investigations were either not done or were not conclusive of his involvement in the crime that formed the

basis of the offence for which he was charged.

Ms Maundu for the state opposed the application and urged that the appeal does not have overwhelming chances of success; on the contrary, so counsel submitted, the evidence against the appellant at the trial was overwhelming. Further, there were no special circumstances that would warrant the appellant to be released on bail.

The principles upon which bail pending appeal can be granted have been outlined in several court decisions; these decisions 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 has been 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."***

The foregoing decisions suggest that of all the grounds that an applicant may raise in support of his application only one is crucial which is that the appeal has overwhelming chances of success; the rest of the grounds such as that the applicant intends to resume his studies or that his parents are ill and there is nobody to look after them have been held to be minor and of little relevance if at all.

There is, however, one issue which fits what would amount to be "***some substantial point of law to be urged"*** as was stated in **Jivraj Shah versus Republic (supra);** at the hearing of the appeal this question may or may not be resolved in favour of the applicant. As noted, the appellant was charged with two principal counts and one alternative count. In his judgment, the learned magistrate did not specify which of the two principal counts the appellant was convicted of or whether he was convicted of both counts and the sentence imposed was a combined sentence.

Section 169(2) of the **Criminal Procedure Code** sheds some light on the extent a trial court has to go in specifying in its judgment the offence of which an accused person has been convicted; it says:-

> ***169. Contents of judgment***
>
> ***(1) …***
>
> ***(2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.***
>
> ***(3) …***

Based on this provision of the law and without pretending to prejudge the appeal at this stage, the question whether the learned trial magistrate should have specified which of the two counts the appellant was convicted of and accordingly sentenced is, in my humble view, a substantial point of law to be urged. It is also a substantial point of law to be urged at the hearing of the appeal whether the omission to specify the count or counts for which the appellant was convicted and sentenced prejudiced him in in any way.

The resolution of these questions may probably favour the appellant and by then, he may have served a substantial part of his sentence. It would, in the circumstances, be only fair if the sentence was held in abeyance pending the hearing and determination of the appellant's appeal.

For the foregoing reasons, I am satisfied that the appellant's application to be admitted to bail pending the hearing and determination of his appeal is merited. I will allow it ad admit him to bail on the following conditions:-

1. The appellant is granted a bond of **Kshs. 300,000/=** together with one surety of a similar amount;

2. The appellant shall report to the deputy registrar, High Court Nyeri, once every month pending the admission and the hearing of his appeal.

This appeal shall be mentioned before the deputy registrar on 9th November, 2015.

Signed, dated and delivered in open court this 9th October, 2015

Ngaah Jairus

JUDGE