



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO. 103 OF 2013

RODGERS AREGE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment and sentence of Hon. R.B.N. Maloba, Ag. PM,

dated 3rd October 2013 in the original Kisii CMCR Case No.1623 of 2013)

RULING

1. The applicant herein, Rodgers Arege was charged with injuring an animal contrary to **Section 338** of the **Penal Code**, the particulars being that on the 1st day of October 2013 at Gesangiro sub location of Marani District within Kisii County, willfully and unlawfully killed an animal namely Freshian Cross cow by hitting it on the head using a jembe valued at Kshs.40,000/= the property of Francis Jomo Onsongo.
2. When the applicant appeared for on 3rd October 2013 before Hon. R.B.N. Maloba, Ag. PM, he pleaded guilty to the charge. The facts of the case were that on 7th October 2013 at Gesangiro sub location, Marani District, the applicant hit a Freshian Cow worth Kshs.40,000/= belonging to Jomo Onsongo who had tied the said cow in a grazing field. When the complainant went to check on the cow, he was told the cow was tied by the neck against a pole in the same field. When he went there, he found the applicant, who was armed with a panga, leaving the scene. When the complainant got to where the cow was, he found it had already died.
3. The complainant started running towards the applicant. He entered the applicant's house and found a bloodied jembe. The complainant reported the matter to the police and the appellant was subsequently arrested and charged with the offence.
4. On admission of the facts, the applicant was convicted on his own plea and sentenced to five (5) years imprisonment. In mitigation the applicant told the trial court that the complainants had been grazing his cow in the applicant's banana and sukuma wiki farm for a long time. He also said he was drunk when he found the complainant's cow was in his (applicant's) farm.
5. The applicant has already filed his petition of appeal dated 10th October 2013 seeking to have the judgment and sentence of the trial court set aside, varied and/or quashed. In the meantime, the applicant prays to be released on bond/bail pending appeal.
6. The application is supported by the grounds on the face thereof and is also premised on the averments contained in the applicant's own sworn affidavit dated 15th October 2014. The applicant contends that his pending appeal has high chances of success for reasons that the learned trial magistrate failed to appreciate that the plea of guilty was not unequivocal.
7. A court considering an application for bond or bail in the case of a convict must act with caution because until the appeal is heard and determined, the presumption is that the applicant was

properly convicted. So, bond or bail will be granted only in any exceptional circumstances such as where it appears on the face of it that the pending appeal has overwhelming chances of success. In such a case, there would be no good reason to keep an applicant behind bars if the appeal obviously appears that it will succeed. It has been held that circumstances such as the suffering of the applicant's family or the applicant's poor state of health or the applicant's contention that he will abide by whatever bond terms the court gives him are not exceptional circumstances to warrant grant of the orders for bond.

8. In the instant case, counsel for the applicant submitted that the applicant herein was convicted of an offence under **Section 228** of the **Penal Code** which law was alien to the charge facing the applicant. He also submitted that the plea of guilty which led to the conviction of the applicant was not unequivocal.
9. On his part, prosecution counsel urged the court to give such bond terms as would ensure that the applicant attends court whenever he is required until the appeal is heard and determined or until further orders of this court. The application is otherwise not opposed.
10. Regarding the second ground that the plea of guilty was not unequivocal, it appears to me that there is some merit in this ground considering the principles set out in the case of **Adan –vs- Republic [1975] EA 445**. Without at all intending to get into the merits of the appeal, the record of the lower court, leading to the conviction of the applicant shows that the plea of guilty may not have been unequivocal. With the possibility of the appeal succeeding, it follows that the applicant's application for bond ought to be favourably considered.
11. The first ground in support of this application is that the trial court convicted the appellant under an alien section of the law, vis-à-vis the charge which the applicant was charged with. The applicant was charged under **Section 338** of the **Penal Code**, but during sentencing, the trial court in the typed record said in part:-

“Having considered the sentence as prescribed in Section 338 and also considering the provisions of Section 228 of the Penal Code, I order the accused to serve 5 years’ imprisonment. Right of appeal 14 days.”

12. Section 228 of the Penal Code creates an offence known as **“Killing unborn child”**, which is punishable by imprisonment for life. It is not clear how the provisions of this particular section of the Penal Code could have been imported into the sentencing for an offence under **Section 338** of the **Penal Code**. However, the handwritten record shows that the trial court referred to **Section 278** and not **228** of the **Penal Code**. The error is therefore a typing error and is not an original error on the part of the trial court.
13. In the circumstances, and for reasons that the appeal herein has high chances of success on account of the plea not having been unequivocal, I do hereby allow the Notice of Motion dated 15th October 2013 on the following terms:-
 1. *The applicant may be released on his own bond of Kshs.500,000/= (Shillings Five Hundred Thousand only) with 2 sureties of a like amount OR he may be released on cash bail of Kshs.200,000/= (Shillings Two Hundred Thousand).*
 2. *Any sureties shall be approved by the Deputy Registrar of this Honourable Court.*
 3. *During the pendency of the appeal or until further orders of this court, the applicant shall appear before court every 30 days for mention of his appeal.*
 4. *In default of (3) above, the bond shall be cancelled immediately and sureties called to account OR any cash bail deposited in court shall be forfeited to the State.*
 5. *Mention on 09/06/2014 for further orders.*
 6. Orders accordingly.

Dated and delivered at Kisii this 8th day of May, 2014

R.N. SITATI

JUDGE.

In the presence of:

Mr. Mageto (present) for Applicant

Mr. Ochieng (present) for Respondent

Mr. Bibu - Court Assistant