



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**CRIMINAL APPEAL NO. 103 OF 2014**

**SAMUEL KIPLAGAT KOLUM..... APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence in Criminal Case No. 1235 of 2012 Republic vs Samuel Kiplagat Kolum in the Principal Magistrates' Court at Kapsabet by B. Mosiria, Principal Magistrate dated 26<sup>th</sup> May 2014)*

**RULING**

1. The appellant was convicted on a charge of stealing a motorcycle contrary to section 278A of the Penal Code. He was sentenced to three years imprisonment.
2. The particulars of the charge were that on 23<sup>rd</sup> April 2012 at Kaptidil Sub-location within Nandi County, he stole one motorcycle registration number KMCK 276B, the property of Shadrack Rotich.
3. The appellant has preferred an appeal. The petition of appeal was filed on 4<sup>th</sup> July 2014 and raises four grounds. Pending the hearing and determination of the appeal, the appellant has presented a notice of motion praying for bail. The motion is dated 16<sup>th</sup> June 2014. It is supported by a deposition sworn by the appellant on even date.
4. The appellant contends that the appeal has overwhelming chances of success; that the offence was not proved beyond reasonable doubt; that the sentence meted out was harsh and oppressive; that his family is suffering as he languishes in jail; that he had been admitted to bail in the lower court and faithfully attended his trial; and finally, that he is a man of good character and will abide by any conditions that may be set by the Court.
5. 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.”*

6. There are three main grounds in the petition of appeal dated 4<sup>th</sup> July 2014: that the prosecution did not prove its case beyond reasonable doubt; secondly, that vital local witnesses such as the village

elder or chief were not called; and lastly, that the learned trial Magistrate erred by relying on a “forged purchase receipt” of the motorcycle.

7. It would be inappropriate at this stage to comment about the veracity or otherwise of the evidence presented at the trial. I would be pre-empting the hearing of the appeal. I have noted however that the complainant produced the impugned purchase receipt. In the cross-examination, the appellant did not question the receipt. The appellant however raised the matter in his sworn defence. He said the receipt was for a shop; and, that the logbook was not produced. The learned trial Magistrate dealt with the matter as follows-

*“...the owner produced the receipt and a card in regard to motorbike which shows where he bought it from and showing he is the one who paid for it”*

8. The complainant said he voluntarily gave the motorcycle to the appellant; the appellant did not return it. I am also alive to the provisions of section 143 of the Evidence Act. There is no requirement that all or a certain number of witnesses be called to prove a charge. Like I have said, it will be the true province of the appellate court to re-evaluate all the evidence and draw its own conclusions; and, in particular, whether the charge was proved beyond reasonable doubt from a totality of the evidence presented to the trial court.
9. The appellant was sentenced to three years jail term. Section 278A of the Penal Code provides for a term of up to seven years. It will be for the appellate court to determine whether the sentence of three years was harsh considering all the circumstances of this case; the fact that the appellant is a first offender; and, the mitigation proffered by the appellant.
10. Applying the legal principles I set out earlier, I am unable to say that there are *exceptional* factors in this case to warrant grant of bail pending appeal. It is true that the appellant had been admitted to bail in the lower court; and that he faithfully attended his trial. It is also true that bail is a constitutional right. But I am alive that the appellant has already been convicted. The *presumption* of innocence no longer holds true. The considerations for grant of bail at this stage are thus markedly different. I am not persuaded that a substantial point of law has been urged or that the sentence or a substantial part of it will have been served by the time the appeal is heard and determined.
11. In the result, the notice of motion dated 16<sup>th</sup> June 2014 is devoid of merit. It is hereby dismissed.

It is so ordered.

**DATED, SIGNED and DELIVERED** at **ELDORET** this 2<sup>nd</sup> day of October 2014.

**G.K. KIMONDO**

**JUDGE**

**Ruling read in open court in the presence of**

The appellant.

Mr for the appellant.

Ms for the State.

Mr. Kemboi, Court Clerk.