



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL APPEAL NO. 115 OF 2014

EMMANUEL MUTEGI.....APPELLANT/APPLICANT

VS

REPUBLIC.....RESPONDENT

RULING.

The appellant was convicted of the offence of handling stolen property contrary to section 322 (1) (2) of the Penal Code CAP 63 of the Laws of Kenya and sentenced to 5 years imprisonment without the option of a fine. Being aggrieved with the said conviction and sentence, he preferred the instant appeal and subsequently filed a Notice of Motion Application on 18th September 2014, pursuant to the provisions of Section 357 of the Criminal Procedure Code CAP 75 of the laws of Kenya, seeking to be admitted on bail pending appeal on such terms as it would deem fit and just in the interests of justice.

The gist of the appellant's application was that he was convicted of handling stolen property contrary to Section 322 (1) (2) of the Penal Code and that the said charge had not been preferred against him as the 2nd and 3rd counts had not been preferred against him. The appellant therefore contended that the said sentence was unlawful and that as a result the appeal has overwhelming chances of success.

Mr. Musyoka, Learned State Counsel did not oppose the application. This is an application for bail pending appeal. The applicant has already been found guilty by the trial court and is serving sentence. It is unlike an application for bail pending trial where an arrested person has right to be released on bail/bond pending trial pursuant to Article 49 (1) (h) of the Constitution. I am alive to the fact that in the instant case, the presumption of innocence against the appellant has already been lost. In an application for bail pending appeal, the principle consideration is whether the appeal has a high likelihood of success. The onus is on the appellant to discharge this burden. The applicant had deposed that his appeal has high chances of success.

In **Some V. Republic 1972 EA 476** court held:

“iii) the most important ground is that the appeal has an overwhelming chance of being successful; in that case there is no justification of depriving the applicant of his freedom.”

In the instant case, a cursory perusal of the charge sheet, proceedings and judgment reveals that the appellant and three other co-accused persons had been charged with the main count of breaking into a building and committing a felony contrary to section 306 (A) of the Penal Code. The 2nd and 4th accused were further charged with an alternative count of handling stolen property contrary to section 322 (1) (2)

of the Penal Code. At the end of the trial all the 4 accused persons were acquitted in respect of the main charge under section 215 of the Penal Code. The 1st and 3rd accused were however found guilty and convicted of the offence of handling stolen property contrary to section 322 (1) (2) of the Penal Code whereupon the 1st accused (the appellant) in the instant appeal was sentenced to 5 years imprisonment.

The basis for this application is that the applicant was convicted for an offence that he was not charged with. I have perused the proceedings before the trial court and the judgment of that court. The court has direction to convict an accused person for another offence disclosed by the facts see section 179 CPC though he was not charged with it. The onus rests on the applicant to demonstrate that his appeal has overwhelming chances of success. In the instant case the applicant has not discharged that onus and the court finds no merit in the application.

The court notes that the record of appeal is ready and the applicant should have the appeal admitted for hearing and set it down for hearing.

In the end, the application is dismissed.

DATED SIGNED AND DELIVERED THIS 5TH DAY OF DECEMBER, 2014

R. P .V. WENDOH

JUDGE

Mr. Kariuki holding brief for Mr. Mwanzia for appellant

Mr. Musyoka for State

Kirima/Jane Court Assistant

**Appellant
present.**